FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Fall 2015

IN THIS ISSUE

MOFO METRICS

2: Amount of poop a Canada goose drops in a day, in pounds

40: Percentage of U.S. households that fight over how to load the dishwasher

25: Percentage of all calories consumed that go toward brain activity

65: Percentage of U.S. adults who own a smartphone

25: Percentage of all car accidents that involve use of a smart phone

1000: Amount that half of U.S. workforce spends on coffee annually (dollars)

78: Cost, one ounce Russian Osetra caviar, in dollars

110: Cost, one ounce HP printer ink, in dollars

MORRISON FOERSTER

Editor's Note

The kids may be back in school, but it was the adults who got smarter. North Korea moved to its own time zone, so now it lags only a half hour behind everyone else. Think about it. Show up late for work, but still be on time. Know that the bartender really doesn't mean it when she says "last call." Watch Gilligan's Island reruns twice. Work for government. Maybe the Dear Leader is on to something.

Speaking of the Dear Leader, Donald Trump's name is on everything else, so why not the Summer of 2015? Will kids have to write essays called "How I spent my Trump vacation"? Will the movie, *Suddenly Last Summer* get renamed *Suddenly Last Trump?* What about *500 Days of Trump? Trump School*, and *Trump Camp*? And that all time classic from Tennessee Williams, *Trump and Smoke*.

In the really big news, the "hitchbot" got mugged and decapitated in Philadelphia. Tears were shed. The perp has not been caught, but they're rounding up the usual suspects. Meanwhile, the Consumer Financial Protection Bureau is looking for character witnesses.

Stuff happened this summer, which is what stuff does. While you were at the beach, others were busy. The Bureau issued its Summer Supervisory Highlights, but we prefer to play the B-side. There was stuff about fair lending, credit card add-on products, new reckoning for mobile payment, and stuff for virtual currency folks, as well as the usual RESPA, Volcker Rule, preemption, arbitration, and privacy stuff. We've got all the stuffing here.

Until next time, remember: You are what you tweet.

BELTWAY

Straight Out of the Seventh Circuit

The Seventh Circuit recently affirmed a lower court's ruling that the SEC cannot be sued in district court to stop it from bringing an administrative action. *Bebo v. SEC*, No. 15-1511, 2015 U.S. App. LEXIS 14844 (7th Cir. Aug. 24, 2015). The ruling is significant because district courts in Georgia and New York recently decided to freeze similar administrative proceedings on the grounds that the appointment of certain SEC judges was "likely unconstitutional." Although this ruling shields the SEC's administrative process from attack in the Seventh Circuit, it does not impact a defendant's ability to file proceedings for review of an administrative law judge's ruling on the merits.

For more information, contact Joe Rodriguez at jrodriguez@mofo.com.

Where's the Beef?

The GAO has called on federal financial regulators to conduct an in-depth study on the effects that new mortgage rules, such as the CFPB qualified mortgage standard, are having on the mortgage market. Noting that federal agency officials took the position that the qualified mortgage regulations would not have broad-reaching effects on the mortgage market, the GAO has essentially asked the agencies to prove it, calling on them to conduct a retrospective review of the mortgage regulations that were put in place in response to the financial crisis. The GAO also made recommendations with respect to the availability of data in the mortgage market.

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

DFS Don't Mess

Recently, the New York Department of Financial Service alleged that Promontory Financial Group "sanitized" reports it submitted to the regulator about its client's alleged assistance provided to Iranian clients in accessing the U.S. banking system in violation of an embargo. Specifically, DFS alleged that Promontory employees assigned to review its client's compliance with the Bank Secrecy Act and anti-money laundering regulations regularly altered their findings or presented them in such a way as to minimize the extent of potential violations. After vowing to take the matter to court, Promontory ultimately settled with DFS, admitting as part of the settlement that, in certain instances, its work did not meet the DFS's "current requirements for consultants performing regulatory compliance work for entities supervised by the department." Promontory agreed to pay a $15 million fine and agreed to a six-month ban on taking on new work for clients regulated by the DFS.

