FINANCIAL SERVICES REPORT

Quarterly News, Winter 2017

IN THIS ISSUE

Beltway Report
Page 2

Bureau Report
Page 2

Mobile & Emerging Payments Report
Page 3

Mortgage & Fair Lending Report
Page 3

Operations Report
Page 4

Preemption Report
Page 5

Privacy Report
Page 6

Arbitration Report
Page 7

TCPA Report
Page 8

BSA/AML Report
Page 9

MOFO METRICS

12	Number of time zones in France (including overseas territories)
11	Number of time zones in Russia
60	Percentage of world's lakes located in Canada
25	Percentage of world's forests located in Russia
90	Percentage of world's fresh water located in Antarctica
75	Percentage of highest 25 peaks in the world located in the Himalayas
33	Percentage of world's rainforests located in Brazil
12	Percentage of world's languages spoken in Papua New Guinea

Attorney Advertising

MORRISON
FOERSTER

EDITOR'S NOTE

The holidays came early for the financial services industry. First, the Senate voted to repeal the CFPB's rule banning class waivers in arbitration agreements in consumer financial contracts. Then, Richard Cordray stepped down as CFPB Director. Former Director Cordray's attempt to name his interim successor hours before submitting his formal resignation created dueling interim directors when President Trump appointed OMB Director Mick Mulvaney to the same position. Now it's up to a federal judge to decide, with the first round going to President Trump in a denial of a request for an emergency TRO blocking Mulvaney's appointment. The next day, Mr. Mulvaney showed up to work anyway with a box of donuts. After the TRO was denied on November 28, he implemented a freeze on hiring and issuance of new regulations.

There's more to come (a hearing is set for December 22), but for now, the two-ring circus just adds to the joy of the season. Read on for all the latest on privacy, mortgage, preemption, operations, TCPA, and the goings-on in Washington, D.C. And all the best in the New Year!

BELTWAY

A New Boss at the Fed?

Changes in priorities and approaches may be coming to the Fed. President Trump nominated Jerome Powell to be Chairman of the Board of Governors of the Federal Reserve, and Janet Yellen, the current Chair, announced that she will leave the Board once Powell is sworn in. Powell has been a member of the Board since 2012, and it is widely believed that his appointment signals continuity on monetary policy and approach to regulations.

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

Back to the Future Part II

The Treasury Department released its second in a series of reports examining the financial regulatory system following on the president's February 2017 Executive Order on Core Principles for Regulating the U.S. Financial System. The report addresses the elements of capital markets, including equity and debt markets and the securities market. Treasury noted that the capital markets regulatory framework would benefit from better "calibration," but also recognized that certain aspects of capital markets regulation worked well. The report includes many recommendations from Treasury related to the regulation of capital markets, including, among others, a recommendation that the CFTC simplify and formalize its outstanding no-action letters and that the CFTC complete its position limit rules focusing on detecting and deterring market manipulation.

For more information, read our Client Alert or contact Julian Hammar at jhammar@mofo.com.

Faster Payments, Market Structure

The FRB Staff released a paper examining the three hypothetical market structures that may emerge: (1) dominant-operator environment, (2) multi-operator environment, and (3) decentralized environment. The paper examines the impacts and risks of these market structures. For example, dominant-operator environments for emerging technologies lack competitive discipline on pricing and quality of services; a decentralized environment could make coordination among providers costly and lack of coordination could increase vulnerability to cyberattacks.

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

Refreshed Strategy for Faster Payments

The FRB released a follow-up report to its January 2015 paper examining tactics the Board's plans to use in the near term to facilitate faster payments, which it believes will lead to its desired outcomes of speed, security, efficiency, international payments and collaboration. For example, the FRB plans to support industry efforts to implement a safe and faster payments capability (such as pursuing FRB settlement services that address future real-time retail payment environments). Before the end of the year, the Board plans to establish an initiative to explore and assess the need for its engagement as a service provider in the faster payments ecosystem.

