FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Fall 2013

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MOFO METRICS

45	Shelf life of "new" Twinkies, in days
26	Shelf life of old Twinkies, in days
33	Yearly crop losses in U.S. due to weeds, in billions
1	Miles that Americans drive each year looking for parking, in billions
25	Average speed in mph, Tour de France winner, 2012
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70	Secret Service rooms booked at Martha's Vineyard during Obama's August vacation
20	Percentage of people under 30 who use smartphones during sex

Editor's Note

The leaves are changing, the cicadas have finished making new cicadas, the kids are back in school and it's time to put the toothpick umbrellas and beer-dispensing caps back in the attic. It's also time to hit the wayback button and review all that happened this summer.

For those whose margarita glass is half full, there was lots of good news. Everyone loves babies, right? This summer, we got a new Royal Baby. His name is Anthony Weiner. Upon his arrival, everyone in New York was saying, "Aw, look, isn't he tweet?" Meanwhile, scientists came a step closer to identifying an elusive particle that accounts for the vast majority of dark matter in the universe, which they have named "twerk." Fortunately, "twerk" entered and exited the lexicon faster than the in-flight time of a North Korean rocket. If only Miley Cyrus had danced the "Argle-Bargle"! And for those like me who can't stand getting to airports early and having to wait around, we now know that it's possible to survive for weeks in the transit zone at the Moscow airport on nothing but scotch, perfume and Toblerone® chocolate.

What about the bad news? Our newsletter's regular readers, both of them, have been asking for more Bureau jokes, but there wasn't much to laugh about in that department. In fact, our editor gave himself a hernia working overtime trying to meet demand. He is texting Anthony Weiner even as we speak.

Until next time, please don't hit "Reply All" (again) to the Internet Viagra® emails, don't hire Lindsay Lohan as your chauffeur and listen carefully for drone strikes.

William Stern, Editor-in-chief

BELTWAY

You're So Wrong!

On July 31, 2013, the U.S. District Court for the District of Columbia issued a sharply worded opinion holding the Federal Reserve Board's (FRB) debit interchange fee and network exclusivity provisions are contrary to the language and purpose of the underlying statute, section 920 of the Electronic Fund Transfer Act (EFTA), commonly known as the "Durbin Amendment." The court relied on its view of the statutory language and on statements made by Senator Durbin to conclude that the FRB disregarded congressional intent in "inflating all debit card transaction fees." The court instructed the FRB to vacate the debit interchange fee limitation and network exclusivity rules, but stayed the vacatur to "provide the FRB an opportunity to replace the invalid portions of" the regulation. On August 21, the FRB appealed the decision to the D.C. Circuit, and both the FRB and the merchants requested a stay of the court's decision until the appeal has been heard. Read our Client Alert.

For more information, contact Oliver Ireland at oireland@mofo.com.

Do Something About It!

Sixteen Democratic Senators sent a letter on the regulation of payroll cards to the Consumer Financial Protection Bureau (CFPB) and the Department of Labor (DOL). The letter urges the CFPB to clarify through rulemaking or guidance, employer compliance obligations for payroll cards. It focuses on three perceived problematic issues: (1) employer-mandated use of payroll cards; (2) fees associated with card usage; and (3) coercive tactics by employers to encourage card acceptance. The Senators also urged the CFPB to bring enforcement actions "[w]here systematic abuses are clear." See our Client Alert for more details.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Capital Is Contagious

The Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) approved final rules to implement revised regulatory capital requirements for U.S. banks that were proposed in June 2012, and proposed for comment a supplemental leverage capital ratio (Proposal) for the eight largest U.S. banking organizations that are deemed systemically significant. The Proposal would implement the leverage capital provision of the 2010-2011 revised regulatory capital accord (Basel III) adopted by the Basel Committee in the wake of the financial crisis. The Proposal contains an important modification of the Basel Committee proposal, namely, a significantly more stringent leverage capital requirement. For additional information, please review our Client Alert.

For more information, contact Barbara Mendelson at bmendelson@mofo.com.

FRB's BSA/AML Focus Continues, Delaying Acquisition

Citing deficiencies in M&T Bank's firm-wide compliance risk management program, internal controls, customer due diligence procedures and transaction monitoring processes with respect to Bank Security Act/Anti–Money Laundering (BSA/AML) compliance, and a bank subsidiary's due diligence practices for foreign correspondent accounts, the FRB entered into a consent order with the bank on July 11, 2013. Although no penalties were levied, the consent order requires implementation of an enhanced compliance program and an independent review of certain transactions with high-risk customers to determine whether such activity was properly identified and reported. M&T Bank postponed its acquisition of Hudson City Bancorp, Inc. after the FRB raised concerns about the bank's BSA/AML program.

For more information, contact Barbara Mendelson at bmendelson@mofo.com.

Get Ready to Count

The OCC issued a final rule amending its lending limits rule. The final rule extends the effective date of the rule's application of its requirements to derivative transactions and securities financing transactions to October 1, 2013, to allow additional time for banks to comply. It outlines the acceptable methods of measuring credit exposure of derivative transactions and securities financing transactions and allows discretion in choosing a particular method unless the OCC directs otherwise for safety and soundness reasons. The final rule exempts securities financing transactions relating to Type I securities (U.S. or state government obligations, etc.) from the lending limits calculations.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Not Much to Look Forward to

The OCC's *Semiannual Risk Perspective* for spring 2013 provides an overview of the risks facing federally chartered institutions. According to the OCC, "strategic risk" continues to increase for many banks as they re-evaluate their strategy and business models to generate returns amid slow economic growth, low rates and regulatory requirements. These institutions are facing increasing competition for lending opportunities along with a low-interest-rate environment, which increases the risk of capital erosion. The OCC also identified increasing BSA/AML risks as money-laundering methods evolve and electronic bank fraud increases in volume and sophistication.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

One Size Does Not Fit All

The FRB, the FDIC, and the OCC are seeking comment on proposed guidance describing supervisory expectations for stress tests conducted by financial companies with total consolidated assets between $10 billion and $50 billion. These institutions are required to conduct annual company-run stress tests beginning this fall under rules the agencies issued in October 2012 to implement a Dodd-Frank requirement. Comments are due by September 25, 2013.