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

The Regulators are Coming!

The Treasury Department is wading into marketplace lending. It issued a Request for Information seeking public comment on the various business models and products offered by online marketplace lenders to small businesses and consumers; the potential for online marketplace lending to expand access to credit to historically underserved market segments; and how the financial regulatory framework should evolve to support the safe growth of this industry. The Treasury also is hosting roundtables on online marketplace lending.

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

Can the Little Guys Get a Break?

On July 15, 2015, Federal Reserve Chair Janet Yellen was pressed by several members of the House Financial Services Committee regarding the regulatory burden faced by community banks. Chair Yellen stated that the Federal Reserve is seeking to focus the regulatory burdens on larger banks and that "we share the goal of minimizing burdens on community banks." She also noted that the Federal Reserve will be tailoring exams based on individual bank's risk factors and looking to reduce the amount of documentation and time spent in community banks.

For more information, contact Joe Rodriguez at jrodriguez@mofo.com.

BUREAU

The Bureau Is Coming!

In June, the CFPB issued a long-awaited final rule permitting Bureau supervision of larger nonbank auto finance companies that make, acquire, or refinance 10,000 or more loans or leases in a year. The Bureau estimates the Rule will cover approximately 90% of the market. The final rule counts automobile leases toward the 10,000 threshold, but excludes motor homes, recreational vehicles, golf carts, and motor scooters from the count (so all you Vespa dealers are off the hook . . . for now!). Purchases or acquisitions made by special-purpose entities for purposes of asset-backed securitizations generally aren't counted either. The Bureau provided guidance to these newly regulated entities in examination procedures released with the final rule. The Bureau's press release indicated that its exams will focus on UDAAP issues associated with marketing and disclosures, FCRA issues around accurate furnishing of information to credit bureaus,

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FDCPA and UDAAP issues associated with collection of debt, and fair lending concerns regarding underwriting and pricing practices and methodologies.

For more information, contact Joe Rodriguez at jrodriguez@mofo.com.

Don't Keep the Change

The CFPB and FDIC entered into a consent order with a depository institution in August in connection with the bank's failure to credit consumers for the full amounts of deposited funds when the customers' receipts did not match the actual money transferred into the account. If the amount transferred exceeded the amount on the customer's deposit slip, the Bureau alleged, the bank would keep the overage without investigation if the discrepancy did not exceed a certain sum. The consent order required the bank to refund approximately $11 million to customers and pay a $7.5 million penalty.

For more information, contact Michael Miller at mbmiller@mofo.com.

CFPB Loves a Person in Uniform

The CFPB sued Security National Automotive Acceptance Company (SNAAC), an Ohio-based auto finance company that specializes in lending to active-duty and former military to buy used motor vehicles. The CFPB claimed that SNAAC leveraged servicemembers' military status in collecting debts, allegedly exaggerating the potential that the servicemembers could face adverse career consequences or actions under the Uniform Code of Military Justice for nonpayment. The abusiveness claim in the *SNAAC* litigation echoes some of the allegations in last year's complaint against Freedom Stores, Inc., alleging that Freedom Stores had taken unreasonable advantage of military consumers' inability to protect their interests by including Virginia forum selection clauses in contracts with servicemembers stationed far from Virginia.

For more information, read our blog post on the SNAAC settlement or contact Michael Agoglia at magoglia@mofo.com.

Summer Supervisory Highlights

The CFPB's Summer Supervisory Highlights continued to focus on debt collectors, including a couple of observations related to collectors' FCRA compliance. The CFPB criticized the practice of deleting a trade line in response to a consumer dispute without conducting an investigation. The Supervisory Highlights also discussed fair lending, loss mitigation, and other topics this quarter.

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

If You Can't Say Anything Nice . . .

