FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Spring 2021

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MOFO METRICS

16.1	Average per capita ice cream consumption in the U.S. in 2000, in pounds
3.1	Average per capita ice cream consumption in the U.S. in 2019, in pounds
92	Percentage of ice cream worldwide that's consumed in the U.S.
78	Percentage of U.S. households that have ice cream in their freezer at any given time
3	Number of gallons of milk to make one gallon of ice cream
30	Percentage of premium pint ice cream sold as a percentage of all ice cream sold
1960	Haagen Dazs starts selling premium ice cream at 3x the price of supermarket pints
1978	Ben and Jerrys opens its first shop

Attorney Advertising

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EDITOR'S NOTE

Can you say 0 to 60? Not cars, but pretty much everything to do with financial services. A new year, a new administration, and new challenges for providers. Prior CFPB Director Kraninger is long gone. Acting Director Uejio has wasted no time in making clear that he intends to do much more than keep the seat warm. His plan to focus on consumers impacted by the pandemic, military lending, and racial equity follow the priorities President Biden set out during the transition and on the campaign trail. And the Senate Banking Committee will hear testimony tomorrow from Rohit Chopra, President Biden's nominee to head the agency.

The new year has also brought the first actions by the newly named California Department of Financial Protection and Innovation flexing its newly created mini-CFPB muscle. We've seen the DFPI issue subpoenas to a dozen debt collectors in a UDAAP investigation, enter into Memoranda of Understanding with five companies issuing earned wage access products, and invite comments on a wide range of topics for potential rulemaking under the new law.

Not to be outdone by California, other states are doubling down on financial privacy proposals and federal banking agencies are horning in, issuing a proposed rule that would require financial institutions and their service providers to notify federal regulators within 36 hours of data breaches meeting certain parameters.

So what can we expect in 2021? More—more enforcement, more regulation, and more change. We'll help you stay on top of all the developments in Beltway, the Bureau, Operations, Privacy, Mortgage, TCPA, AML/BSA, and more.

BELTWAY

Mo Money Not Mo Problems

Continuing its efforts to backstop credit markets and facilitate continued economic recovery stemming from the pandemic, the FRB extended, and Treasury approved, several lending facilities through March 31, 2021, which were set to expire at the end of 2020.

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

New OCC Rule, New AG Challenge

In a move that surprised no one, state AGs filed suit challenging the OCC's true lender rule. The claims track the arguments made in a comment letter signed by 24 of the 25 Democratic AGs. They also are similar to the claims made in the suit challenging the OCC's valid-when-made rule, including that the rule goes beyond the OCC's authority, does not comply with the Dodd-Frank Act's preemption provisions, and is arbitrary and capricious in violation of the APA.

For additional information, contact Nancy Thomas at nthomas@mofo.com or read our Client Alert on the state AG lawsuit challenging the valid-when-made rule.

Going at It Together, but Alone

The FDIC finalized a rule codifying the September 2018 Interagency Statement Clarifying the Role of Supervisory Guidance. The FDIC adopted the final rule without "substantive change" from the proposal. Importantly, the final rule does not address (1) standards for MRBAs or other supervisory actions, or (2) the FDIC's approach to supervisory criticism, including criticism related to reputation risk. The FDIC reaffirmed in the final rule that it does not issue supervisory recommendations solely based on reputation risk. The FDIC declined to include in the final rule examples used in supervisory guidance to establish safe harbors from supervisory criticism. The rule becomes effective 30 days after publication in the *Federal Register*.

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

Fair Access Rule Pause

The OCC announced that it has paused publication of its "fair access" final rule to allow input from the new Comptroller. The pause follows the OCC's January 14, 2021 announcement that it had finalized its November 2020 proposal, which was scheduled to take effect on April 1, 2021. According to the OCC in its proposal, the rule would have codified well-established guidance instructing banks to conduct risk assessments of individuals rather than make broad decisions that impact access to services, capital, and credit for whole classes of customers. The rule would have had the force and effect of law, allowing the OCC to take supervisory and enforcement action when appropriate.

For additional information, contact Crystal Kaldjob at ckaldjob@mofo.com.

