FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Fall 2018

IN THIS ISSUE

MOFO METRICS

1.3	Number of active-duty U.S. military personnel, in millions
1.3	Number of lawyers in the U.S., in millions
7.8	Combined number of cashiers and retail salespersons in the U.S., in millions
12.4	Number of people in the U.S. working in manufacturing, in millions
13.9	Number of restaurant workers in the U.S., in millions
9	Percentage of workers in South Korea who are members of a labor union
10.6	Percentage of workers in the U.S. who are members of a labor union
26.5	Percentage of workers in Canada who are members of a labor union

MORRISON FOERSTER

EDITOR'S NOTE

So much for the lazy days of summer. It's been a busy couple of months on both coasts. In a case of déjà vu all over again, a New York federal court found that the CFPB structure is unconstitutional and that the defects infected Title X of the Dodd-Frank Act as a whole. The Judge rejected the D.C. Circuit's conclusion otherwise in *PHH Corp. v. CFPB*, and granted the CFPB's request to enter final judgment so it can appeal the ruling to the Second Circuit. Another round of appellate court watching and reading of tea leaves anyone?

Meanwhile, on the Left Coast, the California Legislature is at it again. The Legislature broke all speed records by passing the California Consumer Privacy Act only one week after the proposed legislation was introduced. The landmark law creates significant privacy rights for California residents and enormous operational and compliance challenges for impacted businesses. Not surprisingly given the speedy work, amendments are already on the Governor's desk for signature.

Taking its time in the spotlight, the Senate Banking Committee narrowly approved Kathy Kraninger's nomination to head the CFPB. The nomination now moves on to the full Senate for a vote.

If you missed these or any of the other developments during your well-deserved vacation, read on for news on the Beltway, the Bureau, mortgage, privacy, TCPA, and more.

BELTWAY

To the Beltway and Beyond

An appellate court in London ruled that Visa and Mastercard's interchange fees (i.e., bank-to-bank charges on credit card purchases) violated anti-competition laws; in particular, Article 101(1) of the Treaty on the Functioning of the European Union. *Sainsbury's v. Visa Europe*, U.K. Court of Appeal, Civil Division, Case No: A3/2017/3493. The case goes back to a lower tribunal to review the size of potential damages against Visa and Mastercard, and whether the two companies can claim an exemption applies to the interchange fees.

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

May the [Task] Force Be With You

In conjunction with the CFPB, SEC, and FTC, the DOJ announced the establishment of a new task force on Market Integrity and Consumer Fraud to provide guidance for the investigation and prosecution of cases involving fraud on the government, the financial markets, and consumers (e.g., cyber-fraud and financial crimes). The Task Force will be chaired by Deputy Attorney General Rod Rosenstein and is directed to invite participation from other government agencies, including Treasury, HUD, the Small Business Administration, the Federal Reserve Board, the NCUA, the CFTC, the FDIC, and the OCC.

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

New Words

The Federal Reserve launched a new publication, the *Consumer Compliance Supervision Bulletin*, to provide high-level summaries of "pertinent supervisory issues" and to "enhance transparency" about the Federal Reserve's compliance supervisory program and highlight identified violations. The bulletin will be published by the Federal Reserve's Division of Consumer and Community Affairs on a periodic basis. In the inaugural issue, the bulletin discusses the Federal Reserve's supervisory observations regarding redlining, discriminatory loan pricing and underwriting, and UDAP violations involving student financial products and services, overdraft practices, and loan officer misrepresentations, and highlights recent regulatory and policy developments.

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

BUREAU

Take Two

Adding fuel to the never-ending fire challenging the constitutionality of the CFPB's structure, a federal judge in New York dismissed the Bureau from an enforcement case, finding the Bureau's structure is unconstitutional. Siding with the dissent in the D.C. Circuit's *en banc* decision in *PHH v. CFPB*, the court objected to the structure of the Bureau as an independent agency exercising substantial executive power with a single director who can only be removed for good cause, not at will. *CFPB v. RD Legal Funding, LLC*, No. 17-CV-890 (LAP), 2018 WL 3094916 (S.D.N.Y. June 21, 2018). The CFPB advised the court that it intends to appeal the ruling.

For more information, contact Joe Palmore at jpalmore@mofo.com.

Meanwhile, in Montana, the CFPB is *Definitely* Constitutional . . .