. . . You will feel right at home reading the CFPB's newly augmented web-based public-facing complaints database. In accordance with its Final Policy Statement issued on March 19, 2015, the CFPB began publishing consumer complaint narratives. As of June, there were about 7,700 narratives in the database. Complaints about mortgages, debt collection, and credit reporting accounted for about 70% of those received between March and June 2015 and about 70% of the narratives posted so far. Debt collection narratives slightly outpaced mortgage narratives even though the number of mortgage complaints received during this time period exceeded the number of debt collection complaints. Payday loans are at the other end of the spectrum. Despite the CFPB's intense scrutiny and criticism of these products, payday loans accounted for less than 1% of the total complaints received since March 19, 2015.

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

Add-On, and On, and On . . .

The CFPB agreed in July to settle claims against Affinion Group Holdings, Inc. (and affiliates) and Intersections Inc., two of the vendors that offered credit monitoring and identity theft insurance add-on products that were the subject of prior consent orders between the CFPB and financial institutions who marketed, sold, or administered the products. Affinion allegedly engaged in deceptive conduct during retention calls. Intersections allegedly provided "substantial assistance" to its financial institution marketing partners in an unfair practice by "instruct[ing] its depository institution clients to bill affected consumers . . . knowing those consumers were not receiving full product benefits." These new settlements (you can find them here and here) apparently cover accounts that were not part of prior settlements with financial institutions. Both defendants will pay restitution and penalties.

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

And On . . . New Consent Order Makes Ten

One more credit card issuer joined nine other large financial institutions this July in entering into a consent order with the CFPB and OCC concerning the allegedly unfair and deceptive practices in connection with the marketing and sale of credit card add-on products. The credit card issuer agreed to pay $700 million in consumer redress, plus $70 million in civil monetary penalties to the Bureau and the OCC. This settlement, unlike the prior deals, also addressed the issuer's expedited pay-by-phone fees.

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

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Debt Collection Takes Center Stage Yet Again

In July, the CFPB announced its largest UDAAP settlement to date with a credit card issuer in connection with debt sales and collection litigation. The OCC and 47 State Attorneys General were part of the settlement. The CFPB alleged that the sale of debts the issuer knew or should have known were unenforceable, and the selling of debts with inaccurate or inadequate evidence that the stated amount of the debts were owed, constitute unfair practices. The CFPB also alleged that the issuer provided substantial assistance to debt collectors who purchased and attempted to collect the unsubstantiated, inaccurate, and/or unenforceable debts. On the debt litigation claims, the Bureau alleged that robo-signing of sworn statements to support collection lawsuits was both unfair and deceptive. But the CFPB went further, alleging failure to provide notice to consumers and courts that judgments were obtained based on robo-signed sworn statements constitutes an unfair practice, as does failure to remediate alleged miscalculation of amounts owed that were incorporated into erroneous judgments.

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

Peppercorn Penalty in Student Aid Case

The CFPB imposed a civil monetary penalty of just one dollar on Student Financial Aid Service, Inc., when it settled allegations that Student Financial engaged in deceptive acts or practices, violated the Telemarketing Sales Rule, and violated the Electronic Funds Transfer Act by initiating recurring, preauthorized transfers from consumer accounts without the required authorization. The CFPB said in its complaint that consumers who used the sites were unknowingly billed for an annual subscription when they signed up for the service and entered their payment information, but did not authorize a transaction. The CFPB also alleged that the sites implied they were affiliated with government programs, creating confusion. Student Financial did not admit or deny wrongdoing, but has since publicly denied the CFPB's allegations.

For more information, contact Michael Miller at mbmiller@mofo.com.

Do Military Student Lenders Pass Muster?

The realities of military life can amplify issues with student loan servicing, the CFPB said in a Report released this July. The Report indicated that student loan servicers failed to implement military deferment due to servicer error, at times failed to process requests for the SCRA interest rate cap of 6 % in a timely manner or failed to convey clear information about the application process, and did not effectively grant loan discharges to severely disabled veterans.