For more information, contact Oliver Ireland at oireland@mofo.com.

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How Appealing

The OCC revised its policies to provide additional guidance on appeals of agency decisions or actions. The guidance explains that appealable agency actions include examination ratings, determinations of the adequacy of the allowance for loan and lease loss methodology, individual loan ratings, findings of violations of law, fair-lending-related decisions, licensing decisions and material supervisory determinations, such as matters requiring attention, compliance with enforcement actions or other conclusions in a report of examination. Actions that are not appealable include decisions to pursue a formal enforcement-related action, receiver and conservator appointments, preliminary examination conclusions, formal enforcement-related actions, Administrative Procedure Act rulemakings, Freedom of Information Act requests for records or information and other agency decisions subject to judicial review.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

BUREAU

Congress Compromises, Cordray Confirmed

Pushing the CFPB one step closer to its 2013 hiring goals, the Senate confirmed Richard Cordray as director of the CFPB on July 16, 2013. Cordray's confirmation ends two years of partisan bickering over the merits and constitutionality of the CFPB. For law firms and their clients, the confirmation marks the end of alerts on the *Noel Canning* decision's significance for financial services providers.

For more information contact, Nancy Thomas at nthomas@mofo.com.

Groundhog Day for Remittance Transfer Rules

In what is becoming a regular occurrence, the CFPB issued another technical correction to its remittance transfer rules. The amendment, published on August 14, 2013, clarifies that remittance transfer providers are required to refund or reapply the total amount that a sender paid minus any fees or taxes the remittance provider actually paid or was required to collect. No word yet on whether Bill Murray has accepted the part of Rich Cordray for the big screen adaptation of the rulemaking.

For more information, contact Sean Ruff at sruff@mofo.com.

Where Supervision Is Risky Business

In July, the CFPB issued a final rule setting forth procedures for when and how a non-bank "covered person" might become subject to CFPB supervision because the non-bank presents risks to consumers. The final rule allows the CFPB to examine non-banks that are not otherwise classified as "larger participants." In establishing a framework for this new authority, the final rule prescribes procedures to notify a non-bank that it is being considered for supervision, provides the non-bank an opportunity to respond and guidelines for the substance of the response and includes a mechanism for non-banks to file a petition to terminate supervisory authority after two years. The rule became effective on August 2, 2013.

For more information, contact Andrew Smith at asmith@mofo.com.

Finishing Your Chores Is Just a Start

In June, the CFPB issued Bulletin 2013-06 identifying "responsible business conduct" that may impact the exercise of its "enforcement discretion." The Bulletin specifies the four broad categories of responsible conduct that the CFPB "may favorably consider," placing special emphasis on prompt and complete self-reporting of violations and even potential violations to regulators and impacted consumers. The other conduct categories identified by the CFPB are self-policing, remediation and cooperation. Our Client Alert provides more details and discusses practical implications.

For more information, contact Leonard Chanin at lchanin@mofo.com.

It Applies When We Say It Applies

In July, the CFPB published two guidance bulletins relating to debt collection practices. The bulletins were accompanied by a set of form letters intended for consumers to use when communicating with debt collectors, and also coincided with a field hearing in Maine on debt collection and the start of the CFPB's acceptance of debt collection complaints through its consumer response system. The CFPB's authority to regulate debt collection practices stems, in part, from the Fair Debt Collection Practices Act (FDCPA). Although the FDCPA only applies to third-party debt collectors, the CFPB relied on its Unfair, Deceptive or Abusive Acts of Practices (UDAAP) authority to expand application of certain FDCPA provisions to all entities engaged in debt collection—including original creditors collecting on their own behalf. See our Client Alert for more information.

For more information, contact Andrew Smith at asmith@mofo.com.

Unlucky Debt Collector Collects Enforcement Action

In August, the CFPB filed a complaint against debt settlement firm Morgan Drexen, alleging UDAAP and Telemarketing Sales Rule (TSR) violations. As it has alleged in prior cases against other debt settlement firms, the CFPB alleges Morgan Drexen violates the TSR by collecting fees in advance for its debt settlement services and falsely promises unrealistic results. Morgan Drexen decided the best defense was a good offense, beating the CFPB to the courthouse by filing suit to enjoin the anticipated action. In its suit, Morgan Drexen alleges the CFPB is an unconstitutional delegation of congressional authority, and that the CFPB's suit is an improper attempt to regulate the practice of law because attorneys rely on Morgan Drexen to carry out legal functions.

For more information, contact Nancy Thomas at nthomas@mofo.com.

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After CFPB Shows Highlights, Is Full Dye Job Next?

In August, the CFPB released its second set of supervisory highlights. Though promoted as detailing various mortgage violations, the guidance opens with a lengthy discussion of how both banks and non-banks should maintain compliance management systems. Specifically, the CFPB recommends that supervised entities have strong board management and oversight, develop a formal compliance program and consumer complaint program, and conduct regular independent compliance audits. The highlights also discuss recent fair lending issues and considerations for avoiding similar enforcement violations.

For more information, contact Andrew Smith at asmith@mofo.com.