On August 3, 2018, a Montana federal judge rejected Think Finance's efforts to get rid of a CFPB lawsuit alleging that the company deceived borrowers and used sham tribal leaders to evade state usury laws. *CFPB v. Think Fin., Inc.*, No. CV-17-127-GF-BMM, 2018 WL 3707911 (D. Mont. Aug. 3, 2018). In moving to dismiss the Bureau's claims, Think Finance argued that the Bureau was acting outside of its mandate and that the agency is unconstitutionally structured. The Judge was not persuaded, pointing to other district courts within the Ninth Circuit that had already rejected Think Finance's arguments regarding both the scope of the CFPB's authority and the agency's constitutionality.

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

The Winds Blow a Different Direction Part 1?

On June 25, 2018, the Bureau closed its investigation into real estate listing company Zillow without initiating an enforcement action. The CFPB had been considering whether Zillow's marketing program, which allowed mortgage lenders to pay to have their advertisements appear next to a real estate agent's name, gave the appearance that the businesses were endorsing each other in violation of RESPA and the UDAAP statute.

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

The Winds Blow a Different Direction Part 2?

The CFPB reached a settlement with a debt collection company and its former CEO based on the CFPB's claims of UDAAP and FDCPA violations based on allegedly unlawful debt collection acts and practices and sales of consumer debt with knowledge or reckless disregard of these allegedly illegal debt collection practices. As part of the settlement, the CFPB imposed $3 million in civil penalties. Under the terms of the Consent Order, payment of these penalties was suspended as long as the company paid $500,000 and the former CEO paid $300,000. *Nat'l Credit Adjusters, LLC*, 2018-BFCP-0004 (July 13, 2018). The deal also bars the defendants from certain debt collection practices and permanently bars the former CEO from working in any business that collects, buys, or sells consumer debt.

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

The Winds Blow a Different Direction Part 3?

The CFPB and an auto title lender settled claims based on the CFPB's allegations that the lender purportedly violated TILA and UDAAP by failing to disclose finance charges properly and by failing to disclose APR and other information in its advertisements. The Consent Order required the lender to pay over $1.5 million in undisclosed finance charges to impacted borrowers. *Triton Mgmt. Grp. Inc., et al.*, 2018-BCFP-0005 (July 19, 2018). However, the Order provided that full payment of this amount was suspended subject to payment of $500,000 to impacted borrowers.

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

Down and Out in Ohio

On July 25, 2018, a judge in Ohio dismissed a CFPB lawsuit alleging that a debt collection law firm made false representations to debtors. *CFPB v. Weltman, Weinberg & Reis Co.*, No. 1:17 CV 817, 2018 WL 3575882 (N.D. Ohio July 25, 2018). The judge found that the firm had appropriately disclosed its legal status and identity in demand letters to consumers. The judge also called out former Bureau Director Richard Cordray for previously signing off on using this firm to collect debts on Ohio's behalf when he was attorney general of the state. After Mick Mulvaney took over, but before the court issued its ruling, the CFPB had voluntarily dropped three causes of action and a request for disgorgement in the action.

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

Pay to Play, No Stay

In August, a federal judge in Texas again turned down a joint request from the CFPB and payday lenders to stay the August 2019 compliance date of the CFPB's payday rule. *Cmty. Fin. Servs. Ass'n of Am. v. CFPB*, No. 1:18-cv-00295-LY (W.D. Tex. Aug. 7, 2018), ECF No. 36. In June, the court responded to the parties' joint motion by staying the lawsuit challenging the payday rule, but refusing to stay the rule's compliance date. ECF No. 29 (W.D. Tex. June 12, 2018). Both the Bureau and payday groups asked the judge to reconsider, arguing that staying the case without staying the rule alleviates the burdens of litigation but does not resolve the underlying need for litigation. The court again declined, setting up a conflict between the August 2019 compliance deadline and Acting Director Mulvaney's stated goal of re-writing the rule.

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

That and a Dollar

On August 10, 2018, the CFPB settled claims against Richard Moseley, Sr. and Richard Moseley, Jr. and 20 interrelated corporate entities they control. The Bureau alleged that the defendants obtained consumers' personal and financial information and then used that information to access consumers' bank accounts without authorization. The Consent Order provides for a $69 million civil penalty, but defendants are only required to pay a $1 civil money penalty due to their limited ability to pay. *CFPB v. Moseley*, No. 4:14-cv-00789-SRB (W.D. Mo. Aug. 10, 2018), ECF No. 218. Under the settlement, the defendants also forfeited $14 million in assets and are banned from the payday loan industry. A jury in New York convicted Moseley, Sr. last year on criminal charges associated with his business dealings.