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

The Call to Streamline

The OCC, Federal Reserve, and the FDIC proposed revisions to streamline the Consolidated Reports of Conditions or Income (i.e., call reports) requirements for supervised entities. The revisions are designed to result in an overall reduction in the burden of completing the call reports by deleting or consolidating certain reporting requirements and by adding new or increasing the reporting thresholds. Comments are due January 8, 2018.

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

BUREAU

CFPB Issues Final Payday Lending Rule

The CFPB released its final rule on payday loans, title loans, and other high-cost installment loans in October. The nearly 1,700-page rule follows the CFPB's June 2016 proposal, with several significant changes. Most notably, the CFPB dropped rules relating to underwriting requirements for long-term loans that do not have balloon payments.

For more information, read our Client Alert or contact Obrea Poindexter at opoindexter@mofo.com.

"No Action" Not Just an Elvis Costello Song Anymore

In September, the Bureau issued its very first no-action letter. The no-action letter was directed to an online lending platform that uses alternative data to model consumer credit decisioning and pricing, and signifies that the CFPB has no present intention to recommend an enforcement or supervisory action against the company for

violation of the Equal Credit Opportunity Act. The letter comes as the Bureau "continues to explore the use of alternative data to help make credit more accessible and affordable for consumers who are credit invisible or lack sufficient credit history."

For more information, read our Client Alert or contact Angela Kleine at akleine@mofo.com.

Trust Me, I'm a "Federal" Agent

In October, the CFPB sued debt relief companies for allegedly falsely suggesting they were affiliated with the federal government and falsely promising to eliminate consumers' debts and improve credit scores. The Bureau's complaint describes mailers that were allegedly designed to look like official government notices, stating that they were a "regulatory notification" and including a seal similar to that of the United States. The Bureau also alleges that the defendants misrepresented success rates, failed to disclose properly that not making payments on debts in the program could result in the consumer being sued, and improperly collected advance fees before achieving results.

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

Debt Settlement Companies Remain a Target

The Bureau filed yet another action against a large debt-settlement services provider and its CEO. The CFPB's complaint is based on a host of alleged misrepresentations, principally overstating its negotiating power—even with creditors with policies against negotiating with debt-settlement companies, and the extent of its role in the negotiations. The Bureau further alleges that the company led customers to believe its negotiators would deal directly with creditors, but instead provided some consumers only with "guidance" or "coaching" on how to negotiate their own settlements.

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

CFPB: Consumers Auto Know Longer Loans Are Riskier

The CFPB's November report on auto loan trends found a big increase in longer-term auto loans. According to the report, 42% of auto loans made in the last year had a six-year or more repayment term, compared to 26% in 2009. The shift has largely been away from four- and five-year loans. Longer loans make the cost of buying a more expensive model more manageable if viewed on a monthly basis. The CFPB posited that six-year loans are riskier for consumers because they "cost more, are used by consumers with lower credit scores to finance larger amounts, and have higher rates of default." Auto dealers have responded, saying the real problem is the CFPB's 2013 guidance on indirect auto lending and compliance with the ECOA, which they say limits their ability to offer financing discounts at dealerships. In response to congressional inquiry, the GAO recently opined that the CFPB's guidance is a "rule", and subject to the Congressional Review Act, which would allow Congress to repeal the guidance.

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

MOBILE & EMERGING PAYMENTS

Virtual Currency Offerings Encounter Not-So-Virtual Scrutiny

Financial regulators have joined in the conversation about virtual currencies and initial coin offerings (ICOs), which are an alternative means to raise capital by granting investors rights to virtual currency issued by a company. Recently, the SEC, CFTC, and ESMA have asserted their regulatory authority over the ICO landscape. The SEC chairman advised that the SEC will begin taking action against ICO issuers who fail to register or comply with federal securities laws. The SEC has also taken the position that tokens offered in ICOs can be securities. Likewise, the CFTC released a report in which the CFTC takes the position that tokens offered through ICOs "may be commodities or derivatives contracts," and subject to CFTC regulation. Lastly, ESMA issued a blanket warning about the volatility of tokens offered through ICOs and warned issuers to take European Union financial laws into consideration before announcing an offering.