BUREAU

Payday Loan Disclosures

New payday loan disclosure requirements may be on the horizon. The CFPB published a notice that it has hired a contractor to conduct one-on-one consumer interviews to evaluate potential options for a CFPB-designed payday loan disclosure. When the CFPB rescinded the mandatory underwriting provisions of its final payday loan rule, it indicated that the CFPB would conduct research on possible disclosure requirements for payday loans. The CFPB expects the testing to conclude in September 2021, and the CFPB may use the results of the testing to consider whether to move forward with a rulemaking.

For more information, contact Calvin Funk at cfunk@mofo.com.

Mission Accomplished: CFPB Taskforce Releases Recommendations

The CFPB Taskforce on Federal Consumer Financial Law released a two-part report summarizing the current regulatory landscape (Volume I) and recommending changes (Volume II) for the CFPB, Congress, and state and federal regulators. The Taskforce is a five-member group of external experts established in October 2019 as an independent body within the CFPB that reported to the CFPB Director. The Taskforce's recommendations touch on a range of issues, including alternative data use, consumer credit reporting, enforcement, financial inclusion, fintech regulation, privacy and security, regulatory streamlining, and small-dollar credit. The Taskforce's charter will expire 90 days after completion of the report, unless renewed.

For more information, contact Jeremy Mandell at jmandell@mofo.com or read our Client Alert.

Small Business Lending Data Collection Rulemaking Moves Forward

The CFPB took a step forward in its process toward issuing rules that would govern the collection and reporting of small business lending data as required by the Dodd-Frank Act. The CFPB published the final report of the Small Business Review Panel on the CFPB's proposals for developing the regulations. Final rules will implement Section 1071 of the Dodd-Frank Act, which requires financial institutions to compile, maintain, and submit to the CFPB certain data on credit applications for women-

owned, minority-owned, and small businesses. Among other things, the panel recommended that the CFPB provide sample disclosure language for the collection of race, sex, and ethnicity information, that the CFPB consider whether to exempt smaller financial institutions from coverage of a final rule, and that the data collected be self-reported only and not verified by the financial institution.

For more information, contact Crystal Kaldjob at ckaldjob@mofo.com.

Playing in the Sandbox

The CFPB has issued its first two compliance assistance sandbox (CAS) approval orders pursuant to the CFPB's 2019 CAS Policy. An approval order provides a regulatory safe harbor for the recipient of the approval order as long as the recipient complies with the terms of the order. One approval order was issued to a federal savings bank and approves the bank's offering of a dual-feature credit card program that will allow cardholders to graduate from secured use of the card to unsecured use. The other approval order was issued to a fintech company and addresses certain aspects of the company's earned wage access products, which allow employees to access their earned but unpaid wages prior to their payday.

For more information, contact Crystal Kaldjob at ckaldjob@mofo.com.

Court Strikes Down Portions of Prepaid Rule

The federal district court for the District of Columbia ruled in favor of PayPal in a lawsuit challenging the legality of two provisions of the CFPB's prepaid accounts rule. *PayPal, Inc. v. Consumer Fin. Prot. Bureau*, No. CV 19-3700 (RJL), 2020 WL 7773392 (D.D.C. Dec. 30, 2020). The court held that the CFPB exceeded its authority when promulgating rules that require mandatory short-form disclosure requirements for prepaid cards and rules that impose a 30-day credit linking restriction for prepaid accounts in certain instances. As a result, the court struck both provisions.

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

Military Lending Act Settlement

The CFPB announced a $1.25 million settlement with an online payday lender for alleged violations of the Military Lending Act. The CFPB alleged that the lender had made more than 4,000 loans to covered servicemembers or their dependents that had rates that exceeded the Military Lending Act's 36% military APR limit, had violated certain disclosure requirements, and had improperly included arbitration provisions in loan agreements. The settlement includes a $950,000 civil money penalty and at least $300,000 in consumer redress.

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

Repeat Offender?

The CFPB and a student loan servicer entered into a consent order for alleged violations of a 2015 consent order and for alleged unfair and deceptive acts or practices. The CFPB alleged, among other things, that the student loan servicer continued to make material misrepresentations of critical information (e.g., amount of interest paid, minimum periodic payment) and did not provide all of the consumer redress required under the 2015 consent order. The student loan servicer is required to pay $25 million in civil money penalties and $10 million in consumer redress, in addition to the remediation required under the 2015 consent order. The student loan servicer is also required to submit a board-approved compliance plan and must consider the consent order in any new initiatives affecting its student loan servicing. The student loan servicer did not admit to or deny any of the CFPB's allegations.