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

And Then There Were New Members. . .

After canceling the last two meetings of the Consumer Advisory Board, CFPB Acting Director Mick Mulvaney reportedly amended the Consumer Advisory Board Charter to limit the size of the Board. The Bureau then fired all twenty-five Board members and announced the appointment of new members of a much smaller Consumer Advisory Board. The new members will serve for a one-year term, a reduction from the three-year terms of the previous members.

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

MOBILE & EMERGING PAYMENTS

Treasury Trumpets FinTech in Final Report

On July 31, 2018, Treasury released the fourth and final [Report](#) in response to President Trump's Executive Order 13772. The report focuses on Nonbank Financials, FinTech, and Innovation. It includes over 80 recommendations "designed to facilitate U.S. firm innovation by streamlining and refining the regulatory environment." Most notably, Treasury's report endorses a national bank charter for FinTech firms, recommends the establishment of federal or state "regulatory sandboxes," and suggests codifying the "valid when made doctrine" that would facilitate online lenders' ability to extend loans across state lines.

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

FinTech Charter

Immediately following the release of Treasury's FinTech report, the OCC [announced](#) that it will accept applications for national bank charters from FinTech companies engaged in "one of the core banking functions." As part of its announcement, the OCC [released](#) a Policy Statement on Financial Technology Companies' Eligibility to Apply for National Bank Charters as well as a [supplement](#) to the Comptroller's Licensing Manual. Comptroller of the Currency Joseph Otting stressed that FinTech companies that obtain special purpose national bank charters "will be supervised like similarly situated national banks" and will be required to comply with existing capital, liquidity, and financial inclusion standards. The announcement was quickly condemned by the Conference of State Bank Supervisors and the New York State Department of Financial Services, both of which had filed suits challenging the previous iteration of the OCC's FinTech charter that were dismissed for lack of standing.

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

Heads in the Sand or Ahead of the Curve?

Regulators at the state, federal, and international level are increasingly adopting regulatory sandboxes to promote financial innovation. The Arizona Attorney General's Office recently [announced](#) the launch of a FinTech Sandbox, the first of its kind in the United States. Participants will have two years to test their products on a limited number of Arizona consumers or businesses without obtaining a state license. The CFPB also [announced](#) the hiring of Paul Watkins to lead the Bureau's Office of Innovation. Watkins developed the Arizona sandbox and is expected to spearhead a new round of no-action letters to collaborating FinTech firms. State regulators outside of Arizona have voiced their concerns in recent months.

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

MORTGAGE & FAIR LENDING

Beep, Beep: New Fair Lending Guidance for NY Indirect Automobile Lenders

The New York State Department of Financial Services issued [guidance](#) that outlines the minimum requirements for indirect auto lenders to comply with New York's Fair Lending Law. The guidance includes seven actions that all lenders should take to develop a compliant compliance program, reminds lenders that they can be held liable for dealers' discriminatory practices, and specifically calls out six compliance actions lenders should take before permitting dealers to mark up the buy rate.

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

You Are [Partially] Excused

Summer came early for lenders who originated fewer than 500 closed-end mortgage loans or 500 open-end lines of credit in each of the preceding two years—the President excused some of their HMDA reporting homework when he signed the "[Economic Growth, Regulatory, Relief, and Consumer Protection Act](#)." S. 2155, 115th Cong. (2018). For those that qualify, the Act excuses certain collection, recording, and reporting requirements under Regulation C. The format of lenders' HMDA submissions, however, will not change for now. The Loan/Application Registers will be submitted to the same HMDA platform, and the CFPB will provide exemption codes for exempt entities to use in lieu of the formerly required data points.

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

The Last RMBS Settlement?

Wells Fargo reached a [settlement](#) with the DOJ to resolve claims that it misrepresented the quality of some of its residential mortgage-backed securities from 2005-2007. In this previously disclosed investigation, the DOJ alleged that Wells Fargo's internal testing showed borrowers had overstated their income in more than 70% of these loans. Yet, the DOJ alleged, Wells Fargo did not adjust its view or rating of the underlying loans. Wells Fargo disputed the allegations, and the settlement did not contain any admissions of wrongdoing. The settlement did not include any consumer redress. It required Wells Fargo to pay a $2.09 billion civil penalty.