CFPB Overdraft Report

After studying the issue since February 2012, the CFPB released its long-awaited Overdraft White Paper in June. The CFPB reports that consumers who opt in to overdraft coverage have a higher likelihood of incurring overdraft charges, insufficient funds charges for returned checks and involuntary account closures. The CFPB noted that involuntary account closures are especially damaging because they make it harder to obtain a deposit account elsewhere. The report also discusses the CFPB's findings of a great deal of variation among the banks studied in terms of opt-in rates, overdraft usage, overdraft fees and involuntary account closures. Now we wait to see whether these findings translate into rulemaking or enforcement actions.

For more information, contact Oliver Ireland at oireland@mofo.com.

Bad Summer for Big Spring

On August 1, 2013, a federal judge dismissed a lawsuit challenging the constitutionality of the CFPB. The case was brought by the State National Bank of Big Spring, Texas, the Competitive Enterprise Institute and the seniors group, 60 Plus Association. The U.S. District Court for the District of Columbia ruled that none of the plaintiffs in the case had legal standing to pursue the action because they had suffered little if any direct impact from actions taken by the CFPB or from any Dodd-Frank provision.

For more information, contact Nancy Thomas at nthomas@mofo.com.

PRIVACY

NIST Releases Outline of Initial Cyber Framework

On July 1, 2013, the National Institute of Standards and Technology (NIST) released a draft outline of the cybersecurity framework to implement the President's cybersecurity Executive Order from early this year. Ultimately, the NIST framework will include standards, guidelines and best practices designed to help protect critical infrastructure from cyber risks. Although the NIST has been active in its efforts to prepare a draft of the cyber framework, including publishing a request for information and holding workshops and stakeholder meetings, the recent release is only a discussion draft of an outline of the framework. Essentially, the draft outline identifies the topics that will be addressed in the framework, but does not include any substance for the standards at this point. NIST is continuing to move forward on implementation, though, and will hold more workshops in September.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

Watch Out for Cyberthreats!

The OCC's *Semiannual Risk Perspective* for spring 2013, issued on June 18, 2013, highlighted risks related to cyberthreats. The OCC noted that cyberthreats continue to increase in sophistication and the corollary that the costs and resources needed for a bank to manage these risks also continue to increase as attacks broaden and intensify. With respect to OCC supervision of large banks, the OCC indicated that its supervisory staff will be reviewing bank programs for assessing the evolving threat environment and continuously adjusting controls, as well as for robust vulnerability assessments and timely correction, access management and incident response programs.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

FFIEC Gets into the Cyber Space

On June 6, 2013, the Federal Financial Institutions Examination Council (FFIEC) announced that it had formed a working group to coordinate federal and state banking authorities on issues related to cybersecurity and critical infrastructure within the sector. The FFIEC's new "Cybersecurity and Critical Infrastructure Working Group" is designed to enhance communication among the FFIEC member agencies and build on existing efforts to strengthen the activities of other interagency and private sector groups, including the Financial Services Information Sharing and Analysis Center. Like the OCC in its report, the FFIEC emphasized that this working group is important in light of the growing sophistication and volume of cyber attacks and the global importance of critical financial infrastructure.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

FCC Privacy Rules Spread to Wireless Carriers

On June 27, 2013, the Federal Communications Commission (FCC) voted at its monthly open meeting to require, by declaratory ruling, wireless carriers to comply with FCC rules about the privacy of "customer propriety network information," such as the duration and location of calls. These FCC rules traditionally applied only to landline telecoms. As a result, wireless carriers will be subject to privacy obligations with respect to certain personal information of their customers, including data security obligations and use and disclosure limitations. The FCC's ruling, however, does not apply to manufacturers of mobile phones or to developers of mobile phone operating systems and applications.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

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From Bad to Worse

On June 14, 2013, Texas Governor Perry signed into law S.B. 1610, which once again amends the state's security breach law. Like last year's amendment, this bill makes the state's law broader and more confusing. S.B. 1610 leaves in place the requirement to notify "any individual" of a breach, regardless of the state of residence of that individual. But this amendment has removed the provision limiting notice to Texas residents and residents of other states that do not require notice of a particular breach. In its place, the Texas law now clarifies that if a breach involves information regarding a resident of a state other than Texas and that state's law requires notice of the incident, a person conducting business in Texas may provide notice of the breach "under that state's law" or under the Texas law. So, the Texas law not only retains its broad extraterritorial reach, but also appears to be attempting to preempt other state breach laws (and continues to raise constitutional issues).

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

Don't Touch My Phone Records (at Least in Texas)

On June 14, 2013, Texas Governor Perry signed into law a bill amending the Texas law relating to search warrants to limit the ability of state and local law enforcement to access stored email communications. The law authorizes search warrants for stored email communications (and related information) only if the affidavit supporting law enforcement's application provides sufficient and substantial facts to establish probable cause that a specific offense has been committed, the electronic communications sought constitute evidence of the offense, and the electronic communications are held in electronic storage by the service provider on which the warrant will be served.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

NIST Dreams of Clouds

On June 11, 2013, NIST released draft guidance to assist the federal government in addressing the security risks associated with using cloud services. This draft guidance comes in the wake of other standards issued by NIST in response to a directive from the country's Chief Information Officer to speed the federal government's adoption of cloud-based services. The draft guidance would provide a "comprehensive security model" for the protection of the federal government's cloud-based efforts, including a risk-management framework. Despite its length and detail, the draft guidance is not a comprehensive guide for all relevant security requirements, but only identifies a core set of security components that should be implemented.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

More PCI

On August 15, 2013, the PCI Council announced that Version 3.0 of the PCI Data Security Standards (PCI Standards) will be released in November of this year, and released a draft outlining expected changes to the current PCI Standards. The next version of the PCI Standards apparently will focus on merchant business processes generally rather than on threats to merchant systems (*e.g.*, malware). For example, the Council highlighted that the root cause of many breaches involving malware was not the malware itself, but the fact that malware was installed because other controls were missing or insufficient (*e.g.*, password strength issues). Moreover, the Council noted that most breaches involved merchants which likely were not in compliance with the PCI Standards due to changes in infrastructure, hardware and/or software. Although Version 3.0 is expected to retain the same core 12 security requirements, the draft indicates Version 3.0 will include new "sub-requirements" that did not exist previously.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