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

MOBILE & EMERGING PAYMENTS

The California DFPI Exercises Its New Authority in Regulating Earned Wage Access Products

The California Department of Financial Protection and Innovation (DFPI) entered into "first of their kind" memoranda of understanding (MOUs), by which the DFPI will regulate earned wage access (EWA) products offered by five companies in California. These MOUs follow the CFPB's issuance of an advisory opinion for EWA products, but they go much further in imposing pricing limitations and reporting and examination obligations. In the MOUs, the companies agreed to: 1) provide quarterly reporting; 2) submit to regular DFPI examinations of their EWA programs; and 3) adhere to certain "best practices," which include disclosure obligations and APR and fee caps. Certain of the MOUs cap APRs at 36%, the same rate cap the California legislature mandated for loans of $2,500 or more but less than $10,000 made under the California Financing Law. Certain of the MOUs specify that "tips" and subscription fees are not counted in the APR calculation.

For more information, contact Nancy Thomas at nthomas@mofo.com or read our Client Alert.

FedNow for Real Now?

The Federal Reserve is a little more bullish when it comes to the future of faster payments, announcing that the FedNow Service for instant payments will be available starting in 2023 instead of the 2023 – 2024 timing it previously indicated. As part of the planned phased rollout of the service, the Federal Reserve anticipates core clearing and settlement functionality will be available to financial institutions with accounts at Federal Reserve regional

banks at the initial launch time. The updated launch timeline quickly followed the announcement of the FedNow Pilot Program Participants on January 25, 2021. The Federal Reserve announced more than 110 financial institution and service provider participants in the Pilot Program, who will assist with ensuring the market-readiness of the FedNow Service and have the opportunity to provide feedback on the program's features, functions, and user experience. After receiving strong interest in the Pilot Program, the Federal Reserve is also planning to launch a broader "ecosystem participant" program later in the year to provide end-to-end testing of the service as well as fine-tuning of end-user solutions. A full list of Pilot Program Participants is available on the Federal Reserve's FedNow site.

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

UK FCA Announces Imminent Regulation of BNPL Products

The UK'S Financial Conduct Authority (FCA) announced its plan to regulate the buy-now-pay-later (BNPL) market. The FCA did not provide text of draft regulations, but did specify that it will require BNPL lenders to carry out "affordability checks" on consumers prior to lending and will implement a complaint process allowing consumers to escalate disputes directly to the Financial Ombudsman Service. Although the FCA noted the benefits of BNPL products, which allow consumers to manage their finances by spreading out the cost of a purchase over multiple payments, the agency criticized the ease with which the products allow consumers to accrue debt across multiple providers and the lack of visibility of the debt to mainstream lenders or credit reporting agencies.

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

MORTGAGE & FAIR LENDING

Fool Me Twice…

The Bureau has sued a mortgage company in federal court, alleging that the company and its owners violated the FCRA, ECOA, and TILA by misleading consumers about mortgage loan refinances and credit denials. The Bureau also claims that the company knowingly used unlicensed employees to originate mortgages and ignored concerns raised by its chief compliance officer. The lawsuit follows a 2014 consent order between the Bureau and the same mortgage company.

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

Special COVID Edition

The Bureau released a special edition of *Supervisory Highlights* focused on its ongoing COVID-19 Prioritized Assessments. In mortgage servicing, the Bureau highlighted six risk areas: (1) information provided to consumers about forbearance; (2) ending collections and default notices, late fees, and foreclosures for borrowers in forbearance; (3) cancelling or providing inaccurate information about electronic funds transfers; (4) timely processing of forbearance requests; (5) enrolling borrowers in automatic or unwanted forbearances; and (6) loss mitigation process deficiencies. The Bureau continues to emphasize the need to convey accurate information on forbearance programs, particularly clear disclosures that borrowers will be required to pay forborne amounts at the end of the forbearance period, as well as issues with automatically enrolling borrowers in forbearance programs.