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

MORTGAGE & FAIR LENDING

Disclosure Is Key

The CFPB made its way to South Bend, Indiana to enforce alleged RESPA violations by a title company. The CFPB alleged that the title company failed to provide the required affiliated business disclosures when it referred consumers to a title insurer owned by several of the company's executives. To resolve the matter, the title company agreed to a consent order, which includes practice changes and $1.25 million in consumer redress.

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

Phew, More Than One Day to Comply

The CFPB issued a new interim rule, which became effective October 19, 2017, that extends the inadvertent one-day window to ten days for mortgage servicers to provide the required early intervention notices to borrowers who have invoked their cease communication rights under the FDCPA. The *prior* rule required servicers to provide a second notice no more than 180 days after the prior notice if the borrower was 45 days or more delinquent on the 180th day, but another subsection provided that if the borrower had invoked his or her cease communication rights under the FDCPA, the mortgage servicer could only communicate with the borrower once in any 180-day period. Acknowledging that one day is a pretty tight window (especially if it lands on a weekend or a holiday), mortgage servicers now have a ten-day window to send out the subsequent notice.

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

Egads, ECOA Changes

The CFPB finalized changes to Regulation B (and supporting commentary), which implement the ECOA. The changes, which were initially proposed in March, will go into effect on January 1, 2018. Under the final rule, mortgage lenders are no longer required to adopt different practices based on their loan volume. This will permit more lenders to adopt and use applications, such as the revised Uniform Residential Loan Application, that include expanded requests for information on the consumer's race, sex, and ethnicity.

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

Mortgage Data, Charts, & More!

The CFPB launched a new mortgage trends tool for tracking delinquency rates. The tool provides nationwide data and breaks down delinquency levels for individual states and counties/metro areas. The tool also allows users to use interactive graphs to analyze data for two different general categories: (1) borrowers 30-89 days delinquent, which generally would indicate one to two missed payments and (2) borrowers more than 90 days delinquent, which would be deemed to be serious delinquencies. So far the trends are positive. The data shows that the rates of serious delinquency are at the lowest level since the financial crisis and that most states have steadily recovered.

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

Hidden HMDA

The CFPB announced proposed guidance to limit the HMDA data the Bureau shares publicly. The Bureau's 2015 amendments require lenders to report swaths of new data about mortgage applications. At the time it amended HMDA, the CFPB indicated that it was still considering what portion of that data it would share with the public and expressed sensitivity to the privacy and data security concerns implicated by gathering and maintaining such large amounts of personal data. Under the proposal, the CFPB would eliminate more than a dozen data and text fields—including property address, credit score(s), and race and ethnicity—from the public data. The CFPB also proposes a compromise on other data fields, like age and loan amount, by reporting them as midpoints or ranges.

For more information, read our Client Alert or blog post or contact Angela Kleine at akleine@mofo.com.

Finally Fields!

The OCC issued needed guidance designating key fields that examiners will use to validate the new HMDA data lenders will begin collecting in 2018. Of 110 data fields, 37 are identified as "key" fields. Examiners may, however, decide to review additional HMDA data fields as they deem appropriate. The Acting OCC Comptroller emphasized that the OCC understands the "burden" of enhanced data collection and reporting and that this bulletin makes clear that "examiners…have the discretion and should exercise judgment…to ensure the accurate collection of HMDA data without requiring burdensome resubmissions." The Federal Reserve and the FDIC issued similar guidance.

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

OPERATIONS

Simplification?

