FINANCIAL SERVICES REPORT

Quarterly News, Summer 2019

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MOFO METRICS

6	Time the average person waits at stop lights over their lifetime, in months
20	Percentage of driving time spent waiting at stop lights
124	Money lost in gasoline and productivity loss due to traffic congestion per year, in billions of dollars
5.7	Annual person-hours of delay caused by traffic congestion in the U.S., in billions
20	Percentage of car crashes in U.S. cities relating to searching for parking

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EDITOR'S NOTE

The fireworks have started early this year. On May 2, a federal court in New York rejected the OCC's motion to dismiss the lawsuit brought by the NY DFS challenging the OCC's fintech charter. The decision has something for everyone — ripeness, standing, state sovereign authority, dictionary definitions, and some *Chevron* deference (or lack thereof) for good measure. Exciting reading! And after fighting about everything else, it looks as though the OCC and the NY DFS have agreed that the next stop should be the Second Circuit. So we can all look forward to Round 2.

Speaking of Round 2, a federal judge in Texas continued the stay of the compliance dates for both the payments and ability-to-repay provisions of the CFPB's payday lending rule, as well as the stay of the litigation brought by trade groups challenging the rule. The CFPB issued a final rule to delay the implementation date for the ability-to-repay portion of the rule, which is the subject of rulemaking to rescind these requirements. The federal judge stayed the compliance date for both these ability-to-repay provisions and the payments provisions of the rule over the CFPB's objection.

It's not looking much like the lazy days of summer in the world of financial services. Grab a glass of lemonade and read on for updates on Fintech, Bureau, Beltway, Mortgage, Privacy, BSA/AML, etc.

BELTWAY

Faster Payments Primer

NACHA's Payments Innovation Alliance released its Faster Payments 101 primer for small- to mid-sized financial institutions. The primer is an update to the Introduction to Faster Payments that NACHA released in 2017, and was finalized during NACHA's Faster Payments Playbook Project Team meeting in February 2019. The primer provides a timeline of payment milestones, a comparison of faster payment solutions (e.g., NACHA Same Day ACH, Visa Direct, and Early Warning Zelle), and an overview of faster payments governance, such as the NACHA Operating Rules, Regulation E, and Zelle Operating Rules.

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

Warning! Technology Failure!

The FDIC issued a letter to supervised entities highlighting gaps in technology service contracts — gaps that the FDIC noted "contribute to ambiguity" in the rights and responsibilities of service providers, and gaps that could increase the risks that disruptions of service providers or security breaches could impact a supervised entity's operations or compromise customer information. In recent FDIC examination reports, examiners noted that some technology service contracts "may not adequately" define rights and responsibilities regarding business continuity and incident response, or provide sufficient detail to manage business continuity and incident response processes or risks. The FDIC pointed to several areas of concern, including long-term contracts and auto-renewals, noting higher risk for coverage gaps with respect to due diligence ongoing monitoring of technology service providers.

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

Marketplace Lender UDAP Settlement

In April 2019, the FTC settled with a marketplace lender to resolve allegations that the lender engaged in unfair and deceptive practices when it deceived consumers about (1) the acceptance of credit cards and debit cards for repayment of loans and (2) loan payoff amounts. The FTC also alleged that the lender violated the Telemarketing Sales Rule and the EFTA by requiring borrowers, as part of the loan application, to allow the lender to initiate recurring EFTs or remotely created checks as a condition of obtaining the loan. Despite informing consumers in the loan agreement and via FAQs that payments may be made by check, money order, and credit or debit card, according to the FTC, the lender rejected such payments. The FTC also alleged that the lender failed to timely apply paper payments and made unauthorized charges to consumers. The settlement requires the lender to pay $3.85 million in consumer restitution and prohibits the lender from taking payment using remotely created checks.

For more information, contact David Fioccola at dfioccola@mofo.com.

Tailoring FBOs Framework

Paralleling the framework proposed for the supervision of large domestic banking organizations, in April 2019, the federal banking agencies released two proposals intended to tailor the approach to supervision of large foreign bank organizations (FBOs) with respect to the application of (1) enhanced prudential standards, (2) the regulatory capital rule, (3) the liquidity coverage ratio rule, and (4) the proposed net stable funding ratio rule. Under the proposals, the enhanced prudential standards would not apply to FBOs with less than $50 billion in total consolidated assets, and FBOs with a limited U.S. presence (i.e., less than $100 billion in combined U.S. assets) would generally be subject to the same enhanced prudential standards currently required by Regulation YY, but with altered thresholds for applicability. For FBOs with a more significant U.S. presence (i.e., more than $100 billion in total consolidated assets), the proposals would establish categories for the application of requirements based on size and certain other risk-based indicators.

For more information, contact Oliver Ireland at oireland@mofo.com or read our Client Alert.