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

At Your Service

The Bureau issued a consent order against a mortgage servicer alleging "widespread failures" in handling loss mitigation applications. The Bureau alleged improper delays, denials, and foreclosures constituted unfair acts and practices. It further alleged that the mortgage servicer violated RESPA regulations by sending defective acknowledgment notices, not exercising reasonable diligence in obtaining material necessary to complete loss mitigation applications, and failing to evaluate borrowers properly. Under the consent order, the servicer will pay more than $4.9 million to almost 12,000 consumers and a $500,000 civil money penalty.

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

Everyone's Got an Opinion

The Bureau issued an advisory opinion clarifying the application of Regulation B to special purpose credit programs (SPCPs). The opinion gives more information about the content for-profit organizations must include in written plans that establish and administer an SPCP under Regulation B. The opinion also clarifies the type of research and data that may be appropriate to inform a for-profit organization's determination that an SPCP would benefit a certain class of people.

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

It's Alive!

The Eleventh Circuit Court of Appeal revived a False Claims Act suit against a defunct mortgage lender that allegedly defrauded a Department of Veterans Affairs refinance program. *United States v. Mortgage. Investors Corp.*, 2021 U.S. App. LEXIS 4499 (11th Cir. Feb. 17, 2021). The district court dismissed the lawsuit on grounds that the alleged misconduct—charging illegal fees—was not

material to the VA's decision to pay out claims. The Eleventh Circuit disagreed, finding that genuine issues of material fact existed on materiality, including evidence that compliance with the VA's fee regulations was a condition of payment.

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

OPERATIONS

Industrial Banks in the Spotlight

The FDIC issued a final rule establishing standards that apply to controlling shareholders of industrial banks that are not subject to consolidated supervision by the Federal Reserve. The Final Rule, which takes effect on April 1, 2021, will apply only prospectively, so existing industrial banks and their shareholders generally will not be covered by the final rule absent a merger or change in control. The final rule will require controlling shareholders of industrial banks to enter into agreements with the FDIC and their industrial bank subsidiaries committing the shareholder to a number of obligations. The final rule imposes requirements on the industrial bank as well, including prior FDIC approval requirements for certain actions. The Final Rule provides clarity and transparency to the regulation and supervision of industrial banks and their controlling shareholders and may signal a path forward for fintechs and other non-banks to enter the banking industry.

For more information, contact Mark Sobin at msobin@mofo.com or read our Client Alert.

Reserve Requirements Regulation

The Federal Reserve released a final rule and a proposed rule impacting reserve requirements and interest paid on reserves pursuant to Regulation D. The final rule adopts the interim final rule, without amendment, eliminating reserve requirements for transaction accounts. At the same time, the Federal Reserve issued the proposed rule, which, if adopted, will streamline the approach to interest payments on reserve bank balances. Currently, Regulation D establishes two interest rates (interest on required reserves (IORR) and interest on excess reserves (IOER)) and the interest rate applied to reserve bank balances is a function of an institution's reserve requirements. In light of the elimination of reserve requirements, the Proposed Rule will eliminate the distinction between the IORR and IOER and establish a single rate for interest on reserve balances (IORB). Under the Proposed Rule, interest on balances held at a reserve bank (other than term deposits) would be calculated by multiplying the IORB by the total balance maintained each day.

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

PREEMPTION

Preemption Pronouncement

The Chief Counsel of the OCC issued Interpretive Letter 1173 regarding the Dodd-Frank Act requirements for determination of national bank and federal thrift preemption of state laws. In statements that echo the OCC's statements regarding its recently issued valid-when-made and true lender rules, the OCC explains in the Interpretive Letter that "preemption determinations" subject to the Dodd-Frank requirements are determinations regarding "state consumer financial laws," which are state laws that "directly and specifically regulate[] the manner, content, or terms and conditions of any [consumer] financial transaction" or account. As a result, the OCC states, preemption determinations under Section 85 of the NBA or other federal laws are not covered. In addition, the OCC acknowledges that per the Dodd-Frank provisions, its "preemption determinations" are subject to *Skidmore* deference. But its interpretations of the NBA are not "preemption determinations," and therefore are still subject to *Chevron* deference.

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

No FCRA Ticket to Federal Court

A federal court in New York held that the FCRA does not completely preempt all state laws to create federal question jurisdiction over a case alleging only state-law claims. *Torres v. Wakefield & Assoc's*, 20-cv-09343-MKV, 2021 WL 199532 (S.D.N.Y. Jan. 20, 2021). The court explained that it "agrees with the majority of other courts" in finding that even though the FCRA may preempt certain claims, it "does not have the requisite extraordinary preemptive force to support complete preemption." *Id.* at *1, *3.