The OCC, FRB, and FDIC released a proposed rule to change certain aspects of the capital rules under the "standardized" approach. The proposal modifies the approach to the capital treatment of acquisition, development, and construction (ADC) loans currently characterized as high-volatility commercial real estate (HVCRE) exposures. Under existing rules, banks are required to apply a 150% risk-weight to HVCRE exposures under the standardized approach; however, banks have long criticized the complexity of the HVCRE definition and its uncertain application under the "standardized" approach. The proposal would result in a broadening of assets classified as ADC loans subject to a higher capital charge, and a reduction of the size of the capital charge for

covered loans to 130% from 150%. Whether the cumulative effect of the proposal is, in fact, a simplification of the rule, remains to be seen. Comments to the proposal are due December 26, 2017. The House has also passed legislation to amend FDIA to clarify the capital treatment of ADC loans characterized as HVCRE exposures.

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

FDIC Finalizes QFC Rulemaking

The FDIC finalized a rule designed to improve the resolvability of systemically important U.S. banking organizations and systemically important foreign banking organizations. The final rule requires supervised institutions to ensure that covered qualified financial contracts (QFCs) to which they are a party provide that any default rights and restrictions on the transfer of the QFCs are limited to the same extent as they would be under Dodd-Frank and FDIA. A supervised institution also is prohibited from being party to QFCs that would allow a QFC counterparty to exercise default rights against the institution based on the entry into a resolution proceeding under the FDIA, or any other resolution proceeding of an affiliate of the covered institution. The final rule also amends certain definitions in the FDIC's capital and liquidity rules (e.g., "qualifying master netting agreement"). With one exception subject to separate rulemaking, the final rule is effective January 1, 2018.

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

Be Ready for Board Effectiveness Guidance

The FRB issued proposed supervisory guidance and request for comment setting forth the Board's effectiveness guidance for boards of directors of supervised institutions. The proposed guidance would consolidate and replace existing board supervisory expectations contained in various Fed Supervision and Regulation Letters. The resulting 33 proposed expectations in the proposed guidance are categorized into five attributes that support safety and soundness and would provide the framework with which the Board proposes to assess an institution's board of directors, including: (1) setting clear direction for the institution; (2) actively managing information and board discussions; (3) holding senior management accountable; (4) supporting independent risk (and compliance) management and internal audit; and (5) maintaining a capable board composition and governance structure. Final guidance is expected in 2018.

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

Rethinking of Regulation of Asset Managers

The Treasury Department issued a report on asset management and insurance that recommended, among other things, a delay in implementation of the SEC's liquidity risk management rule and the Department of Labor's fiduciary rule. The report is the third of four that address the president's Core Principles to regulate the U.S. financial system. In the report, Treasury recommends that the FSOC, which broadly oversees systemic risks to the U.S. financial system, back off of entity-based systemic risk evaluations of asset managers, and that the SEC focus on potential risks that arise from asset management and on strengthening the asset management industry as a whole. The report also makes recommendations related to the Volcker Rule and insurance companies.

For more information, read our Client Alert or contact Jay Baris at jbaris@mofo.com.

PREEMPTION

Charter Confusion

A California federal court recognized "a growing divide in [California] district courts" on which charter applies to the preemption analysis when a loan is owned by a financial institution with a different charter than the originating institution. *Warren v. Wells Fargo & Co.*, No. 3:16-cv-2872-CAB-(NLS), 2017 WL 4876212, at *8 (S.D. Cal. Oct. 27, 2017). The court identified three different positions taken by California courts: (1) the charter of the originating entity (in this case the OTS) applies; (2) the charter of the current owner (in this case OCC) applies; and (3) the charter of the entity that took the challenged actions applies. The court adopted the first position, finding HOLA (Home Owners Loan Act) preemption continued to apply even after the originating institution was merged into a national banking association. As a result, the court found plaintiffs' claims of improper foreclosure under the California Homeowners' Bill of Rights were preempted.

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

So Close and Yet So Far

A Ninth Circuit panel recognized that "[w]hether, and to what extent, HOLA applies to claims against a national bank when that bank has acquired a loan executed by a federal savings association is an open question in our court." *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 970-71 (9th Cir. 2017). However, the court found it need not reach the issue because plaintiffs' breach of contract claim was not preempted under HOLA and OTS

MOFO *RE* ENFORCEMENT
THE MOFO ENFORCEMENT BLOG

Providing insights and timely reports on enforcement and regulatory developments affecting the financial services industry.