OCC Piloting Innovation

The OCC announced that it was soliciting comments on its proposed Innovation Pilot Program (Program), and released FAQs related to the Program. According to the OCC, the Program is intended to provide "consistent and transparent framework" for the OCC's engagement on small-scale pilots for innovation in the federal banking system. The Program sets forth (1) the eligibility criteria for the OCC's participation (e.g., must be within the scope of the OCC's supervisory authority) and (2) program parameters, such as length of program (3-24 months) and controls and safeguards. The OCC seeks comment on additional eligibility criteria and the evaluation process and type of innovative activities would best be served through the Program. Comments are due no later than June 14, 2019.

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

Examination Modernization

As part of the FFIEC's examination modernization project, the FFIEC issued a Policy Statement on the Report of Examination. The Policy Statement replaces a 1993 interagency policy statement used by the OCC, FDIC, and Federal Reserve. Rather than relying on the three categories for the reports of examination (ROE) — mandatory core, optional core, and supplemental content — the Policy Statement adopts a principle-based approach for completing ROEs. Under the new approach, all ROEs should, among other things, (1) present conclusions and issues in order of importance, (2) document the financial institution's condition and risk profile, (3) discuss the adequacy of the financial institution's risk management policies, and (4) document issues of supervisory concern or warranting corrective action (e.g., violations of law).

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

BUREAU

CFPB Gets More Social

The CFPB is stepping up its outreach efforts with the launch of a new symposia series and the relaunch of three consumer advisory boards. Designed to assist the CFPB with policy development and possible rulemaking, the series will explore consumer protection issues through a panel discussion with experts on various topics, including the meaning of "abusive acts or practices," behavioral law and economics, small business loan data collection, disparate impact and ECOA, cost-benefit analysis, and consumer-authorized financial data sharing. Several of these topics were the focus of recent CFPB Requests for Information (RFIs).

For more information, contact Kathleen Ryan at kathleenryan@mofo.com.

Gone Fishing? CFPB Says Not Anymore

In April, the CFPB announced changes to its policy on Civil Investigative Demands (CIDs). Under former Director Cordray, the CFPB had often been criticized for vagueness in its CID requests and what some characterized as "fishing expeditions." Under the CFPB's revised policy, CIDs will provide more information on the potentially applicable provision of the law that may have been violated, and the CID recipient's related business activities that are subject to the CFPB's authority. The revised policy is the result of comments provided in response to the agency's 2018 RFI on CIDs, the first RFI the Bureau issued in its "Call for Evidence," and recent court decisions about the CFPB's CIDs.

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

NY DFS Creates Mini-CFPB

Fulfilling its stated intention to address the CFPB's "troublesome policy shift away from consumer protection," the NY DFS launched its own "mini-CFPB." The NY DFS announced the creation of a new Consumer Protection and Financial Enforcement Division to protect and educate consumers, fight consumer fraud, and ensure that regulated entities are complying with New York and federal law. New York follows other state efforts to fill the perceived gap created by the CFPB's reduced enforcement activities. State attorneys general (AGs) in Massachusetts, New Jersey, and Pennsylvania have already created state consumer protection units, and other state AGs have been vocal in their opposition to the CFPB's re-examination of ECOA enforcement and its decision to halt supervision of the Military Lending Act.

For more information, contact Jessica Kaufman at jkaufman@mofo.com.

Reg Review

The CFPB requested feedback on its plan to review rules with a "significant economic impact upon a substantial number of small entities" within 10 years of their publication, pursuant to the Regulatory Flexibility Act (RFA). Under its review plan, the CFPB will consider the continued need for the rule; the nature of public complaints or comments on the rule; its complexity; the extent to which the rule overlaps, duplicates, or conflicts with other existing federal or state rules; and the time since the rule was evaluated or the degree to which the relevant market has changed.

Along with the RFA notice, the CFPB launched its first RFA review, which is of the 2009 Overdraft Rule it inherited from the Federal Reserve Board under the Dodd-Frank Act. The CFPB asked for public input on the Rule's benefits and economic impacts, and whether and how the agency could, by regulation, reduce the Rule's costs on small entities.

For more information, contact Oliver Ireland at oireland@mofo.com or read our Client Alert.

Ch-Ch-Changes to Remittance Rule Ahead?

In April, the CFPB published an RFI on potential changes to the Remittance Rule. Currently, the Rule contains a temporary exception that allows insured banks and credit unions to provide estimated disclosures related to certain fees and exchange rates. The RFI seeks information on whether the exception, which expires in July 2020, is

"necessary" for certain destinations due to a specific characteristic of that destination. The CFPB also seeks input on whether to change the remittance transfer providers covered by the Rule, and asks how many transfers a provider must make in order to be considered providing transfers "in the normal course of business." The RFI follows the CFPB's publication of its Remittance Rule Assessment Report in October 2018, which foreshadowed future rulemaking efforts to the Rule.

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

Just Text Me How Much I Owe

The CFPB issued proposed debt collection rules, which would be the first substantive regulations for debt collection practices since the FDCPA was enacted in 1977. The proposed rules would apply to debt collectors as defined in the FDCPA and would clarify how debt collectors may use voicemail, email, text messages, and social media to contact borrowers. The proposed rules would also limit the number and frequency of phone calls a debt collector can make to a person, make changes to the debt validation notice requirements, and prohibit debt collectors from suing consumers to collect time-barred debt. The comment period for the proposed rules will be open until August 19, 2019.