Staying Alive on the Digital Front

On June 11, 2013, the Seventh Circuit denied comScore Inc.'s request to appeal the district court's certification of a class in a suit involving the company's collection of user data online. The district court had found that the plaintiffs had demonstrated sufficient common questions about violations of a host of federal laws, including the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act, to certify a class. The district court rejected the company's arguments that class treatment was inappropriate because the type of data collected by the company was different for various users, and the Seventh Circuit would not agree to consider the company's arguments on an interlocutory basis.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

MOBILE PAYMENTS

Welcome to a new section of the Newsletter dedicated to mobile payments. As mobile payment types continue to proliferate in the marketplace and volume increases, so do questions regarding regulatory compliance and litigation risks. Indeed, the legal waterfront in this space is broad and captures a wide array of payments-related activities, including mobile "wallet" functionality at the point-of-sale and online, and using a handheld device equipped with a payment card reader to accept payments. We'll be covering these and other issues that may impact participants in the mobile payments ecosystem here as a way for you to keep current on the latest developments.

Keep Those Phones Safe

On June 4, 2013, the Federal Trade Commission (FTC) hosted a four-panel forum on mobile device security. The forum's panelists included technology researchers, representatives from mobile providers and security experts from technology companies and academics. The panels addressed a wide range of issues, including the emergence of mobile phone malware, how security features are integrated into mobile device platforms, the role of telecommunications providers in securing mobile device data and consumer behavior. Panelists also discussed consumer authentication

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methods, as well as tracking and wiping technologies. The forum follows previous FTC panels that addressed mobile payments, carrier billing and mobile privacy and highlights the FTC's ongoing interest in consumer protection issues as the functionality of the mobile device platform has expanded to include mobile apps, the ability to make payments, and location-based advertising.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

State AGs Want to Stop Cramming

On June 24, 2013, the National Association of Attorneys General sent a letter to the FTC regarding carrier billing. Noting that "consumers increasingly opt to use their mobile phones to pay for phone-related goods and services," the letter expressed concern about unauthorized charges and consumers' ability to obtain refunds for such charges, disclosure of third-party charges on bills, mechanisms for consumers to block third-party charges and consumer dispute resolution. Forty-one state Attorneys General signed the letter.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

NTIA Form over Substance

The Department of Commerce's National Telecommunications and Information Administration (NTIA) convened a meeting on August 29, 2013, to discuss "lessons learned" from NTIA's first privacy multi-stakeholder process. The first process focused on developing a code of conduct for how mobile device applications handle personal data. The meeting was not intended to focus on the substance of stakeholder work regarding mobile app transparency, but rather to be a venue to discuss what worked well and what can be improved in the NTIA privacy multi-stakeholder process. Discussion points included logistical and procedural issues, such as how future processes might be structured to reach consensus most efficiently and how future processes might make stakeholder participation easier and more effective.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Watch Out for Mobile Money Laundering

On June 26, 2013, the Financial Action Task Force (FATF) released a white paper entitled "Guidance for a Risk-Based-Approach: Prepaid Cards, Mobile Payments and Internet-based Payment Services." The Guidance explains how the risk-based anti-money-laundering principles in the FATF's existing international standards on combating money laundering and the financing of terrorism can be applied to each of these three payment types. The Guidance includes a "risk matrix" that aligns different criteria with higher and lower risk factors. For example, for the "value limits" criterion, the matrix indicates that limitations on transaction velocity and the amount of funds that can be held in an account can reduce money laundering and terrorist financing risks.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Virtual Currency, Real Regulation Redux

On May 30, 2013, the California Department of Financial Institutions (CALDFI) issued a cease and desist letter to Bitcoin Foundation, a not-for-profit organization established to standardize, protect and promote the use and adoption of Bitcoin. CALDFI stated in its letter that the Bitcoin Foundation "may be engaged in the business of money transmission without having obtained the license or proper authorization required by" California's Money Transmission Act. CALDFI's issuance of the letter, the Financial Crimes Enforcement Network's (FinCEN) recent guidance regarding virtual currencies, and the subsequent asset seizures of prominent Bitcoin exchanges all reflect increased scrutiny of the use of virtual currencies. Our Client Alert will tell you more.

For more information, contact Rick Fischer at lfischer@mofo.com.

MORTGAGE

Mount Holly Appeal Still Alive

In June, the Supreme Court granted certiorari in *Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, No. 11-1507, to decide whether disparate impact claims are cognizable under the Fair Housing Act (FHA), as we reported here. It did so over the Solicitor General's strenuous objection that the U.S. Department of Housing and Urban Development's (HUD) new rule interpreting the FHA is "dispositive." Of interest, the Court declined to grant cert. on the question of the appropriate standard for evaluating disparate impact claims, which would be relevant only if the Supreme Court agreed with the HUD's view. Briefing will continue through October 2013 argument is expected in December 2013, and a decision is expected by late June 2014. Speculation about an imminent settlement is rampant. But, the Township of Mount Holly filed its opening brief on August 26, 2013, signaling an intention to fight the case on the merits, at least for now.

For more information, contact Thomas J. Noto at tnoto@mofo.com.

AIA Takes the Fair Lending Fight to HUD

As we previously reported here, in February 2013, HUD issued an aggressive new "disparate impact" rule, which the mortgage industry and others have soundly criticized. In June, the American Insurance Association and the National Association of Mutual Insurance Companies sued HUD, arguing that it violated the Administrative Procedure Act and the FHA by extending disparate-impact liability to the provision and pricing of homeowner's insurance. They also allege that the HUD rule conflicts with the McCarran-Ferguson Act, which generally leaves the power to regulate the insurance business in the hands of the states, and conflicts with various state insurance laws and regulations. The plaintiffs ask the court to, among other things, enjoin and vacate the rule. On August 15, 2013, HUD filed an unopposed motion to stay the proceedings pending the outcome of *Mount Holly*.