Visit us at **moforeenforcement.com.**

MORRISON FOERSTER

regulations. Plaintiff alleged that a national bank breached the contract by failing to calculate interest using the required index. The court found this claim did not seek to impose state-law requirements on lending practices and instead imposed only the obligation to honor a contractual promise. As a result, contract law only incidentally affected the bank's lending activities and the claim is not preempted.

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

Bad Facts Make . . .

A state statute authorizing additional damages for failure to pay taxes with escrowed funds is not preempted by the NBA and OCC regulations according to a federal court in Minnesota. *Althaus v. Cenlar Agency, Inc.*, No. 17-445 (JRT/DTS), 2017 WL 4536074 (D. Minn. Oct. 10, 2017). Plaintiff alleged that defendant (a mortgage servicer) failed to fulfill its servicing obligations in violation of Minnesota law by failing to pay property taxes out of his escrow account and repeatedly failed to refund plaintiff after he paid the taxes directly. The court held that plaintiff's claim was not preempted because (1) an OCC regulation providing that "a national bank may *make* real estate loans" without regard to state law limitations on the specified topics (including escrow accounts) applied only to originators, not servicers and (2) the Minnesota statute added only damages, not substantive requirements, so the statute did not prevent or significantly interfere with the national bank's exercise of its powers. *Id.* at *5.

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

PRIVACY

Who Could Have Seen This Coming?

The roster of companies facing lawsuits under the Illinois Biometric Information Privacy Act (BIPA) seems to grow by the day. BIPA prohibits a business from collecting a person's "biometric identifier" or "biometric information" unless the business first provides the individual with notice and obtains informed written consent. The first wave of cases—which are still being litigated—came against online photo sharing services that allegedly create facial geometry scans from pictures. The second wave is coming against companies that use biometric identifiers (e.g., fingerprints) for employee timekeeping (i.e., biological timeclocks). For example, a recent class action filed in Illinois state court alleges that United Airlines violated BIPA by failing to obtain appropriate consent to collect fingerprints, and did not comply with other aspects of the law including the requirement to publish data retention and deletion policies. *Johnson et al v. United Airlines Inc.*, No. 2017 CH 14832 (Cir. Ct. of Cook Cty. Nov. 7, 2017).

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

Until Morale Improves . . .

The New York Attorney General issued a press release announcing draft legislation (to be sponsored by two state senators) that would apparently impose requirements on companies to adopt "reasonable" administrative, technical, and physical safeguards to protect data. The draft legislation would allow the NY AG to seek civil penalties against companies that fail to comply. According to the press release, there would "safe harbors" for companies that "obtain independent certification that their data security measures meet the highest standards" and for companies already regulated by a federal or New York state regulator (including subject to regulations like GLBA or regulated by the NYDFS), provided that they are "compliant" with the applicable regulations.

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

The Hits Keep on Coming

The NYDFS responded quickly to the massive and widely reported Equifax breach, issuing guidance for both insurers and other financial institutions reiterating the importance of controls required by the NYDFS cyber security regulations. The NYDFS also issued proposed rules to regulate consumer reporting agencies (CRAs) doing business in New York. Under these proposed rules, a covered CRA's failure to comply with the NYDFS cyber security regulations would be grounds for NYDFS to revoke, suspend, or refuse to renew the registration of the CRA, subject to notice and a hearing. These actions reaffirm NYDFS's apparent desire to play a prominent role in driving cybersecurity policy in this country.

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

What Is the Solution?

A push has been made at both the state and federal level to impose new cybersecurity mandates; however, one FRB official suggested that more rules may not be the best approach. As was widely reported in early November, a senior associate director in the Division of Supervision and Regulation said at a recent banking conference that he didn't "think the solution to the cybersecurity problem rest[ed] in regulation." This could signal that the banking agencies' Advance Notice of Proposed Rulemaking regarding heightened security standards for critical financial institutions may have an unlikely future. Nonetheless, Congress continues its more than decade-long consideration of data security and breach notification bills with potentially renewed interest in light of the Equifax breach.