For more information, contact Kathleen Ryan at kathleenryan@mofo.com or read our Client Alert.

Stopped In Its Tracks

A federal district court extended a stay of the compliance deadline for the CFPB's 2017 small-dollar (aka payday) lending rule. *Community Fin. Services Assoc. v. CFPB*, No -18-CV-0295-LY (W.D. Tex. March 19, 2019). The court stayed the August 19, 2019 compliance date for two major portions of the rule: the underwriting provisions and the payment provisions. In November 2018, the court initially granted a stay of the compliance date after the CFPB, under new leadership, indicated that it was revisiting the rule. In February 2019, the CFPB issued a proposed rule that would eliminate the rule's underwriting provisions, but would leave intact the payment provisions.

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

CFPB Settles Debt Relief Services Lawsuit

The CFPB settled a lawsuit against two lawyers and their law firms for alleged violations of the Telemarketing Sales Rule in connection with the telemarketing and sale of debt relief services. The CFPB alleged that the defendants received over $35 million in unlawful fees for debt relief services between 2014 and 2015. Under the consent judgment, the defendants agreed to pay $35.3 million in consumer redress and $40 million in civil money penalties. However, payment is limited to $50,000 if the defendants comply with the terms of the consent judgment, which includes prohibitions on participating in telemarketing or engaging in the debt relief business.

For more information, contact Angela Kleine at akleine@mofo.com.

CFPB Plans for the Coming Year

The CFPB recently published its Semiannual Regulatory Agenda, which outlines regulatory matters the CFPB anticipates having under consideration from May 2019 to April 2020. Among other things, the CFPB will take action to implement various statutory directives contained in the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, such as extending the purposes of TILA's ability-to-repay requirements to PACE financing, and implementing amendments to HMDA. The CFPB also indicates it will, again, focus on pre-rule activities for rules implementing Section 1071 of the Dodd-Frank Act, which requires the collection and reporting of data on credit applications by small businesses, including women- and minority-owned small businesses. The CFPB also noted that it is considering whether to take action to address the July 2021 expiration of a regulatory provision known as "the QM patch." The QM Patch extends qualified mortgage status to loans that are eligible to be purchased or guaranteed by Fannie Mae or Freddie Mac. Finally, the CFPB plans on continuing other rulemakings currently in process, as well as reviewing existing regulations for ways to reduce regulatory burdens.

For more information, contact Kathleen Ryan at kathleenryan@mofo.com.

Failure to Adjust Student Loan Balances Leads to Settlement

The CFPB settled with a student loan servicing company for allegedly failing to adjust the balances of student loans it serviced under the Federal Family Education Loan Program. The CFPB alleged that the company neglected to make the balance adjustments necessary to account for circumstances such as deferment, forbearance, or borrowers' entrance into Income-Based Repayment programs. The consent order requires the student loan servicer to pay a $3.9 million civil money penalty and adjust the balances of affected loans or, alternatively, provide restitution if borrowers have paid off their loans.

For more information, contact James McGuire at jmcguire@mofo.com.

Mind if I Pay the Settlement in Change?

According to a disclosure statement filed as part of the company's bankruptcy proceedings, a company that partnered with tribal lenders to make high-cost, short-term loans will be entering into a consent order with the CFPB that will require the company and its subsidiaries to pay $7 ($1 for each defendant) in civil money penalties. The CFPB's complaint, which was brought in 2017 under former CFPB Director Cordray, alleged that the company engaged in unfair, deceptive, and abusive practices in connection with its collection of loans that the CFPB alleged was void under state licensing regulations or usury caps.

For more information, contact James McGuire at jmcguire@mofo.com.

MOBILE & EMERGING PAYMENTS

Small Business Lending Gets the Attention of Big Regulators

As fintech firms increasingly wade into the world of small business financing, they are drawing the attention of state and federal regulators alike. The California Department of Business Oversight (CA DBO) is currently drafting rules for the state's first-of-its-kind commercial financing disclosure law, sparking debate over whether an annualized percentage rate similar to those found in consumer finance agreements is appropriate in the commercial lending space. Meanwhile, the Federal Trade Commission (FTC) recently held a Forum on Small Business Financing to discuss the latest trends and regulatory issues in the field. At the forum, Director of the FTC's Bureau of Consumer Protection Andrew Smith expressed concerns "about reports of unfair and deceptive marketing, sales and collection practices" in small business financing, and reminded attendees of the FTC's "broad authority" to regulate the industry.