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

OPERATIONS

Volcker Rule It Is a Changin'

The Federal Reserve Board, followed by the other federal agencies tasked with implementing the Volcker Rule (collectively, the "Agencies"), issued a Proposed Rule intended to simplify the Volcker Rule compliance requirements. The Proposed Rule would tailor the Volcker Rule's application by segmenting "banking entities" based on their level of trading assets and liabilities. It also would seek to simplify certain standards and requirements in the current implementing regulations. On balance, the Proposed Rule would appear to reduce compliance burden for banking entities subject to regulation. The Proposed Rule was issued less than a week after the President signed into law the "Economic Growth, Regulatory Relief, and Consumer Protection Act" (S. 2155), which made certain statutory changes to the Volcker Rule provisions. The Agencies plan to address the S. 2155 amendments in a separate rulemaking.

For more information, contact Henry Fields at hfields@mofo.com or read our Client Alert.

PREEMPTION

FCRA Focus – Take One

Two federal courts in the Fifth Circuit considered whether state common law and statutory claims based on furnishing of information to a credit reporting agency were preempted by FCRA. *James v. MRC Receivables Corp.*, No. 16-0448, 2018 U.S. Dist. LEXIS 109493 (W.D. La. June 28, 2018); *Seelbach v. Ditech Fin. LLC*, No. 3:17-CV-3386-D, 2018 U.S. Dist. LEXIS 121006 (N.D. Tex. July 19, 2018). Both courts noted that the Fifth Circuit has yet to rule on the scope of the two FCRA preemption provisions, sections 1681h(e) and 1681t(b)(1)(F), and that district courts in the Circuit have issued conflicting rulings. The courts further noted that no district court in the Fifth Circuit has adopted the total preemption approach and both adopted statutory preemption approach. As a result, the Texas federal court found that the state statutory claims alleged in that case were preempted, *Seelbach*, 2018 U.S. Dist. LEXIS 121006, at *11-12, and the Louisiana federal court found that the common law claims alleged in that case were not preempted because the plaintiff had sufficiently pled willful intent. *James*, 2018 U.S. Dist. LEXIS 109493, at *18.

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

FCRA Focus – Take Two

A West Virginia federal court took a different approach to the question of whether a defamation claim based on furnishing of information to a credit reporting agency (CRA) is preempted by the FCRA. *Barry v. Experian Info. Sols., Inc.*, No. 2:16-cv-09515, 2018 U.S. Dist. LEXIS 112387 (S.D.W. Va. July 6, 2018). The court recognized that the Fourth Circuit has not yet ruled on the scope of the two FCRA preemption provisions. The court reasoned that section 1681h(e) does not apply to furnishers and instead is limited to information disclosed pursuant to section 1681g, which applies only to disclosure by CRAs, and sections 1681h and 1681m, which apply only to users. The court found that section 1681t(b)(1)(F) applies only to state statutory claims even though the court's reading of section 1681h(e) eliminates any conflict between the two preemption provisions and there is no reference to statutory claims in section 1681h(e). As a result, the court held that plaintiff's defamation claim was not preempted. *Id.* at *21

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

FCRA Focus – Take Three

A federal court in California adopted a different interpretation of the FCRA preemption provisions. *White v. Navy Fed. Credit Union*, No. 18cv00402-WQH-BGS, 2018 U.S. Dist. LEXIS 132058 (S.D. Cal. Aug. 3, 2018). The court noted that the Ninth Circuit has recognized the tension between the two provisions and that "[n]umerous district courts" have adopted the total preemption approach. *Id.* at *9-10. The court followed suit, finding plaintiff's negligence and defamation claims were preempted by section 1681t(b)(1)(F). The court further explained that even if section 1681h(e) applied, plaintiff had failed to allege "sufficient facts to support a plausible inference of 'malice or willful intent to injure'" as required to proceed with a claim under that section. *Id.* at *11.

For more information, contact Jim McCabe at jmccabe@mofo.com.

