

# To the Point!



## Bank Use of Social Media Data: Compliance Issues

The Internet provides access to new sources and new types of information on potential bank customers, including through social media channels. News stories widely report that non-bank lenders are using information obtained from social media channels to determine the creditworthiness of potential customers. Even Fair Isaac Corp. (“FICO”), the company that provides the credit scoring system most widely used by traditional banks, has reported that it is considering whether to incorporate social media data in its credit scoring system.<sup>1</sup> Before incorporating the use of social media data into their underwriting criteria, banks and other financial institutions should be aware of how such social media data is currently used by their institution and should consider whether credit and compliance policies and procedures should be

modified to address its use. Certain compliance issues related to a bank’s use of social media data in its business are identified in this briefing for consideration and potential action.

### Fair Lending

The Equal Credit Opportunity Act and Regulation B (“ECOA”) prohibit discrimination in any aspect of a credit transaction on nine bases: race, color, religion, sex, national origin, age, marital status, receipt of public assistance, and exercise of any right under the Consumer Credit Protection Act. The ECOA also prescribes standards for evaluating the creditworthiness of a potential borrower. The criteria used by a bank to make a credit decision, including social media data, must not have a disparate impact on these protected classes. The ECOA is not limited to consumer loans and will apply to commercial loans, including guarantors on commercial loans if required for loan approval.<sup>2</sup> Various state anti-discrimination laws provide additional categories of protected classes and may also apply to banks.

### Underwriting

When determining whether to approve or deny an application for a loan, a bank may use either an empirically derived and demonstrably and statistically sound credit scoring system (“*credit scoring system*”), a judgmental system, or a combination of the two. If a bank uses social media data in either a credit scoring system or a judgmental system, the bank should be prepared to demonstrate that social media data is an adopted and approved component of the information that is used by the bank to evaluate a loan applicant and that such information is not used in a manner that has a disparate impact on protected classes.

Credit Scoring System. Banks that choose to use a credit scoring system can purchase a credit score or develop a custom score. Either way, a bank that desires to use social media data in its credit scoring system must establish that the data used is predictive of the applicant’s creditworthiness. The bank must ensure its credit scoring system is validated and revalidated periodically to establish that the credit scoring system meets prescribed technical standards and does not have a disparate impact on protected classes.<sup>3</sup>

When purchasing such a credit scoring system from a third-party vendor, banks must be aware of what data is used in the credit scoring system and whether it has been validated by the vendor. A bank must also require that the vendor validate the credit scoring system, including the data used to derive the score, on a periodic, but no less than annual, basis.

1. Stephanie Armour, *Borrowers Hit Social Hurdles*, Wall St. J., Jan. 9, 2014, at C1. *Experts Dispute Value of Social Media in Assessing Consumers’ Creditworthiness*, 102 Banking Rep. (BNA) No. 4, at 119 (Jan. 28, 2014).  
2. 12 U.S.C. § 1601 *et seq.*; 12 C.F.R. § 1002.  
3. 12 C.F.R. § 1002.2(p).

The CFPB has not yet issued guidance on the use of social media in the context of access to credit but has stated that creditors must “ensure that their scoring models do not have an unjustified disparate impact on a prohibited basis, meaning that they meet a legitimate business need that cannot reasonably be achieved as well by an alternative means that are less disparate in their impact.”<sup>4</sup>

**Judgmental System.** Judgmental systems can also use social media data.<sup>5</sup> There are 11.9 billion Google searches each month. The term “googling” to refer to use of a search engine to find information about a person or topic is so widespread that it has been included in *The Merriam-Webster Dictionary* since 2006. Given the prevalence of search engine usage in daily life, it seems likely that bank employees may use search engines to research customers or potential customers. If a bank employee googles a customer or potential customer, the employee may obtain information about that individual that the bank is prohibited from acquiring and using as part of its credit decision, such as marital status, race, national origin, color, or religion.<sup>6</sup> If this information is used in the credit decision, it may impact the bank’s compliance with federal consumer financial service laws including the ECOA.

To help ensure their compliance with applicable laws and regulations, banks should consider adding policies and procedures, or amending their current policies and procedures, to address access to and use of social media information regarding customers and potential customers.