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

Cash Is Still King

After more than 40 years, Massachusetts is no longer alone in requiring businesses to accept cash. Governor Phil Murphy of New Jersey signed a bill prohibiting businesses from discriminating against cash-paying customers and requiring businesses to accept "legal tender" as payment. Businesses found to be in repeat violation of the ban will face fines approaching $20,000 under the New Jersey Consumer Fraud Act. Despite opposition from the technology industry and merchants, cashless bans have proliferated from coast to coast in recent months. Municipalities have gotten in on the action, with the cities of Philadelphia and San Francisco passing bans on credit-only stores in March and May, respectively.

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

Talk about Over-Sharing

During a recent fintech conference, FDIC Chairman Jelena McWilliams confirmed that the FDIC is working to develop standards for the sharing of consumer financial information between banks, fintechs, and data aggregators. The question of who can access a consumer's financial information and what they may do with it has been a source of confusion and tension between banks and data aggregators, whose business models often revolve around frequent access to a customer's data. Treasury Secretary Steven Mnuchin and Comptroller of the Currency Joseph Otting, both speaking at the same fintech conference, emphasized the importance of viewing data-sharing from a consumer's point of view and ensuring that the process is easy to comprehend for users.

For more information, contact Trevor Salter at tsalter@mofo.com.

Proposed Innovation Pilot Program

The OCC released a paper and FAQs on a proposed Innovation Pilot Program. The program would allow OCC-supervised financial institutions, including those partnering with a third party, to receive input from OCC regulators regarding the testing of innovative products, services, or processes that could benefit consumers. Comments on the proposal are due by June 14, 2019.

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

MORTGAGE & FAIR LENDING

Hmmm . . . More HMDA Changes

On May 2, 2019, the CFPB issued two new notices of proposed rulemaking regarding Regulation C, the implementing regulation of the HMDA. The first proposed change involves increasing the triggering threshold for closed-end loans (from 25 to 50 or 100) and extending the temporary threshold for open-end credit lines (currently 500) until 2022. These proposed changes could have a significant impact on smaller lenders that would no longer be subject to HMDA reporting requirements. The second proposed rule seeks to revise and potentially reduce the data points and transactions these institutions are required to report, and seeks feedback on whether this change would adequately address the aims of the HMDA.

For more information, contact Kathleen Ryan at kathleenryan@mofo.com or read our Client Alert.

Your LAR Is Showing . . .

For those HMDA data aficionados, the CFPB recently published the HMDA Modified Loan Application Register (LAR) data, which covers approximately 5,400 financial institutions. This is the second year in which all Modified LARs have been made publicly available on the CFPB website, and the first year in which additional data required by the 2015 HMDA rule will be included. That's not all. More HMDA data is forthcoming: the CFPB will publish additional data later this year, including a complete loan level dataset and HMDA aggregate and disclosure reports.

For more information, contact Angela Kleine at akleine@mofo.com.

The Road to OCC Fines Can Be Paved with Good Intentions

A national bank was fined $25 million by the OCC for an alleged Fair Housing Act violation. The bank had initiated a Relationship Loan Pricing Program in 2011 that was designed to reduce mortgage pricing for borrowers who maintained a qualifying relationship with the bank. Despite its good intentions, the bank failed to implement effective controls to ensure the program was offered consistently with the FHA, which the bank self-reported to the OCC. Deficiencies identified included insufficient training on how to offer the program and inadequate policies and written guidance, which did not require the program to be offered to every eligible customer or require documentation for the basis of the customer's rejection. In addition to the fine, the bank paid $24 million in restitution to impacted borrowers.

For more information, contact Sarah Davis at sarahdavis@mofo.com.

Indebted to SCOTUS

In a unanimous decision, the Supreme Court held that a business engaged in nonjudicial foreclosure is not a "debt collector" under the FDCPA and is only subject to certain FDCPA prohibitions related to nonjudicial actions to take possession of property. *Obduskey v. McCarthy & Holthus LLP*, 586 U.S. ___, 139 S. Ct. 1029 (2019). This decision resolves a circuit split regarding the definition of a "debt collector" under the FDCPA and the application of the FDCPA to enforcement of security interests. Businesses engaged in nonjudicial foreclosure, however, cannot ignore the FDCPA completely. The Court limited its holding to the situation in which the business's actions are required by state law governing the enforcement of security interests and the business does no more than the bare minimum required by the state law.

For more information, contact Kathleen Ryan at kathleenryan@mofo.com or read our Client Alert.

And the Fines Go On and On and On

The DOJ finalized a settlement with a lender for a $1.5 billion civil monetary penalty to resolve claims that a company misrepresented the quality of subprime home loans issued by its former mortgage company. The DOJ alleged that documentation regarding a majority of the $65 billion in mortgage loans the company made from 2005 to 2007 contained misrepresentations, which caused investors to suffer billions of dollars in losses and contributed to the 2008 financial crisis. The DOJ complaint contained now-familiar financial crisis-era allegations of lax quality controls and practices of encouraging analysts to approve deficient loan applications to meet volume targets.

For more information, contact Angela Kleine at akleine@mofo.com.

Get It Right!