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

Here to Help

In response to a November 2016 RFI regarding access to consumer financial account data, the CFPB released guiding principles for participants in the financial data sharing and aggregation industry along with a "stakeholder report" summarizing key issues. The CFPB's principles reflect both a push for greater consumer control over financial data access and enhanced accountability of commercial participants. The principles also contemplated possible dispute resolution mechanisms for consumers whose data was inaccurately reported or whose data was shared with unauthorized third parties. Although the principles do not establish binding requirements, they do offer the CFPB's view of best practices and indicate the lens through which the CFPB will "closely monitor developments" in the data aggregation market.

For more information, read our Client Alert or contact Obrea Poindexter at opoindexter@mofo.com.

ARBITRATION

Ding Dong the Rule Is Dead

Congress used the Congressional Review Act to overturn the CFPB's controversial arbitration rule. President Trump signed the resolution repealing the arbitration rule on November 1, 2017. The rule will not go into effect, and importantly, under the CRA, the CFPB may not enact a similar rule without congressional approval.

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

OCC and Treasury Respond to Arbitration Rule Repeal

The then-acting Comptroller of the Currency issued a statement in response to the president's signature on the resolution overturning the CFPB's arbitration rule. The OCC statement noted that the arbitration rule "would have cost millions, paved a path to expensive frivolous lawsuits, and lined the pockets of trial lawyers." The OCC had previously issued a review on the probable cost to consumers resulting from the arbitration rule, which found a "strong probability of a significant increase in the cost of credit cards as a result of eliminating mandatory arbitration clauses." Treasury also reported on the likely limitation of consumer choice and cost of litigation that would have resulted from the arbitration rule, including the windfall to plaintiffs' class action attorneys.

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

Lawsuit to Overturn Rule Now Moot

Now that the CFPB's arbitration rule has been overturned, the business groups that filed a lawsuit in Texas challenging the rule voluntarily dismissed their suit. The lawsuit, led by the Chamber of Commerce, sought declaratory and injunctive relief, and challenged the "constitutionality and legality" of the rule. The groups had argued that the rule should be overturned for four reasons: (1) the CFPB's structure is unconstitutional; (2) the CFPB violated Dodd-Frank by failing to conduct a proper arbitration study; (3) the CFPB violated the Administrative Procedures Act by failing to consider the impact of the rule on consumers; and (4) the rule violated Dodd-Frank because it is not "in the public interest and for the protection of consumers."

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

TCPA

Individualized Consent Dooms Class Cert.

Another Illinois federal district court rejected a bid to certify a putative TCPA class action because "individualized consent issues" predominated. *Alpha Tech Pet Inc., et al. v. Lagasse, LLC. et al.*, Nos. 16 C 513, 16 C 4321, 2017 WL 5069946 (N.D. Ill. Nov. 3, 2017). To defeat class certification, the defendants used a database to show that some members of the putative class consented to receiving faxes; however, the database was limited to determining who provided consent by "manually cross-checking" individual records. Relying on a recent D.C. Circuit decision, *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir. 2017), the court held class certification was not appropriate because individuals who consented to receive faxes would have to be weeded out of the class, given that *Baiz Yaakov* held that "solicited faxes" cannot give rise to a TCPA violation.

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

TCPA Standing Expanding?

Two courts denied defendants' motions to dismiss TCPA class actions for lack of standing under *Spokeo*. In one case, the court rejected defendants' claims that the lack of an opt-out notice in an unsolicited fax was a technical TCPA violation that could not support standing. *Am.'s Health & Res. Ctr., Ltd. v. Promologics, Inc.*, No. 16 C 9281, 2017 WL 5001284, at *2 (N.D. Ill. Nov. 2, 2017). The "mere receipt of a fax alleged to lack TCPA opt-out notices" was enough to support the standing needed to bring the action. In another case, the court held that a *single* unsolicited call was sufficient to establish standing under *Spokeo*, and enough to avoid dismissal. The court reasoned that Congress intended the TCPA to elevate a single unwanted call to the status of an invasion of privacy. *Hossfeld, v. Compass Bank & MSR Grp., LLC*, No. 2:16-CV-2017-VEH, 2017 WL 5068752 (N.D. Ala. Nov. 3, 2017).