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

Friend of the Court Report

The CFPB filed two *amicus* briefs in FDCPA cases this summer. In *Bock v. Pressler & Pressler, LLP*, No. 15-1056 (3d Cir.), the CFPB, joined by the FTC, argued that an attorney engages in a deceptive debt collection practice in violation of the FDCPA when he or she files a debt collection lawsuit without meaningfully reviewing it first—a practice it argues occurs when debt collection law firms "mass-file" collection lawsuits. In *Ho v. ReconTrust Co., N.A.*, No. 10-56844, the Ninth Circuit invited the CFPB to weigh in on the question of whether a trustee who forecloses on a deed of trust in a non-judicial action in California can qualify as a "debt collector" under the general definition of that term in the FDCPA. The CFPB argued that a trustee engages in debt collection if it sends consumers notices stating that foreclosure will occur unless the consumers make payment on their debt. The brief also argues that such conduct can qualify as debt collection under the general definition regardless of whether the conduct is also related to the enforcement of a security interest.

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

DC Circuit Revives Constitutionality Challenge

The DC Circuit revived a small Texas bank's challenge to the CFPB's constitutionality in July, reversing a lower court decision dismissing the claim for lack of standing. *State Nat'l Bank of Big Spring v. Lew*, Nos 13-5247, 13-5248, 2015 WL 4489885 (D.C. Cir. July 24, 2015). The court did not address the substance of the bank's constitutionality challenge—its opinion was limited to the issue of whether a regulated entity had standing to challenge agency regulations before they were subject to enforcement actions. The court held that the bank had standing because the regulations affect a market in which it does business and that it made little sense to force a regulated entity to violate a law and trigger an enforcement action just so a constitutionality challenge could be sustained.

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

MOBILE & EMERGING PAYMENTS

D-Day: October 1st

Payments industry participants have had October 1, 2015 circled

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in red on their calendars for quite some time. On that date, liability for in-store fraud under the card association rules will shift to merchants that have not installed EMV-compliant point-of-sale card readers, assuming that the issuing bank has upgraded its technology. The EMV liability shift has been a boon to contactless payments providers and applications because EMV-compliant hardware typically is also able to accept contactless payments. Most industry observers expect that fraud will move in two directions: towards small- and medium-sized business that have not invested in EMV-compliant hardware, and towards online payments. Industry participants in online payments should therefore be prepared for increased attention from fraudsters and should consider leveraging additional security measures, such as encryption and tokenization, to help safeguard digital payments.

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

Regulation Suffocation of Innovation?

We have all heard the complaint that regulation can stifle innovation. The virtual currency industry is taking up this refrain in response to the NYDFS's first-in-the-nation licensing requirement for any company engaged in a "virtual currency business activity." Other states (e.g., California) are considering legislation that would impose a more limited licensing requirement, applying only to companies that have "full custody or control" of a consumer's virtual currency. The NYDFS regulation also imposes anti-money laundering requirements, which go beyond federal requirements in several important ways. For example, licensees must collect additional information from New York residents and must keep records for all transactions regardless of dollar amount and including virtual currency to virtual currency transactions. In contrast, as it relates to anti-money laundering, federal regulations only obligate financial institutions to maintain records for transactions under $3,000 and for virtual currency to fiat currency transactions.

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

It's Not All About the Speed

The CFPB released its "Vision of Consumer Protection in New Faster Payments Systems," which identifies principles for a faster payment system: affordability, ubiquity, security, and consumer control. The CFPB's stated purpose in releasing these principles is to ensure that consumer interests remain top of mind throughout system development. As Director Cordray explained, "[i]t is a lot easier to build something right from the start than it is to retrofit it."

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

MORTGAGE & FAIR LENDING

Much Ado About Nothing?