For those of you trying to keep track of the ever-changing HMDA requirements, the FFIEC recently updated its Getting It Right Guide (the "Guide") to assist financial institutions in complying with their HMDA reporting obligations. The updated Guide is not the only new tool to help financial institutions get it right. The FDIC and other member agencies are also making the updated HMDA examination procedures publicly available. Both the Guide and the revised examination procedures reflect the new exemptions added by the Economic Growth, Regulatory Relief, and Consumer Protection Act, the CFPB's 2018 HMDA Rule, and the amendments to Regulation C. The revised examination procedures will be used for data due in 2020, so relevant financial institutions should quickly get up to speed on the Guide and updated requirements.

For more information, contact Kathleen Ryan at kathleenryan@mofo.com.

He's a Brick, House

President Donald J. Trump issued a "Memorandum on Federal Housing Finance Reform" laying out his views on comprehensive housing finance reform. Perhaps most notably, the President calls for any reform to include the end of the conservatorship of Fannie Mae and Freddie Mac, alleging that the lack of competition with the private sector leaves taxpayers exposed to the risk of another bailout. The President directs the Treasury Secretary and HUD to develop a plan for legislative and administrative options for proposed reforms, including, among other things, the financial viability of the Home Equity Conversion Mortgage Program.

For more information, contact Angela Kleine at akleine@mofo.com.

OPERATIONS

Agencies Address Hard Brexit Swaps Handoff

The federal banking agencies published an interim final rule to amend regulations regarding the minimum margin and capital requirements for registered swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants (each, a "swap entity"). The interim final rule is intended to address a swap entity's ability to service its cross-border clients in the event of a hard Brexit — i.e., the scenario in which the UK withdraws from the European Union without a negotiated withdrawal agreement. The interim final rule states that transfers of legacy swaps from UK-based financial services firms to EU- or U.S.-based financial services firms, if carried out in accordance with the conditions of the interim final rule, will not trigger application of the agencies' broader Swap Margin Rule.

For more information, please contact Julian Hammar at jhammar@mofo.com.

Stress Testing Transparency Efforts

The Federal Reserve Board released a document intended to improve public understanding of the Board's stress testing models and results. The intent of the document is to support the Federal Reserve Board's broader efforts to improve the transparency of its stress tests, without compromising their ability to test the resiliency of the nation's largest banks. The document provides an overview of the general approach to supervisory model development and validation in stress testing, summarizes the supervisory modeling framework and methodology, includes detailed descriptions of the supervisory stress test models, and contains additional disclosures for certain material portfolios, including modeled loss rates on pools of loans and loss rates associated with portfolios of hypothetical loans.

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

PSR Policy Changes

On April 3, 2019, the Federal Reserve Board announced changes to its Payment System Risk Policy ("PSR Policy") concerning intraday credit for U.S. branches and agencies of foreign banking organizations (FBOs). The changes relate to the procedures for determining the net debit cap and maximum daylight overdraft capacity for U.S. branches and agencies of FBOs under Part II of the PSR Policy. As a general matter, the Board will no longer rely on the strength of support assessment (SOSA) ranking or an FBO's status as a financial holding company to determine the level of intraday credit that a U.S. branch or agency can receive from the Federal Reserve Banks. Instead, the Federal Reserve Board is adopting alternative methods for determining, among other things, eligibility for and size of the net debit cap. The Board anticipates that use of the alternative methods will result in a net debit cap that is better tailored to the FBO's use of intraday credit. The PSR Policy changes took effect on April 1, 2020.

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

Federal Reserve Proposes New Control Regulations

The Federal Reserve Board issued a proposed rule that would revise regulations related to the determination of "control" under the Bank Holding Company Act and the Home Owners' Loan Act. According to the Federal Reserve Board, the Proposed Rule would "provide substantial additional transparency on the types of relationships that the [Federal Reserve Board] would view as supporting a determination that one company controls another company" by adopting existing interpretations under the "controlling influence" prong of the control definition into Federal Reserve Board regulations. Key factors that would affect the control determination would be a company's total voting and non-voting equity investment in the bank; director, officer, and employee overlaps between the company and the bank; and the scope of business relationships between the company and the bank. The Proposed Rule would also address other issues that commonly arise when analyzing controlling relationships. The comment period will close on July 15, 2019.

For more information, contact Jiang Liu at jiangliu@mofo.com or read our Client Alert.

Living Will Changes

The Federal Reserve Board and the FDIC published a long-awaited advanced notice of proposed rulemaking regarding resolution plans. The proposed rule would amend and restate the regulations jointly issued by the agencies implementing the resolution plan requirements of section 165(d) of the Dodd-Frank Act. The amendments would implement the requirements of the Economic Growth, Regulatory Reform, and Consumer Protection Act of 2018 (the "Regulatory Relief Act"). Specifically, the Regulatory Relief Act raised the $50 billion total consolidated asset threshold for general application of the living will requirements to $250 billion in total consolidated assets, provided the Federal Reserve Board with discretion to apply the requirements to firms with total consolidated assets of at least $100 billion but less than $250 billion, and eliminated the filing requirements

for firms with less than $100 billion in total consolidated assets.