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

Don't Thank Customers by Text

A California court refused to dismiss a putative class action involving a single "thank you" text message from Häagen Dazs to customers who orally enrolled in its rewards program. *Pedro-Salcedo v. Häagen-Dazs Shoppe Co.*, No. 5:17-cv-03504-EJD, 2017 WL 4536422 (N.D. Cal. Oct. 11, 2017). Plaintiff alleged that although she provided her telephone number to Häagen Dazs, she did not consent to receiving solicitations. The text instructed customers to download a mobile application, and the court held that where the registration had already been completed without the need for an app, the "thank you" text could be seen as an unlawful advertisement for the app.

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

The Right Amount of Damages

A federal court ordered a reduction in damages from $1.6 billion to $32.4 million in a class action in which a marketing company was found liable for making 32 million unlawful prerecorded robocalls. *Golan v. Veritas Entm't, LLC*, No. 4:14CV00069 ERW, 2017 WL 3923162 (E.D. Mo. Sept. 7, 2017). The original $1.6 billion damages award was consistent with TCPA's statutory damages provision and trebled for willful conduct. In reducing the damages, the court found that although the TCPA's statutory damages provision was not unconstitutional on its face, a TCPA statutory damages award could be unconstitutional as applied if it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at *3. However, another federal court declined a company's request to reduce $40 million in statutory TCPA damages. *Krakauer v. Dish Network, LLC*, No. 1:14-CV-333, 2017 WL 4417957 (M.D.N.C. Oct. 3, 2017). The company was found liable for making over 50,000 telemarketing calls to individuals registered on the Do Not Call Registry. The court held that the damages award was "neither excessive nor duplicative in any meaningful way," and, therefore, did not violate due process. *Id.*

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

Sorry, Not Sorry

A divided Ninth Circuit panel affirmed a lower court ruling that the Los Angeles Lakers were not entitled to insurance coverage for a TCPA class action alleging that the team sent unsolicited text messages to fans. *Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795 (9th Cir. 2017). The Lakers' lawsuit to recover under its D&O policy was dismissed based on the exclusion under the D&O policy for claims arising out of an invasion of privacy claim, holding that the TCPA action fell under that provision of the policy. The Ninth Circuit concluded that the TCPA claim was "inherently" an invasion of privacy claim. One judge dissented on grounds that nothing in the TCPA required a plaintiff to prove an invasion of privacy, and the plaintiff had not sued for invasion of privacy.

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

BSA/AML

NYDFS Issues Part 504 FAQs

The NYDFS recently posted five additional FAQs regarding its new Transaction Monitoring and Filtering Program Requirements and Certifications (3 N.Y.C.R.R. Part 504). The FAQs explain that NYDFS expects "full compliance" with Part 504, and that a "Regulated Institution" may not submit its annual certification if it is not in compliance with Part 504 as of the effective date of the certification. The FAQs also clarify that the "certification is intended as a stand-alone document" and that covered institutions are not required to submit "explanatory or additional materials with the certification." Among other things, the FAQs further reiterate Part 504's requirements that institutions must maintain documents and records to support annual certification as well as any areas, systems, or processes the institution has identified as requiring material improvement.

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

No Slipping Under the FinCEN Radar

FinCEN announced a $2 million civil money penalty against a Texas community bank related to allegations of lack of due diligence on correspondent accounts, including the account of a large Mexican bank. FinCEN's acting director emphasized that "[s]maller banks, just like the bigger ones, need to fully understand and follow the 312 due diligence requirements if they open up accounts for foreign banks."