After years of debate and false starts, the Supreme Court held that the Fair Housing Act permits disparate impact claims. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371, 576 U.S. ___ , 135 S. Ct. 2507 (2015), a divided Court held that specific language in the statute permits plaintiffs to challenge housing practices that have an unintentional but "disproportionate adverse effect on minorities." The Court did caution that such practices must be "artificial, arbitrary, and unnecessary" and "unjustified by a legitimate rationale" in order to violate the FHA and that policy considerations require caution in fashioning a disparate impact test. The Court, though, provided only faint guidance on the mechanics of that test, ensuring that the lower courts and litigants around the country will continue to struggle with applying the disparate impact standard.

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

CFPB Keeps Busy with Indirect Auto

Fresh off the *Inclusive Communities* decision, and 18 months after bringing a disparate impact case against Ally Financial for discriminatory auto loan pricing, the CFPB struck again this summer. This time, it took action against American Honda Finance Corporation. Like Ally, Honda stands accused of discriminatory auto loan pricing stemming from discretionary pricing and dealer compensation practices. However, unlike Ally, Honda did not pay money penalties. The CFPB credited the company's agreement to reduce its dealer markup cap from 2.25% to 1.00% (depending on the term of the loan).

Not long after taking action against Honda, the CFPB reportedly referred Santander Consumer USA, Inc. to the DOJ based on the same theory. Like Honda and Ally, Santander is alleged to have engaged in discriminatory auto loan pricing stemming from the company's discretionary pricing and dealer compensation practices, i.e., allowing auto dealers to mark up its risk-based interest rate. However, unlike Honda and Ally, the CFPB has also apparently taken issue with the way Santander treats certain forms of income in its auto loan underwriting.

For more information, contact Joe Rodriguez at jrodriguez@mofo.com.

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Back to Square One

On September 1, 2015, the Eleventh Circuit overturned a Miami federal court's decisions dismissing Fair Housing Act claims by the City of Miami against three lenders. *City of Miami v. Bank of Am., N.A.*, No. 14-14543, 2015 WL 5102581 (11th Cir. Sept. 1, 2015). The circuit court held that, contrary to the district court's holdings, (1) "the City has constitutional standing to pursue its FHA claims," (2) "under controlling Supreme Court precedent, the 'zone of interests' for the Fair Housing Act extends as broadly as permitted under Article III of the Constitution, and therefore encompasses the City's claim," and (3) the City "adequately alleged proximate cause." *Id.* at *1. The Eleventh Circuit cautioned, however, that "any newly pled complaint must take into account the evolving law on disparate impact in the FHA context," and specifically that under *Inclusive Communities*, "defendants must be allowed to 'explain the valid interest served by their [challenged] policies,'" and "courts should insist on a "robust causality requirement" at the "prima facie stage" linking the defendant's conduct to the racial disparity." *Id.* at *20 (citations omitted).

For more information, contact Tom Noto at tnnoto@mofo.com.

MLA Mayhem

On July 22, 2015, the Department of Defense published sweeping changes to its rules that implement the Military Lending Act. The amended rules significantly expand the scope of the MLA provisions by covering both new types of creditors and new credit products, including installment loans and other closed-end credit products and credit cards and other open-end credit accounts. The restrictions of the amended rules would apply to credit extended to a "covered borrower," which is defined as a consumer who, at the time he or she is first obligated on a credit transaction, is a service member who is on "active duty" or a spouse or dependent of such a person (which includes a child under the age of 21). The rules become effective on October 1, 2015, with compliance required by October 3, 2016. However, compliance with the rules for credit cards is delayed until October 3, 2017, unless extended for an additional year until October 3, 2018.

For more information, read our Client Alert or contact Leonard Chanin at lchanin@mofo.com.