PRIVACY

California Breaks New Ground With Comprehensive Privacy Law

The California privacy ballot initiative is gone, replaced by the California Consumer Privacy Act. The Act, which will take effect on January 1, 2020, is arguably the most expansive privacy legislation in U.S. history. It will impose significant and often first-of-their-kind privacy obligations (from a U.S. perspective) on businesses handling data related to California residents, including requiring that a business provide a California resident with access to the "specific pieces" of personal information that the business maintains about the individual, as well as allowing the individual to request that the business delete information about the individual. Given the fact that the Act went from introduction to the Governor's desk in a matter of days, the Act includes numerous drafting errors, ambiguities, and inconsistencies that will create compliance challenges if not addressed by the Legislature. As a result, many financial institutions will likely find themselves spending the next year building out a compliance program for the Act's many obligations, while simultaneously seeking amendments to clarify and fix key issues in the hastily implemented law.

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

CFPB Catches Up to the FAST Act

In August, the CFPB promulgated a Final Rule updating its Gramm-Leach-Bliley Act privacy rule ("Regulation P") to implement statutory amendments to the GLBA made in 2015 by the FAST Act. Specifically, the CFPB amended Regulation P to provide that a financial institution is not required to provide an annual GLBA privacy notice to its customers if the financial institution: (1) does not share nonpublic personal information with nonaffiliated third parties other than pursuant to exceptions; and (2) has not changed its policies and practices with respect to disclosing nonpublic personal information from those disclosed to the customer in the most recent privacy notice the financial institution provided.

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

Take Your Time, Hurry Up

States have responded to continuing high-profile breaches by ratcheting up their data breach notification requirements. For example, Colorado House Bill 1128, which became effective on September 1, 2018, amended the Colorado breach notification law to require notice "not later than thirty days after the date of determination that a security breach occurred." The law also establishes specific requirements for the content of the notice, including: the date of the breach; a description of the personal information involved; contact information for the entity for the Colorado resident to inquire about the breach; and information about consumer reporting agencies and the Federal Trade Commission, including that information about fraud alerts and security freezes can be obtained from them.

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

Unsecure at Any Speed?

In a widely reported story in 2015—and a cautionary tale about the Internet of Things—researchers were able to gain control of connected devices in vehicles, and thus aspects of the vehicles themselves. In a new twist on breach-related litigation—and one likely to become more prevalent in the coming years as more consumer products become "connected"—plaintiffs brought claims alleging, among other things, that the cybersecurity defects in the vehicles constituted fraud and breach of warranty. This summer, the defendant's motion for summary judgment was denied almost in its entirety, with the fraud and warranty claims surviving even though the carmaker claimed it implemented a software fix that addressed the vulnerability. The court was unable to conclude that the fixes were effective. The court refused, however, to certify a nationwide class and instead certified classes of drivers in Michigan, Illinois, and Missouri. *Flynn et al. v. FCA US LLC*, No. 15-cv-0855-MJR-DGW, 2018 U.S. Dist. LEXIS 111963 (S.D. Ill. July 5, 2018).

For more information, contact David McDowell at dmcdowell@mofo.com.

Blockbusters

Michigan's video rental privacy law (the VRPA, but formally the Preservation of Personal Privacy Act) broadly restricts the disclosure without permission of "a record or information that personally identifies [a] customer as having purchased, leased, rented, or borrowed" materials including books, magazines, videos, and other media. VRPA has proved to be problematic for a number of companies, including most prominently (and recently) Hearst Communications, which agreed to a $50 million settlement arising out of the alleged sale of *Good Housekeeping* subscriber information to third parties. Plaintiffs' memorandum in support of approval of the settlement lists a number of recently settled VRPA matters, including similar cases involving subscribers to *People* and to *Consumer Reports*. *Edwards v. Hearst Commc'ns, Inc.*, No. 1:15-cv-09279-AT-JLC (S.D.N.Y. July 12, 2018), ECF No. 291.

For more information, contact Adam Fleisher at afleisher@mofo.com.

ARBITRATION

Who's On First?

The battle over the important question of who decides whether a contract permits class arbitration just got even more circuit-specific. The Tenth Circuit expressly rejected the holdings of the Third, Sixth, and Eighth Circuits that a contract must expressly delegate the issue of class arbitration to an arbitrator. *Dish Network L.L.C. v. Ray*, No. 17-1013, 2018 U.S. App. LEXIS 23305 (10th Cir. Aug. 21, 2018). Instead, the Tenth Circuit sided with the Second Circuit in holding that a broad delegation of arbitrability was enough to delegate the issue to the arbitrator.