For more information, contact Marc-Alain Galeazzi at mgaleazzi@mofo.com or read our Client Alert.

Capital Calculation Changes

The federal banking agencies issued a proposed rule concerning regulatory capital for advanced approaches banking organizations. The proposed rule would permit such organizations to deduct from their own regulatory capital certain investments in unsecured debt instruments for purposes of satisfying their total loss-absorbing capacity (TLAC) requirements. Such investments would include unsecured debt issued by U.S. global systemically important banks (GSIBs), foreign GSIBs, and subsidiaries of foreign GSIBs, including their U.S. intermediate holding company subsidiaries. According to the federal banking agencies, the proposed rule is intended, among other things, "to create an incentive for advanced approaches banking organizations to limit their exposure to GSIBs."

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

PREEMPTION

An End to the Great Divide?

The Ninth Circuit agreed to hear an interlocutory appeal raising the question of which charter governs preemption analysis when a loan is originated by an entity with one charter (for example, a federal thrift) and transferred to an entity with another charter (for example, a national bank) at some point before the borrower files suit. *McShannock v. JPMorgan Chase Bank*, No. 19-15899 (9th Cir. Apr. 23, 2019). The district court found that preemption travels with the lender, so the charter of the entity that took the actions challenged in the lawsuit governs. *McShannock v. JP Morgan Chase Bank N.A.*, 354 F.Supp.3d 1063 (N.D. Cal. 2017). The district court granted the national bank's motion to certify the HOLA preemption question for interlocutory appeal, and the Ninth Circuit agreed to hear the appeal. *McShannock v. JP Morgan Chase Bank N.A.*, No. 18-cv-01873 EMC, 2019 WL 955289 (N.D. Cal. Feb. 27, 2019).

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

Charter Confusion Goes Cross-Country

A federal court in Pennsylvania considered a variant of the issue that has divided courts in the Ninth Circuit. The court ruled that a state law usury claim on a mortgage owned by a national bank was not preempted because the loan was originated by a non-chartered entity. *Owens v. JP Morgan Chase Bank*, No. 18-1421, 2019 WL 1791278 (W.D. Pa. April 24, 2019). The court's ruling was based on its finding that "when determining preemption issues, courts should look to the loan's origination." *Id.* at *5.

For more information, contact James McGuire at jmcguire@mofo.com.

Pre-Pull Notice Not Preempted

A federal court in New York held that a state law requiring entities to provide notice before requesting consumer information from a credit reporting agency is not preempted by FCRA. *Aghaeepour v. Northern Leasing Sys, Inc.*, __ F. Supp. 3d __, 2019 WL 2024505 (S.D.N.Y., May 8, 2019). The court found that the FCRA provision preempting state law relating to any subject matter regulated by the statute did not cover a pre-pull notice requirement, which is not mentioned in or covered by FCRA. The court also relied on the FCRA savings clause, which provides that only state laws that are inconsistent with FCRA are preempted. The court reasoned that a pre-pull notice requirement is not inconsistent with FCRA obligations and instead imposes an additional requirement.

For more information, contact Angela Kleine at akleine@mofo.com.

PRIVACY

Taking a Risk

The FTC released a draft notice of proposed rulemaking to substantially amend its GLBA data security standards for financial institutions subject to its authority (the "Safeguards Rule"). The Safeguards Rule has long been a hallmark of data security that is based on a risk-based, reasonableness standard. It requires a financial institution to maintain an information security program that includes administrative, physical, and technical safeguards designed to protect against risks identified in periodic risk assessments. The proposed rule appears to head to the opposite end of the spectrum. Taking liberally from the controversial NY DFS cybersecurity standards, the FTC is proposing to impose detailed and prescriptive security requirements, including broad obligations regarding the use of encryption and multifactor authentication. Comments were originally due June 3, but the FTC has extended the deadline to August 2, 2019.

For more information, contact Nathan Taylor at ndtaylor@mofo.com or read our Client Alert.

What's New?

The FTC recently released its 2018 Privacy and Data Security Update. The Update provides an overview of the FTC's significant privacy and data security enforcement actions, as well as the other tools the agency uses to promote consumer privacy and data security. The report notes particular areas of focus for the FTC, including financial privacy and data security issues and the FCRA, as well as targeting companies that allegedly make misrepresentations regarding their privacy and data security practices. The report also identifies six "zones" in which the agency is active — advocacy, rulemaking, hosting workshops, issuing reports and surveys, consumer education and business guidance, and international engagement.

For more information, contact Julie O'Neill at joneill@mofo.com or read our Client Alert.

Here to Help

The massive 2017 Equifax data breach continues to draw the attention of policymakers and regulators. Most recently, a new GAO report requested by Senators Elizabeth Warren and Elijah Cummings (one in a series that has been requested) examines the oversight of credit reporting agencies, including with respect to the federal laws and regulations governing information collection; FTC and CFPB measures to enforce data protection requirements; and these agencies' roles in assisting consumers in the wake of data breaches. As called out by Senator Warren in her press release on the report, the GAO noted that the FTC's enforcement authority under the GLBA privacy and security rules does not include civil money penalties. If the FTC had civil money penalty authority, according to the GAO, it could "fine a company for a violation such as a data breach without needing to prove the monetary harm to individual consumers."