So Much for SCRA Subsidies

In July, a federal court approved a settlement of the SCRA class action *Raymond Wray v. CitiMortgage Inc.*, Case No. 3:12-cv-03628-CMC (D.S.C.). Wray had accused the bank of violating the SCRA by subsidizing the interest on his 12.99% rate loan to reduce his direct payments to the 6% statutory max, rather than just reducing the rate to 6% as he claims the statute requires. In the settlement, class counsel will receive up to $1.6 million, and each of the approximately 4,300 members will receive $150 a piece. The bank also agreed not to return to the method of subsidizing interest rates for the next two years or to employ any other method "that would be less beneficial to its borrowers."

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

E-Closings Encounters

On August 5, the CFPB released a 90-page report summarizing the results of its eClosing pilot program, a research initiative launched in April 2014 to explore whether electronic closing processes offer measurable benefits to mortgage borrowers. According to the CFPB, the pilot program was part of the agency's overall "Know Before You Owe" campaign, through which the CFPB developed the TILA-RESPA integrated disclosure (TRID). In the report, the CFPB pointed out eClosings may benefit borrowers by making them feel more empowered during the closing process, and the CFPB encouraged the industry to "explore eClosing as a promising option for customers."

For more information, read our Client Alert or contact Don Lampe at dlampe@mofo.com.

No Rest for the RESPA

The Ninth Circuit wrote another chapter in the long-running RESPA class action *Edwards v. First American Corp*, __ F.3d. __, 2015 WL 4999329 (9th Cir. Aug. 24, 2015). The court affirmed, in part, a district court's order denying class certification in the case, in which plaintiffs allege that First American Title engaged in a scheme to illegally paying title agencies things of value in exchange for the agencies' agreement to refer future title insurance business to First American. The Court held that the district court erred in holding that the RESPA Safe Harbor, 12 U.S.C. § 2607(c)(2), required Edwards to prove that First American overpaid for its ownership interests in each of the title agencies because, according to the court, the ownership interests purchased by First American are equity shares—not "goods, services or facilities" within the meaning of the Safe Harbor. *Id.*, at *5. Also of note, the court held that the CFPB's interpretation of the statute offered in its amicus brief was not entitled to *Chevron* deference.

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

Even RESPA Has Its Limits

Filing loan documents to release liens is not "servicing" under RESPA, according to the Fourth Circuit. *Poindexter v. Mercedes-Benz Credit Corp.*, 792 F.3d 406

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(4th Cir. 2015). Poindexter had claimed that Mercedes-Benz Credit Corp. failed to respond in a timely manner to her requests to release a lien on her home that was tied to her auto loan, attempting to use RESPA as a hook for pursuing her complaint. The Fourth Circuit held, though, that filing a certificate of satisfaction is outside RESPA's servicing framework.

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

Further Fair Housing

On July 8, 2015, HUD announced a new Fair Housing Act rule to "affirmatively further[] fair housing." The Fair Housing Act, passed in 1968, directs HUD to promote fair housing and equal opportunity, including addressing segregated housing patterns. This new rule "aims to provide all HUD program participants with clear guidelines and data they can use to achieve those goals." The key features of the rule, according to HUD, include (1) "clarifying" existing fair housing obligations, (2) publicly opening data and mapping tools on fair housing, (3) changes to facilitate local decision-making, (4) new customized fair housing assessment tools, and (5) encouraging collaboration and communication among different communities. In response to participant requests, the rule provides a "phase-in-implementation" to provide more time to adopt the rules.

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

Another One Bites the Dust

On June 5, 2015, the CFPB filed a Consent Order and Stipulation with a now-defunct California mortgage company to pay $228,000 in civil monetary penalties for alleged Loan Origination Compensation Rule violations. The CFPB accused the company of violating the Rule by basing part of its compensation to branch managers on the interest rates of the loans they closed. The CFPB claims the company was "funded by payments Guarantee made to marketing services entities owned in part by the company's branch managers and other Guarantee loan originators." The originator-owners then allegedly "drew a portion of those fees as compensation." As a result, the CFPB claims "branch managers received compensation based on the interest rates of the loans they originated in violation of the Loan Originator Compensation Rule during that period."