For more information, contact Thomas J. Noto at tnoto@mofo.com.

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Are Servicers Debt Collectors?

There were a number of important FDCPA decisions this summer. In the Home Affordable Modification Program (HAMP) case *Corvello v. Wells Fargo Bank, N.A.*, the Ninth Circuit held that under the Rosenthal Act (the California FDCPA equivalent), the loan servicer was both a "debt collector" and "engaged in debt collection activities when it offered the TPP." In *Schlegel v. Wells Fargo Bank, N.A.*, No. 11-16816 (9th Cir. July 3, 2013), it reiterated that a servicer *can* be a "debt collector" under the FDCPA, but ultimately held that the plaintiff didn't plead facts demonstrating that the servicer was actually acting as a "debt collector" in that case. Similarly, the Fifth Circuit in *Miller v. BAC Home Loans Servicing*, No. 12-41273 (Aug. 13, 2013), held that a servicer who allegedly broke a promise not to foreclose was a "debt collector" under the Texas Debt Collection Act. On the FDCPA, though, it held that servicers do *not* qualify as debt collectors, so "long as the [mortgage] was not in default at the time it was assigned."

For more information, contact Michael J. Agoglia at magoglia@mofo.com.

HUD Gets Creative with "Fair Housing" Settlement

In June, HUD, along with the Department of Justice (DOJ) and National Fair Housing Alliance, extracted a $42 million settlement regarding allegations that a bank failed to maintain foreclosed homes in minority neighborhoods while putting more effort into upkeep of homes in primarily white areas. The statute on which HUD relied, Section 804(a)-(d) of the Fair Housing Act, relates to discrimination in the sale or rental of housing. The conciliation agreement does not attempt to explain how this provision covers maintenance of properties in REO. A copy of the agreement is here.

For more information, contact Thomas J. Noto at tnoto@mofo.com.

Servicers in the Spotlight

On August 21, 2013, the CFPB issued a supervisory report detailing "mortgage servicing problems" found during examinations. The report provides helpful insight into the Bureau's priorities and gives specific guidance on compliance management programs. The servicing issues include: "sloppy account transfers," such as "a lack of protocols related to the handling of key documents"; "poor payment processing"; "excessive delays in handling the cancellation of private mortgage insurance payments"; and "loss mitigation mistakes," including "long review periods." The CFPB notes that in some cases, it opened investigations for potential enforcement actions. The full report is available here. The Bureau also provided guidance on its exam procedures this summer, in its updated examination procedure manuals, available here Real Estate Settlement Procedures Act, here Truth in Lending Act, and here Equal Credit Opportunity Act, as well as in its Mortgage Rules Readiness Guide, available here, and special compliance guides for small entities about loan originator compensation (available here) and the mortgage servicing rules (here).

For more information, contact Don Lampe at dlampe@mofo.com.

HAMP Update

It was a hot summer for HAMP litigation. In the first modification MDL to make it to class certification, the District of Massachusetts held for the bank. *In re: Bank of America HAMP Contract Litig.*, No. 10-md-02193 (D. Mass. Sept. 4, 2013). Expressing sympathy and lamenting a "Kafkaesque bureaucracy," the judge held that the borrowers simply could not show predominance given the "nearly endless series of individual questions" affecting their modification outcomes. A California district court came out the other way in *Gaudin v. Saxon Mortgage Services*, No. 11-cv-01663-JST (N.D. Cal. Aug. 5, 2013), certifying a class of California borrowers. Class certification motions in two HAMP MDLs are currently pending in the Central District of California and the District of Massachusetts.

Meanwhile, the Ninth Circuit deepened the circuit split on whether the Treasury-drafted HAMP TPP "contractually required [servicers] to offer the plaintiffs a permanent mortgage modification after they complied with [the TPP's] requirements." *Corvello v. Wells Fargo Bank, N.A.*, Nos. 11-16234, 11-16242 (9th Cir. Aug. 8, 2013). It held that it does, following the Seventh Circuit's *Wigod* decision and not the contrary holdings by the Fifth and Eleventh Circuits. And Treasury and HUD announced that they are extending the HAMP again, through December 31, 2015.

For more information, contact Michael J. Agoglia at magoglia@mofo.com.

"Fair Lending" Déjà Vu for Loan Securitizers

In a case reminiscent of the FAMCO/Lehman Brothers case, which we reported on here back in 2007, a judge in the SDNY held this July that Detroit mortgage borrowers stated a disparate impact claim against Morgan Stanley under the FHA and ECOA. *Adkins v. Morgan Stanley et al.*, No. 12 CV 7667 (HB), 2013 U.S. Dist. LEXIS 104369 (S.D.N.Y. July 25, 2013). Morgan Stanley didn't originate the loans, the defunct subprime lender New Century did. But New Century is no longer in business, and so the borrowers looked to Morgan Stanley, which packaged some of New Century's loans into mortgage-backed securities. The court accepted at face value the plaintiffs' far-fetched allegations without addressing whether they were plausible, and dispatched with standing, statute of limitations, tolling, the discovery rule and FHA liability with very little analysis.

For more information, contact Thomas J. Noto at tnoto@mofo.com.

More and More Amendments to the 2013 Mortgage Rules

In July, the CFPB issued six revisions and seven proposed amendments to its 2013 Mortgage Rules, which are scheduled to become effective in mid-January of 2014. Here's a summary:

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Revisions

(1) No Preemption: "Clarifies" that RESPA and Reg. X do not occupy the field of mortgage servicing regulation.