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

Watch Out for the Watchmen

The Office of the Inspector General (OIG) of the Justice Department issued an audit of the FBI's cybervictim notification process, the process through which the FBI informs victims of cyberintrusions after the FBI has identified a cyberattack, often before the victim company has learned of the incident. The report explains that "[t]he goal of the FBI's cyber victim identification and notification process is to mitigate ongoing and future intrusions at targeted entities." The OIG found that the process often does not work well because of various issues, including incomplete and unreliable data in the FBI's "Cyber Guardian" system (e.g., typos), improperly set leads, and inadequate tracking of notices provided through other channels. The OIG also spoke to a number of cybervictims who stated that they received either not enough meaningful information to remediate, or received such information too late. According to the report, the FBI stated that issues with timeliness and quality are "usually the result of classified information being involved."

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A Broader Breach Law

Nearly 10 states have amended their breach notification laws in 2019. Washington recently joined the mix, enacting HB 1071, effective March 1, 2020, to amend the state's breach law. The legislation makes a number of changes, including expanding the definition of covered personal information to include, among other things, a username or email address in combination with a password or security question that would permit access to an online account. Of note, Washington joins North Dakota as the only states to treat an individual's name and date of birth as covered personal information. Furthermore, notice of a breach will be required to include new information, such as the timeframe of exposure, if known, as well as the date of the breach and of the discovery of the breach. Subject to specific exceptions, notice will be required to be provided no more than 30 days after the breach was discovered.

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ARBITRATION

Supreme Court Clarifies Clear Consent Necessary for Class Arbitration

On April 24, 2019, the Supreme Court issued a decision related to arbitration agreements, clearing up the issue of whether clear consent is necessary for class arbitration. *Lamps Plus, Inc. v. Varela*, 587 U.S. ___, 139 S. Ct. 1407 (2019). In a 5-4 decision, the Supreme Court held that class arbitration is barred if an arbitration agreement is ambiguous on the issue of class arbitration. This decision settled a disputed issue in lower courts about how to deal with ambiguous arbitration provisions and whether ambiguity would be construed against the drafter of the agreement. The Supreme Court clarified that an ambiguous clause does not provide sufficient consent to submit to class arbitration, holding that explicit and clear consent to class arbitration is required to compel parties to engage in class arbitration.

For more information, please contact David Fioccola at dfioccola@mofo.com or read our Client Alert.

Court Questions Whether Midland Purchased Arbitration Right

A Pennsylvania federal court denied a subsequent owner's attempt to send a consumer debt collection practices class action to arbitration. *Lance v. Midland Credit Mgmt. Inc.*, No. 18-4933, 2019 WL 1318542 (E.D. Pa. Mar. 22, 2019). The named plaintiff opened a credit card account, and the account agreement included a mandatory arbitration clause and class action waiver. The plaintiff then defaulted on his payments and the bank sold the account. The purchaser and current owner moved to compel arbitration based on the prior owner's account agreement. The court found that it did not have sufficient evidence to compel arbitration, as it was unclear whether the current owner had purchased or been assigned the original owner's arbitration right. The court denied the motion without prejudice to allow the parties to develop a factual record on the issue.

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

No Fees No Arbitration

The Eleventh Circuit affirmed a lower court decision holding that a defendant accused of calling a consumer 250 times in violation of the TCPA could not arbitrate its claims after failing to pay arbitration filing fees. *Freeman v. SmartPay Leasing, LLC*, No. 18-10380, 2019 WL 1977199, (11th Cir. May 3, 2019). The arbitration provision at issue permitted either party to arbitrate in one of two forums — AAA or JAMS. The consumer chose JAMS, which requires that a consumer not be charged more than $250 of the $1,200 filing fee. The defendant argued that the JAMS rule was in conflict with its arbitration provision, which required the filing party to cover the filing fee, and refused to pay the rest of the filing fee. When JAMS dismissed the arbitration, the district court and the Eleventh Circuit held that the consumer could resume an action in district court, in light of the failure of the parties to arbitrate.

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TCPA

Strike, Federal Debt Exemption Is Out!

The Fourth Circuit became the first Circuit to hold that the TCPA's federal debt collection exemption violates the First Amendment. *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019). According to the Fourth Circuit, the exemption — which permits robocalls to cell phones in connection with collecting debts owed to the federal government — is a content-based regulation that "depend[s] entirely on the communicative content of the [call]." *Id.* at 166 (citation omitted). Based on this finding, the court applied strict scrutiny, but found the exemption "fatally underinclusive," as it "subverts the privacy protections" underlying the TCPA's ban on robocalls to cell phones and "deviates from the purpose of the automated call ban." *Id.* at 167-68. Rather than invalidate the entire statute, the court struck down "the flawed exemption." *Id.* at 161.