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

It's a Casino

FinCEN fined a California card club for willful violations of the BSA/AML controls. FinCEN alleged that "for years, [the card club] turned a blind eye to loan sharking, suspicious transfers of high-value gaming chips, and flagrant criminal activity that occurred in plain sight." For example, when questioned about loan-shark activity, an employee of the card club explained, "[i]t's a Casino. There's always [expletive] loan-sharks." Card clubs have been subject to BSA requirements since 1998, though this is only the third civil money penalty assessed by FinCEN against a card club for BSA/AML violations (it is also the largest). Interestingly, all three assessments have occurred within the last three years.

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.

The firm members who specialize in financial services are:

Los Angeles

Henry Fields (213) 892-5275 hfields@mofo.com

Joseph Gabai (213) 892-5284 jgabai@mofo.com

Robert Stern (213) 892-5484 rstern@mofo.com

Nancy Thomas (213) 892-5561 nthomas@mofo.com

New York

James Bergin (212) 468-8033 jbergin@mofo.com

David Fioccola (212) 336-4069 dfioccola@mofo.com

Jessica Kaufman (212) 336-4257 jkaufman@mofo.com

Mark Ladner (212) 468-8035 mladner@mofo.com

Jiang Liu (212) 468-8008 jiangliu@mofo.com

Barbara Mendelson (212) 468-8118 bmendelson@mofo.com

Michael Miller (212) 468-8009 mbmiller@mofo.com

Joan Warrington (212) 506-7307 jwarrington@mofo.com

San Francisco

Roland Brandel (415) 268-7093 rbrandel@mofo.com

Angela Kleine (415) 268-6214 akleine@mofo.com

Adam Lewis (415) 268-7232 alewis@mofo.com

Jim McCabe (415) 268-7011 jmccabe@mofo.com

James McGuire (415) 268-7013 jmcguire@mofo.com

William Stern (415) 268-7637 wstern@mofo.com

Washington, D.C./Northern Virginia

Rick Fischer (202) 887-1566 lfischer@mofo.com

Natalie Fleming Nolen (202) 887-1551 nflemingnolen@mofo.com

Oliver Ireland (202) 778-1614 oIreland@mofo.com

Steve Kaufmann (202) 887-8794 skaufmann@mofo.com

Don Lampe (202) 887-1524 dlampe@mofo.com

Obrea Poindexter (202) 887-8741 opoindexter@mofo.com

Nate Taylor (202) 778-1644 ndtaylor@mofo.com

ABOUT MORRISON & FOERSTER

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology, and life science companies. We've been included on *The American Lawyer's* A-List for 13 straight years and the *Financial Times* named the firm number six on its list of the 40 most innovative firms in the United States. *Chambers USA* has honored the firm with the only 2014 Corporate/M&A Client Service Award, as well as naming it both the 2013 Intellectual Property and Bankruptcy Firm of the Year. Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger.

NEWSLETTER STAFF

Editor-in-Chief: Nancy Thomas

Beltway Report
Crystal Kaldjob, Managing Editor

Bureau Report
Jessica Kaufman

Mobile & Emerging Payments Report
Trevor Salter

Mortgage & Fair Lending Report
Angela Kleine and Sarah Davis

Operations Report
Jeremy Mandell

Preemption Report
Nancy Thomas

Privacy Report
Nate Taylor and Adam Fleisher

Arbitration Report
Natalie Fleming Nolen

TCPA Report
David Fioccola

BSA/AML
Marc-Alain Galeazzi and Meghan Dwyer

Can't wait for the next issue? The Financial Services Group sends out client alerts by e-mail, reporting on developments of significance. If you would like to be added to our circulation list, contact Caitlin Baker at cbaker@mofo.com.

If you wish to change an address, add a subscriber, or comment on this newsletter, please write to:

Caitlin Baker
Morrison & Forester LLP
250 West 55th St.
New York, NY 10019
cbaker@mofo.com

©2017 Morrison & Foerster LLP