(2) ARM Disclosures: Clarifies the implementation dates for certain provisions governing adjustable rate mortgage (ARM) disclosures.

(3) Higher-Priced Mortgage Loan (HPML) Exclusions: Revises Reg. Z to clarify that construction and bridge loans and reverse mortgages are *not* subject to some of the rule's requirements.

(4) Small Servicer Exemption: Clarifies which mortgage loans to consider in determining small servicer status and the application of the small servicer exemption.

(5) QMs: Revises the ATR (ability-to-repay) final rule to describe QMs (qualified mortgages) that are entitled to a presumption of compliance, including details on the use of automatic underwriting systems and the treatment of government-sponsored enterprises (GSE) and agency loans.

(6) QM DTI Determination: Amends Appendix Q of Reg. Z to provide clarity and detail on debt-to-income (DTI) calculations.

Proposed New Rules

(1) Following Up on Loss Mitigation. Applications: Clarifies that if a borrower's packet is incomplete, but the servicer has enough information to make a decision, the servicer can go ahead and do so.

(2) Facilitate Forbearance Plans: Makes it easier for servicers to offer short-term forbearance plans by eliminating the need for a full loss mitigation evaluation.

(3) Encourage Lending in Rural and Underserved Areas: Extends the exception to the general ban on balloon features for high-cost mortgages to allow small creditors to continue originating the loans if they meet the requirements for QMs.

(4) Financing Credit Insurance Premiums: Clarifies what constitutes the financing of credit insurance premiums.

(5) Definition of "Loan Originator": Tries to resolve the current ambiguity about when an originator's staff qualify as "loan originators."

(6) Manufactured Housing Sales: Details what compensation manufactured home retailers must count toward certain thresholds for points and fees.

(7) Effective Dates: Considers (a) pushing the current January 10, 2014 effective date for various training and compensation-related loan originator (LO) rules back to January 1, 2014, and/or (b) adjusting the date for implementing the ban on financing credit insurance premiums.

For more information, contact Leonard Chanin at lchanin@mofo.com.

Loan Servicers Exempt from TILA Disclosure Rules, Sometimes

In July, the Eleventh Circuit held that a loan servicer, which was assigned the beneficial interest in a loan by MERS in connection with foreclosing on the property securing the loan, was exempt from TILA's disclosure requirements for new creditors. *Reed v. Chase Home Finance LLC*, No. 12-15755, 2013 U.S. App. LEXIS 15323 (11th Cir. July 29, 2013). Financial institutions should be aware, though, that the "administrative convenience" provision the Eleventh Circuit relied on is an exception to the normal requirement that they provide notice of any transfer or assignment of a loan.

For more information, contact Michael J. Agoglia at magoglia@mofo.com.

Eighth Circuit Wades Into Muddy Waters of TILA Loan Cancellation

TILA gives mortgage borrowers the right to rescind within three days of the transaction or the delivery of required notices and disclosures, whichever is later. If the creditor fails to provide the notices and disclosures, TILA sets a deadline of "three years after the date of consummation of the transaction." But, TILA does not say whether the borrower has to actually *sue* within three years, or just give *notice* of intent to rescind. Appellate courts were, until now, evenly divided, with the Ninth and Tenth Circuits holding a borrower has to sue, and the Third and Fourth Circuits deciding that notice is enough. Breaking the tie, the Eighth Circuit held in *Keiran v. Home Capital Inc.* and *Sobieniak v. BAC Home Loans Servicing LP*, Nos. 11-3878 and 12-1053 (8th Cir. July 12, 2013), that a borrower has to actually file suit by the deadline. Importantly, it rejected the CFPB's interpretation of TILA, argued as amicus curiae, that notice is enough and that the burden is on the lender to file a lawsuit to prevent rescission.

For more information, contact Michael J. Agoglia at magoglia@mofo.com.

OPERATIONS

Regulatory Capital Overhaul

The FRB, OCC and FDIC approved final regulatory capital rules. These rules make major changes to the U.S. regulatory capital framework in an effort to strengthen the regulatory capital of U.S. banking organizations and bring the U.S. into compliance with the Basel Committee's current international regulatory capital accord (Basel III). The final regulatory capital rules will replace the agencies' general risk-based capital rules, advanced approaches rule, market risk rule and leverage rules, in accordance with the agencies' transition provisions. See our Client Alerts, here and here, for more details.

For more information, contact Oliver Ireland at oireland@mofo.com.

The Price to Pay

The FRB issued a final rule promulgating Regulation TT, implementing the Dodd-Frank provision requiring the FRB to "collect assessments, fees, or other

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charges equal to the total expenses the [FRB] estimates are necessary or appropriate to carry out the supervisory and regulatory responsibilities of the FRB with respect to certain 'Assessed Companies.'" Assessed Companies include bank holding companies and savings and loan holding companies with total consolidated assets of $50 billion or more and nonbank financial companies designated by the Financial Stability Oversight Council for FRB supervision. Regulation TT outlines the process by which the FRB estimates the direct and indirect operating expenses referenced in Section 318 (the "Assessment Basis"), apportions the Assessment Basis to each Assessed Company, and collects the assessments. For the 2012 assessment period, the FRB estimates it will collect $440 million from 70 companies.

For more information, contact Jeremy Mandell at jmandell@mofo.com.

Three Men Enter, One Man Appeals

The Financial Stability Oversight Council voted to designate American International Group, Inc. and General Electric Capital Corp. as nonbank systemically important financial institutions (SIFIs). These companies will be subject to consolidated supervision by the FRB and enhanced prudential standards. The SIFI designation, as authorized by Section 113 of the Dodd-Frank Act, is based on the Council's determination that either the material financial distress or the nature, scope, size, scale, concentration, interconnectedness or mix of activities of a company could pose a threat to U.S. financial stability. Prudential Financial Inc., which had been preliminarily identified for designation, has appealed the Council's preliminary determination.