For more information, contact David Fioccola at dfioccola@mofo.com.

Limiting the Business Relationship Defense

In *Craftwood II, Inc. v. Generac Power Systems, Inc.*, the Seventh Circuit vacated a lower court's dismissal of a TCPA action for lack of standing based on defendants' "prior business relationship" defense. 920 F.3d 479 (7th Cir. 2019). Rejecting the lower court's finding of no harm given this relationship, the Seventh Circuit determined plaintiffs sufficiently alleged two injuries: (1) the costs of printing the unsolicited faxes, using paper and toner; and (2) the need to read the faxes, diverting employees' time from the businesses. Although a factfinder may decide that "any award exceeding nominal damages would be inappropriate" for these "slight," though concrete, "identifiable trifle[s]," such a finding is "some distance from saying that there has been neither injury nor a violation of law." *Id.* at 482-83.

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

Ratifying Vicarious Liability

The Ninth Circuit recently held that a company with no direct contractual relationship to independent contractors could be found vicariously liable for those independent contractors' actions. *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068 (9th Cir. 2019). Plaintiff sought to hold her loan owner liable for TCPA violations where collectors hired by the owner's loan servicer placed calls to a number plaintiff neither provided nor consented to be called on. Reversing the lower court's decision, the Ninth Circuit held that "willful ignorance" can give rise to liability where "the principal . . . ratif[ies] the act of a third party — thereby making the third party the principal's agent — even if it does not know all the material facts, but it must be aware that it does not know the material facts and ratify anyway." *Id.* at 1073-74.

For more information, contact David Fioccola at dfioccola@mofo.com.

Possibly Wrong Numbers, Definitely No Class

A California district court rejected a bid to certify a TCPA class of wrong-number call recipients, finding no "common

method of proof" to determine consent. *Revitch v. Citibank, N.A.*, No C 17-06907 WHA, 2019 WL 1903247 (N.D. Cal. Apr. 28, 2019). Because plaintiff conceded defendant had prior express consent to call customers about their accounts, plaintiff had to define a class including only individuals who received calls about someone else's account. Plaintiff's proposed methodology to identify members was flawed, however, because (among other things) several numbers identified as wrong were actually associated with the customer the bank attempted to reach, and data regarding wrong numbers existed only for a fraction of the proposed period. The court found the issue of consent would "devolve into individualized inquiries that would overwhelm the trial," making "class certification impractical." *Id.* at *1, *4.

For more information, contact David Fioccola at dfioccola@mofo.com.

BSA/AML

FinCEN Keeps Up with the Times

FinCEN announced a civil money penalty against a peer-to-peer virtual currency exchanger for violations of the BSA's AML compliance program requirements. The exchanger allegedly violated the BSA's registration, AML compliance program, and reporting requirements for money services businesses, conducting over 1,700 transactions as a money transmitter, including for parties doing business on the website Silk Road. The enforcement action is the first-ever penalty assessed by FinCEN against a peer-to-peer virtual currency exchanger, and it signals that FinCEN is looking to its enforcement powers to compel compliance with the BSA by exchangers of convertible virtual currency, regardless of their size.

For more information, contact Marc-Alain Galeazzi at mgaleazzi@mofo.com.

Convertible Virtual Currency Guidance and Advisory

FinCEN issued guidance explaining the application of the BSA to certain virtual currency activities, including P2P exchanges, convertible virtual currency (CVC) wallets, CVC kiosks, and payment processing services. The guidance confirms that these businesses may be considered money transmitters if they receive and transfer CVC and, as such, they are required to comply with the BSA. On the same day, FinCEN issued an advisory cautioning financial institutions of the risk associated with CVC activities. The advisory describes how criminals and other bad actors exploit CVCs for illicit purposes, and provides guidelines for the filing of suspicious-activity reports associated with CVC activities.

For more information, contact Meghan Dwyer at meghandwyer@mofo.com.

BSA/AML Deficiencies In the FRB's Crosshairs

A foreign bank and its New York branch entered into a written agreement with the Federal Reserve Board. In the agreement, the Board alleges that it identified BSA-related deficiencies during its last examination of the New York branch. The agreement requires, among other things, that the branch submit a written plan to improve governance and oversight, an enhanced BSA/AML program, a revised customer due diligence program, and a revised suspicious-activity monitoring and reporting program. The Board did not assess a penalty.

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OCC Cites BSA/AML as a Key Risk Area

In its Semiannual Risk Perspective for Spring 2019, the OCC noted that "compliance risk related to BSA/AML remains high," although overall compliance trends are positive. The OCC explained that "BSA/AML-related deficiencies identified by the OCC stem from three primary causes: inadequate customer due diligence and enhanced due diligence, insufficient customer risk identification, and ineffective processes related to suspicious activity monitoring and reporting, including the timeliness and accuracy of Suspicious Activity Report filings." The OCC further explained that talent acquisition and staff retention remain a challenge, particularly for smaller regional and community banks.

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