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

DIDA to the Rescue

State UDAP claims relying on state usury law are preempted by DIDA as to affiliates of a state-chartered bank because DIDA preemption "like its precursor in the National Bank Act . . . extends not only to the bank that issues the loan or extends the line of credit, but also to the affiliates, assignees, servicers, and secondary markets that carry the obligation to term on behalf of or in place of the original lender." *Sanh v. Opportunity Financial, LLC*, No. C20-0310RSL, 2021 WL 100718, at *4 (W.D. Wash. Jan. 12, 2021). The court found that for a loan made by a state-chartered bank, state law does not "spring back into force if the loan is serviced by or conveyed to a non-bank entity," like the defendant. *Id.* The court noted, though, that

state-law claims based on conduct other than interest rates would not be preempted by DIDA.

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

PRIVACY

Banking Agencies Propose Distinct Security Incident Notice Rule

The federal banking agencies proposed a rule that would require covered banks and certain of their service providers to provide notice to the agencies regarding certain security incidents. The proposed rule would apply with respect to certain computer security incidents (whether malicious or otherwise) that a covered bank believes could "materially disrupt, degrade, or impair," among other things, the ability of the bank to carry out its operations, activities or processes, or deliver banking products and service to a material portion of its customer base (e.g., a significant ransomware or DDOS attack). Under the proposed rule, a bank would be required to notify its regulator of such an incident "as soon as possible and no later than 36 hours after" determining that such an event has occurred. In addition, a bank service provider that provides services subject to the Bank Service Company Act would be required to notify at least two individuals at each of its bank clients "immediately" after it experiences a computer security event that it believes could disrupt, degrade, or impair such services.

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

Virginia Close to Passing CCPA-Like Legislation

As anticipated, a number of states are considering legislation similar to the California Consumer Privacy Act (CCPA). Virginia is closest to the finish line. On February 19, the Virginia legislature passed a CCPA-like bill, H.B. 2307. The bill is widely expected to be approved by the Governor. Similar to the CCPA, the bill would impose privacy obligations on businesses (e.g., access, correction, and deletion rights for Virginia residents). The bill, however, includes a broad GLBA exception, providing that the law would "not apply to any . . . financial institutions or data subject to Title V of the" GLBA.

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

Indiana Governor Vetoes AG Breach Rule

As we reported in the last issue, in September, the Indiana Attorney General proposed a data breach and data security rule. The proposed rule would have imposed a breach-related obligation never before seen in the United States, requiring that a business prepare a written corrective action plan following a breach and certify to the Attorney General that the plan has been implemented within 30 days after notifying the Attorney General of the breach. The Indiana Governor issued a Notice of Disapproval, denying the proposed rule, including calling into question the AG's authority to "conduct random and unannounced audits" of a business without any limitation as to the scope or duration of such audits. It is unclear whether the Attorney General will propose a new rule addressing the Governor's concerns.

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

Another Court Rejects Privilege Arguments in Breach Case

A federal court in the District of Columbia found that forensic reports prepared in a data breach investigation were not privileged or work product. *Wengui v. Clark Hill, PLC*, 2021 U.S. Dist. Lexis 5395 (D.D.C. Jan. 12, 2021). The court found that the defendant failed to satisfy its burden of showing that the incident response report was prepared solely in anticipation of litigation. The court concluded that the law firm would have asked for the report for business reasons, not just for litigation, as evidenced by its sharing of the response report with the FBI as well as the firm's leadership and internal IT team.

For more information, contact Mark David McPherson at mmcpherson@mofo.com or read our Client Alert.

Incomplete Reporting = Inaccurate Reporting

The Bureau and a bank subsidiary settled claims that the company erroneously reported consumer loan data to consumer reporting agencies (CRAs) in violation of the FCRA, Regulation V, and the CFPA. The Bureau claimed that data furnished in 2016 – 2019 contained systemic errors that "in many instances, could have negatively impacted consumers' credit scores and access to credit." The alleged errors included "incomplete" data about whether accounts were open or closed and whether consumers were carrying a balance or obligated to make future payments. The Bureau further alleged that the company did not establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information it furnished to CRAs. The company did not admit or deny any of the allegations and will pay a $4.75 million civil money penalty.