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

Be Careful What You Wish For

A court in New York refused what is characterized as a request by a defendant to compel its employees to arbitrate but then challenge the arbitration award if it is not favorable to the defendant. *Wells Fargo Advisors, LLC v. Livia Sappington*, 16-CV-8956 (VEC), 2018 U.S. Dist. LEXIS 128190 (S.D.N.Y. July 31, 2018). The court affirmed the arbitrator's rulings that the arbitration agreement authorized the arbitrator to decide whether class arbitration was permitted and that the arbitration provision at issue permitted class arbitration. The court applied the highly deferential standard for reviewing these decisions and found no basis for reversal of the arbitrator's findings.

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

Online Agreement Unenforceable

The First Circuit held that an online arbitration agreement was unenforceable because the terms were not sufficiently conspicuous. *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018). The court relied on Massachusetts contract law in reasoning that an online contract is enforceable if it is reasonably communicated to and accepted by the plaintiff. Here, the court found the arbitration agreement terms were not sufficiently communicated because they were displayed in a box with text titled "Terms of Service," which customers could, but were not required, to click in order to read the actual terms. The court also noted that customers were not required to acknowledge that they agreed to the terms. The defendant has moved for rehearing *en banc* of the panel's ruling.

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

TCPA

What Exactly Is an Autodialer?

Following the D.C Circuit's decision in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), which struck down the FCC's expanded definition of an autodialer, the Third Circuit applied a narrowed interpretation of the term. *Dominguez v. Yahoo!, Inc.*, 894 F.3d 116 (3d Cir. 2018). The Third Circuit affirmed the district court's finding that the defendant's text messaging service was not an autodialer. In reaching this decision, the Third Circuit applied a "present capacity" standard and found that there was no evidence of the system's "present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers." *Id*. at 121.

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

Second Circuit's "Current" Autodialer Definition

On the heels of the Third Circuit's decision in *Dominguez*, the Second Circuit issued its own decision interpreting the term "autodialer." *King v. Time Warner Cable*, 894 F.3d 473 (2nd Cir. 2018). The Second Circuit, relying on the D.C. Circuit's decision, concluded that the term "capacity" in the TCPA's definition of autodialer "should be interpreted to refer to a device's current functions, absent any modifications to the device's hardware or software," including "devices whose autodialing features can be activated . . . by the equivalent of 'the simply flipping of a switch.'" *Id*. at 481 (citing *ACA Int'l*, 885 F.3d at 696).

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

Back to State Court

In *St. Louis Heart Center, Inc. v. Nomax, Inc.*, No. 17-1794, 2018 WL 3719694 (8th Cir. Aug. 6, 2018), the Eighth Circuit held that a plaintiff's injuries were not traceable to a technical violation of the TCPA where the defendant sent faxes allegedly lacking proper opt-out notices. Even assuming plaintiff suffered an injury in the form of wasted time, paper, and toner, or invasion of privacy, the plaintiff failed to establish that the injury was fairly traceable to the alleged TCPA violation as plaintiff "both invited and did not rebuke" the challenged faxes. *Id*. at *7-8. The Eighth Circuit upheld the lower court's findings on standing, but reversed the district court's dismissal with prejudice in this removed case, instead remanding the matter to state court. *Id*. at *10-11.

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

BSA/AML

BSA Bill

U.S. Representative Stevan Pearce (R-N.M.) introduced [H.R.6068](), the "Counter Terrorism and Illicit Finance Act." The bill is co-sponsored by Representatives Blaine Luetkemeyer (R-MO) and Ralph Lee Abraham (R-LA). Among other provisions, the bill would increase dollar thresholds for currency transaction and suspicious activity reports, establish a no-action letter process for FinCEN, and facilitate SAR sharing with the foreign branches, subsidiaries, and affiliates of financial institutions. The bill would also require the Comptroller General of the United States to submit a comprehensive cost-benefit analysis of the BSA and related anti-money laundering laws and regulations to Congress.

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

Swiss Bank Hit With Consent Order

On May 31, 2018, the OCC issued a Consent Order against three U.S. branches of a bank based in Switzerland in connection with deficiencies in the branches' BSA/AML compliance programs. Among other concerns, the Consent Order cited a "weak BSA Officer/staffing function," and "systemic deficiencies" in transaction monitoring systems that led to alert and investigation backlogs and late SAR filings. The Consent Order requires the branches to undertake compliance remediation, but no monetary penalty was assessed in connection with the Consent Order.

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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