For more information, contact Oliver Ireland at oireland@mofo.com.

Living Will Update

The FDIC and FRB released the public portions of the living wills for four banks with U.S. nonbank assets between $100 billion and $250 billion: Wells Fargo, HSBC, Royal Bank of Scotland and BNP Paribas, SA. Each living will describes the bank's strategy for rapid and orderly resolution in the event of material financial distress or failure. Although the public portions are short on detail, they provide insight into how each bank would be resolved without damaging the U.S. financial system. The FDIC and FRB also recently released an optional model template for "tailored" resolution plans, which are permitted for certain smaller, less-complex institutions.

For more information, contact Barbara Mendelson at bmendelson@mofo.com.

Parity for Push Out

An interim final rule issued by the FRB provides parity for foreign banks' uninsured U.S. branches and agencies with U.S. insured depository institutions (IDIs) for purposes of the swaps push-out rule in Section 716 of the Dodd-Frank Act, otherwise known as the Lincoln Amendment. Without the interim final rule, uninsured U.S. branches and agencies of foreign banks that are considered "swaps entities" for purposes of the Lincoln Amendment would have been required to "push out" their swaps activities to an affiliate or cease them all together by July 16, 2013, in order to be eligible for access to the FRB's discount window. Under the interim final rule, foreign banks' uninsured U.S. branches and agencies may apply to the FRB for a transition period of up to 24 months (with the possibility of an additional year) in which to conform their swaps activities to those permitted to IDIs under Section 716. See our Client Alert for more details.

For more information, contact Barbara Mendelson at bmendelson@mofo.com.

Defining "Exposure Measure"

The Basel Committee on Banking Supervision published a Consultative Document that proposes specific leverage capital requirements and related disclosure requirements. This would more fully implement the leverage capital provision of Basel III. Specifically, the proposal would specify the elements of the "Exposure Measure" for calculating leverage capital requirements. For example, the proposal would provide that a bank's total Exposure Measure would represent the sum of on-balance sheet exposures (net of on-balance sheet exposures that are deducted from Tier 1 capital), derivative exposures, securities financing transaction exposures and other specified off-balance sheet exposures. See our Client Alert for more details.

For more information, contact Oliver Ireland at oireland@mofo.com.

FATF Standards for Dummies

The Basel Committee also published for public comment a Consultative Document to support countries' implementation of the Financial Action Task Force International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation. The guidance in the Consultative Document covers essential elements of sound AML/CFT risk management, including risk assessment, management and mitigation, customer identification, verification and risk profiling, ongoing monitoring, information management (*i.e.*, record keeping and communications with supervisors) and suspicious transaction reporting.

For more information, contact Barbara Mendelson at bmendelson@mofo.com.

PREEMPTION

HOLA Preempts HBOR

Last year, California passed the Homeowner's Bill of Rights (HBOR), which imposed significant state-law obligations on mortgage servicers that conduct more than 175 foreclosures a year in California. As expected, the first courts that have considered the issue have held that the loan modification and disclosure provisions of the HBOR are preempted by the Home Owners' Loan Act (HOLA) and the Office of Thrift Supervision (OTS) regulations. *Kaplan v. Wells Fargo Bank NA*, 2013 U.S. Dist. LEXIS 109023 (C.D. Cal. July 30, 2013); *Gorton v. Wells Fargo Bank NA*, 2013 U.S. Dist. LEXIS 86006 (C.D. Cal. June 3, 2013). These courts applied HOLA preemption because both loans were originated by federal thrifts. They recognized that the Dodd-Frank

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preemption provisions do not apply to loans originated before the Act's effective date. On the merits, the courts held that claims brought under the HBOR are preempted by the OTS regulations as state laws purporting to impose requirements regarding "terms of credit," and "[p]rocessing, originat[ing], servicing . . . or participati[ng] in, mortgages."

For more information, contact Nancy Thomas at nthomas@mofo.com.

TISA Evasion

The California Supreme Court held that a plaintiff can pursue a California Unfair Competition Law claim under the "unlawful" prong premised on an alleged Truth in Savings Act (TISA) violation, even though Congress repealed the private right of action in TISA. *Rose v. Bank of America, N.A.*, 2013 Cal. LEXIS 6521 (Cal. Aug. 1, 2013). The court relied on the savings clause in TISA, finding it reflects congressional intent to authorize state law claims premised on the TISA requirements, whether by a specific state law or a general UDAAP statute. The plaintiff therefore was not pleading around an express prohibition and instead was pursuing a claim expressly authorized by TISA.

For more information, contact Nancy Thomas at nthomas@mofo.com.

Kickback Claims to Continue

Keeping with the California focus of preemption decisions this quarter, a federal court in San Francisco held that state law claims challenging alleged force-placed insurance kickback and backdating practices were not preempted by the National Bank Act (NBA) and OCC regulations. *Leghorn v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 86426 (N.D. Cal. June 19, 2013). The court first rejected the line of cases applying the preemption analysis of the charter of the financial institution that originated the loan. Instead, the court followed decisions applying the preemption analysis applicable to the financial institution that took the challenged actions, in this case a national bank. The court then found the NBA and OCC regulations did not preempt plaintiff's state claims contending that defendant over-charged for force-placed insurance in order to receive kickbacks from the insurer and purchased backdated policies. The court reasoned that these claims did not challenge the national bank's right to obtain force-placed insurance or charge for it, but instead challenged defendant's alleged manipulation of the process.

For more information, contact Nancy Thomas at nthomas@mofo.com.