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

ARBITRATION

Supreme Court DIGs Arbitration Case

The U.S. Supreme Court issued a one-line order dismissing as improvidently granted (informally known as a "DIG") a case in which the Supreme Court agreed to consider whether an arbitrator or a court should decide whether a dispute fell within an exception for injunctive relief claims in the arbitration provision. The Court had declined to

hear a cross-petition on the related question of whether an arbitrator or a court should decide the gateway issue of whether any dispute was arbitrable. Both the briefing and the oral argument touched on both questions, even though the Justices had only agreed to hear the first issue. The Court's DIG of the case left the Fifth Circuit's decision in place, which held that the district court, rather than an arbitrator, should decide whether the claims for injunctive relief are arbitrable.

For more information, contact Natalie Fleming Nolen at nflemingnolen@mofo.com.

Courts Disagree on Who Is "We"

A federal court denied a motion to compel arbitration because the definition of "we" in the arbitration agreement did not include disputes with a successor of one of the parties. *Williams v. Encore Capital Group, Inc., et al*, No. 2:19-cv-05252, 2020 U.S. Dist. Lexis 238773 (E.D. Pa Dec. 18, 2020). The defendant had purchased all rights and title to charged-off credit card debt from the credit card issuer. The defendant argued it could enforce the card agreement's arbitration provision, but the court disagreed, finding the definition of "we" in the arbitration provision did not mention assignees. The court, therefore, denied the motion to compel arbitration, splitting with another court that found in two cases that the defendant could enforce the same arbitration agreement against different plaintiffs. *Dotson v. Midland Funding, LLC*, No. 18-cv-16253, 2019 WL 5678371 (D.N.J. Aug. 1, 2019); *Clemons v. Midland Credit Management, Inc.*, No. 1:18-cv-16883, 2019 WL 3336421 (D.N.J. July 25, 2019).

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

It Helps to Be Clear

Defendants in data breach class actions are looking to their arbitration agreements as a first step in defending these claims. A federal court in Michigan granted defendant's motion to compel arbitration in a data breach class action, finding the broad delegation clause reflected the parties' agreement that the arbitrator should decide plaintiff's claim that the arbitration agreement was unconscionable. *In Re StockX Customer Data Breach Litigation*, No. 19-12441, 2020 U.S. Dist. LEXIS 241178 (E.D. Mich. Dec. 23, 2020). The court relied on the clear language and links on the company's website, including a statement that by logging onto the website, users agreed to updated terms and conditions, bound all plaintiffs to the terms of the revised arbitration agreement, including its clear delegation of gateway issues to the arbitrator rather than the court.

For more information, contact Natalie Fleming Nolen at nflemingnolen@mofo.com.

TCPA

The Next Big TCPA Fight: Did *Barr* Wipe Out Five Years of TCPA Liability?

In the wake of the landmark U.S. Supreme Court decision *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), lower courts continue to grapple with the question of whether plaintiffs can bring TCPA claims for conduct occurring between 2015 and July 2020—the date the government-backed debt exception amendment was enacted and the date it was declared unconstitutional. In two recent cases, both the Southern District of California and the Northern District of Ohio rejected the argument that all TCPA claims arising during the 2015 – 2020 time period are barred because the TCPA in its entirety was unconstitutional during that period. *See McCurley et al. v. Royal Sea Cruises, Inc.*, 2021 WL 288164 (S.D. Cal. Jan. 28, 2021); *Less v. Quest Diagnostics Incorporated*, 2021 WL 266548 (N.D. Ohio Jan. 26, 2021).

The two courts relied on slightly different reasoning. The *Less* court found that because the unconstitutional debt collection exception had "no effect on the original [TCPA]," the full statute remained constitutional while the amendment was in effect. *Less*, 2021 WL 266548, at *1. The *McCurley* court relied on Justice Kavanaugh's statement (one of four opinions in *AAPC*) that the decision "does not negate the liability of parties who made robocalls covered by the robocall restriction." *McCurley*, 2021 WL 288164, at *2 (quoting *AAPC*, 140 S. Ct. at 2355 n.12).

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

But There Is a TCPA Circuit Split . . .