## Adverse Action Notifications

The ECOA and the Fair Credit Reporting Act (“FCRA”) place obligations on creditors including adverse action notice requirements. The ECOA requires a creditor that takes adverse action to provide the applicant with the specific principal reasons for the action taken or to disclose that the applicant has the right to request the reasons for denial within sixty days of receipt of the creditor’s notification.<sup>7</sup> The FCRA requires a creditor to make disclosures when it denies consumer credit or increases the charge for such credit based in whole or in part on information obtained from a person other than a consumer reporting agency bearing upon the consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. Specifically, the creditor must disclose that third-party information was used and the nature of the information.<sup>8</sup> Traditionally under the FCRA this third-party information used by creditors referred to information provided by landlords, references, and the like.

If a bank uses information from social media channels in its underwriting criteria and an adverse action is taken, the bank will have to determine whether such information must be disclosed as a principal reason for the adverse action as required under the ECOA and disclosed as third-party information used in the decision under the FCRA.<sup>9</sup> The bank’s policies and procedures should be amended and updated to address the use of social media data and the resulting compliance responsibilities, including notices required under the ECOA and FCRA, when using that data in its determination of whether to grant or deny credit.

## Reliability of Social Media Data

The Federal Trade Commission (“FTC”) has determined that data brokers who aggregate and sell information on consumers, including information from social media channels, are consumer reporting agencies subject to the FCRA including the requirement to implement procedures to ensure the accuracy of information provided.<sup>10</sup> However, the FTC has not determined that social media channels are consumer reporting agencies subject to the FCRA. The information reported or otherwise posted on social media may be incorrect or misleading. For example, a post by a dissatisfied client may be inaccurate and may not be indicative of a business’s success or its creditworthiness. As a result, not only must the social media data considered be predictive of the creditworthiness of the applicant, but the reliability of the social media data must be confirmed. Whether the use of such information as part of a credit decision is appropriate should be established by the bank. Failure to use correct information in making a credit decision could result in safety and soundness concerns, and the bank should consider adding a

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4. Banking Rep. (BNA), *supra* note 1, at 120.

5. 12 C.F.R. § 1002.2(t).

6. *Id.* at § 1002.5.

7. *Id.* at § 1002.9.

8. 15 U.S.C. § 1681m(b).

9. FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, SOCIAL MEDIA: CONSUMER COMPLIANCE RISK MANAGEMENT GUIDANCE (2013).

10. See Complaint at 5, *United States of America v. Spokeo, Inc.*, No. CV12-05001 (C.D. Cal. June 7, 2012); see also Letter from Maneesha Mithal, Assoc. Dir., Div. of Privacy and Identity Prot., Bureau of Consumer Prot., to Renee Jackson, Social Intelligence Corporation, F.T.C. Matter No. 112 3014 (May 9, 2011).

provision in its underwriting policy restricting use of such unverified social media channel information in its credit decisions and steps required to verify such information if it will be used in the credit decision.

## Unfair, Deceptive, and Abusive Acts or Practices

Finally, banks that use social media data in credit decisions must also confirm that their use of social media data will not result in an unfair, deceptive, and abusive act or practice (“UDAAP”). The CFPB has stated that compliance with all applicable federal consumer financial service laws may still result in a UDAAP violation.<sup>11</sup> As a result, banks that choose to use social media data in underwriting or making other decisions related to an account relationship should consider that not all individuals use social media and that this should not be viewed as a negative. A bank’s policies outlining the permissible use of social media data in underwriting should ensure that unfair treatment of customers and applicants does not occur, whether or not a customer has a social media profile or presence or whether data has been posted about such customer on social media.

## Action Items

While FICO continues to consider whether to include social media data in its credit scores, banks should examine how and when social media data is otherwise being used in their business and identify potential compliance issues, including whether any vendor-supplied credit scoring system uses social media data. This may include restrictions on use of social media data in underwriting to ensure both that it is predictive and that customers without a social media presence are not treated unfairly; requirements that social media data be verified to ensure that sound credit decisions are made; and reporting the use of social media data on adverse action notices. These restrictions and requirements should be addressed in the bank’s credit policy and procedures to ensure that the use of social media data is consistent throughout the organization, including managing any exceptions to the use of social media data.

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11. CONSUMER FINANCIAL PROTECTION BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL (VERSION 2), at UDAAP 10 (Oct. 2012).