ARBITRATION

The Answer Is Still No

Two years ago, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court found that the Federal Arbitration Act (FAA) preempted a California law invalidating certain arbitration agreements containing class action waivers. The Court specifically rejected the notion that an arbitration agreement could be invalidated because it prevented effective vindication of small-value claims. After *Concepcion*, a heated debate ensued about whether the decision applies where an arbitration agreement prevents effective vindication of federal statutory rights. In *American Express Co. v. Italian Colors Restaurant*, the Supreme Court held that it does. 133 S. Ct. 2304 (2013). Because the FAA requires courts to "rigorously enforce" arbitration agreements according to their terms, an arbitration agreement cannot be invalidated on the basis that it prevents effective vindication of federal statutory rights, unless the FAA's mandate has been overridden by a contrary congressional command. The Court found no such command in federal antitrust laws. See our Client Alert for more details.

For more information, contact Rita Lin at rlin@mofo.com.

Don't Mess with the Arbitrator

The Supreme Court, in a unanimous opinion delivered by Justice Kagan, held that courts have limited authority to review an arbitrator's determination that a contract authorizes class arbitration. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). Oxford alleged that, under Section 10(a)(4) of the FAA, the arbitrator exceeded his powers by deciding the contract authorized class arbitration. The Court cautioned that under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances" and that an arbitral decision "even arguably construing or applying the contract" must stand. And for relief under Section 10(a)(4), it is not enough to show that an arbitrator committed an error, even a serious error. A court may overturn an arbitrator's determination only if the arbitrator acts outside the scope of his contractually delegated authority, issuing an award that simply reflects his own notions of justice rather than drawing from the contract. See our Client Alert for more details.

For more information, contact Rita Lin at rlin@mofo.com.

Concepcion Patrol

In *Mortensen v. Bresnan Communications LLC*, the Ninth Circuit vacated a decision by a Montana district court declining to enforce the arbitration clause in an Internet services subscriber agreement. No. 11-35823, 2013 U.S. App. LEXIS 14211 (9th Cir. 2013). Under Montana state law, courts may determine a clause is void as against public policy if the contract is one of adhesion and if the clause was not within the "reasonable expectations" of both parties when contracting. The Ninth Circuit held that the FAA preempts this Montana rule. Relying on the Supreme Court's holding in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Ninth Circuit concluded that the FAA preempts all laws that have a "disproportionate impact on arbitration."

For more information, contact Rita Lin at rlin@mofo.com.

Status Update: Comments on CFPB's Proposed Telephone Survey

On August 6, the comment period closed on the initial draft of the CFPB's proposed telephone survey of customers to assess consumer awareness and perception of arbitration provisions in their agreements with credit card providers. In a joint comment letter, the American Bankers Association, Consumer Bankers

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Association, and Financial Services Roundtable urged the CFPB to not proceed with the proposed survey because its lengthy and complex questions would not produce meaningful information and because a telephone survey would not yield useful information about the comparative outcomes in class action litigation versus arbitration. The Chamber of Commerce submitted a comment in agreement. Consumer advocate groups like the National Association of Consumer Advocates supported the CFPB's proposal and its ability to yield helpful data, but agreed that the survey questions could be clearer. A second 30-day period for comment will begin after the CFPB prepares a revised proposal.

For more information, contact Rita Lin at rlin@mofo.com.

TCPA REPORT

Regulators and class action attorneys alike have sharpened their focus on the Telephone Consumer Protection Act (TCPA), which governs faxes and auto-dialed text messages or calls (supposed "robo-calls") to consumers for marketing or other purposes. Given the many benefits of reaching consumers through automated equipment and the widespread use of such equipment, companies in a wide variety of industries have started to pay attention to the rules and regulations associated with the TCPA. Ensuring TCPA compliance is especially critical in light of the draconian penalties of up to $1500 per call/text/fax sent in violation of the TCPA. Stay tuned for more to come as the litigation in this area continues and continues …

Change My Number

The FCC has imposed new consent requirements in regulations that take effect on October 16, 2013. Those regulations require prior express written consent from the called party for the following telemarketing calls: (1) any autodialed or prerecorded telemarketing calls or text messages to a cell phone; and (2) any prerecorded telemarketing calls to residential landlines. The FCC eliminated the existing exception allowing sellers to place prerecorded telemarketing calls to parties with whom they have an established business relationship.

For more information, please contact Julie O'Neill at joneill@mofo.com.

Go Ahead and Change Your Mind

In a recent appellate decision involving a financial services institution, the Third Circuit held that a consumer has the right under the TCPA to revoke her prior express consent to be contacted via an automated telephone dialing system and that a consumer can revoke such consent at any time. The district court had declined to find such a right in the absence of express language in the TCPA, but the Third Circuit reversed, holding that the statute's silence on this issue should be construed in favor of the consumer for three reasons: (1) consent is revocable under the common law; (2) as a remedial statute, the TCPA should be interpreted in favor of consumers; and (3) the FCC recently concluded (albeit with "admittedly sparse" analysis) that consumers may revoke their consent to be contacted by autodialing systems.

For more information, contact Tiffany Cheung at tcheung@mofo.com.

As Long As Some Consented

In a pair of related class certification decisions, an Illinois district court denied plaintiff's attempt to certify a class on a TCPA claim. *Jamison v. First Cred. Servs.*, 290 F.R.D. 92 (N.D. Ill.), *reconsideration denied*, 2013 WL 3872171 (N.D. Ill. 2013). The court held that individualized issues of consent predominated over common issues and that the class was not ascertainable because the defendant offered "specific evidence" showing that a significant percentage of the putative class may have consented to receiving calls on their cell phone. Because there was no "way to employ generalized proof to prove consent, or lack thereof," no class could be certified.

For more information, contact Tiffany Cheung at tcheung@mofo.com.

This newsletter addresses recent financial services developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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