We now have a full-fledged circuit split on the question of whether the unconstitutional debt collection exception tainted the entire statute during the five-year period when it was in effect. Three district courts have agreed with defendants that the entire TCPA was unconstitutional during this period. *Creasy v. Charter Commc'ns, Inc.*, 2020 WL 5761117 (E.D. La. Sept. 28, 2020); *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.*, 2020 WL 7346536 (M.D. Fla. Dec. 11, 2020); *Lindenbaum v. Realgy, LLC*, 2020 WL 6361915 (N.D. Ohio Oct. 29, 2020), *appeal filed*, No. 20-4252 (6th Cir. Nov. 30, 2020). Nine district courts have rejected the argument. *E.g., Rieker v. National Car Cure, LLC, et al*, No. 3:20CV5901-TKW-HTC, 2021 WL 210841, at *1 (N.D. Fla. Jan. 5, 2021); *Trujillo v. Free Energy Sav. Co., LLC*, 2020 U.S. Dist. LEXIS 239730 (C.D. Cal. Dec. 21, 2020). An appellate court decision on this issue may arrive by summer: the Sixth Circuit is considering an appeal of the decision in *Lindenbaum*.

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

Two Texts Won't Interrupt Your Online Shopping, So Forget about that TCPA Claim

A federal court in Florida recently dismissed a TCPA claim for lack of subject matter jurisdiction, finding that the plaintiff had not alleged a concrete injury-in-fact based on the alleged receipt of two unsolicited text messages. *Perez v. Golden Trust Insurance, Inc.*, 470 F. Supp. 3d 1327 (S.D. Fla. 2020). The court rejected plaintiff's allegation that the text messages "interrupted business calls" because "a cell phone user can continue to use all of the device's functions, including receiving other messages, while it is receiving a text message.'" *Id.*

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

BSA/AML

The Anti-Money Laundering Act of 2020

Congress passed the Anti-Money Laundering Act of 2020 (AMLA), the first major overhaul of the U.S. AML regime since the 2001 USA PATRIOT Act. The AMLA tasks FinCEN with creating a beneficial ownership registry, which financial institutions may use to verify their customers' beneficial ownership information. The AMLA includes many other changes as well, including enhanced whistleblower protections, a broadened purpose for the BSA, new penalties for certain BSA violations, and the addition of two new committees to the BSA Advisory Group. The Secretary of the Treasury and the Attorney General are granted new subpoena powers under the law, with potential extraterritorial effect, for documents located at foreign banks that have a correspondent banking account in the United States.

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

FinCEN Focus on CVC and Digital Asset Transactions

FinCEN issued a Notice of Proposed Rulemaking proposing that banks and money services businesses must comply with certain requirements for specific transactions involving convertible virtual currency (CVC) or certain digital assets with legal tender status (LTDA). In particular, the proposed rule would require that covered entities: (1) report transactions exceeding $10,000; (2) maintain records of transactions exceeding $3,000; and (3) verify the identity of customers engaging in transactions above $3,000, where the counterparties' wallets are either not hosted by a financial institution or are located in a jurisdiction on a list to be established by FinCEN. FinCEN stated that the proposed rule is aimed at promoting national security and aiding law enforcement by increasing transparency around CVCs and LTDAs. FinCEN released related FAQs and extended the comment period.

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

OCC and FDIC Propose SAR Filing Exemptions

The OCC and the FDIC each released a Notice of Proposed Rulemaking that would permit each agency to grant exemptions to SAR filing requirements for entities they supervise. The agencies explained that the proposal is designed to offer regulatory relief to entities that develop innovative solutions to meet their BSA requirements more effectively and efficiently. In weighing whether to grant an exemption, the agencies will consider whether the exemption is consistent with safe and sound banking practices, among other factors. FinCEN also will be required to grant an exemption if a FinCEN regulation is implicated.

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

SAR and AML FAQs to the Rescue

The federal banking agencies and FinCEN, in consultation with other federal functional regulators, issued FAQs on SAR reporting and other AML considerations. The agencies and FinCEN explained that the FAQs are aimed at clarifying regulatory requirements relating to AML obligations and SARs, including when to file SARs and how to manage customers for whom SARs have been filed. The FAQs do not establish or change legal requirements or supervisory expectations. The agencies developed the FAQs in response to recent BSA Advisory Group recommendations and are related to recent regulatory efforts to streamline the AML regulatory regime.

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