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

More Mod Mayhem

On July 30, 2015, the CFPB entered into a consent order with loan servicer Residential Credit Solutions, Inc. for allegedly "blocking consumers' attempts to save their homes from foreclosure." The CFPB claims the servicer "failed to honor modifications for loans transferred from other servicers, treated consumers as if they were in default when they weren't, sent consumers escrow statements falsely claiming they were due a refund, and forced consumers to waive their rights in order to get a repayment plan." This, the CFPB alleges, constituted unfair and deceptive practices. Residential Credit Solutions agreed to pay $1.5 million in restitution and a $100,000 civil money penalty. The order highlights both the compliance challenge and the legal importance of accurately tracking loan modifications in servicing transfers.

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

Equity, Schmequity

On July 28, 2015, the CFPB filed Consent Orders against payment processor Paymap Inc. and loan servicer LoanCare, LLC for allegedly deceptive ads about an "Equity Accelerator" electronic mortgage payment program. The CFPB claims the ads "promised tens of thousands of dollars in interest savings from more frequent mortgage payments" that did not materialize for customers. Under the orders, the processer is returning $33.4 million in fees and paying a $5 million civil penalty to the CFPB, and the servicer will pay a $100,000 civil penalty.

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

PMI, Please

The CFPB released a new bulletin on private mortgage insurance cancellation and termination. The bulletin delves into various technical requirements of the Homeowners Protection Act (e.g., cancellation, automatic termination, final termination, and refunds) and "describes examples from CFPB's supervisory experience of PMI cancellation and termination procedures that violate the HPA or create a substantial risk of noncompliance." The bulletin also discusses the interaction between HPA PMI cancellation and termination requirements and the PMI cancellation and termination requirements under Fannie Mae or Freddie Mac guidelines. The CFPB is quick to point out, however, that the bulletin does not impose any new regulatory requirements as it relates to PMI.

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

F-D-C-P-A That

The CFPB weighed in on whether a trustee foreclosing on a California home qualifies as a "debt collector" under the federal Fair Debt Collection Practices Act. In *Ho v. ReconTrust Co., N.A.* (9th Cir. Aug. 7, 2015), the CFPB filed an Amicus Curiae brief arguing that a trustee

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engages in debt collection if it sends consumers notices stating that nonjudicial foreclosure will occur unless the borrowers make payment on their debt. That is, of course, standard practice in nonjudicial foreclosure states and is frequently required by state law. The topic is of interest not only to entities that act as trustees under deeds of trust, but also to lenders, servicers, and other entities involved in nonjudicial foreclosure. Among other things, grafting FDCPA requirements onto nonjudicial foreclosure sets up procedural conflicts with state foreclosure law every step of the way.

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

OPERATIONS

More Capital on the Horizon

On June 8, 2015, the Basel Committee on Banking Supervision, of which the Federal Reserve Board is a member, released a consultation paper outlining two potential approaches for banks to maintain higher capital levels to guard against rising interest rates. The first approach would call for the creation of a uniformly applied measure for the capital banks needed to protect against interest rate risks. The second approach would require greater disclosures from banks regarding their interest rate risk profile. According to the BCBS, its review of the regulatory treatment of interest rate risk is motivated by two objectives: (1) to help ensure that banks have appropriate capital to cover potential losses from exposures to changes in interest rates; and (2) to limit capital arbitrage between the trading book and the banking book, as well as between banking book portfolios that are subject to different accounting treatments. Comments on the BCBS consultation paper were due by September 11, 2015.

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

New Volcker FAQs Issued

On June 12, 2015, staff at the Federal Reserve Board, the OCC, the FDIC, the SEC, and the CFTC added two Frequently Asked Questions to their list of FAQs related to the Volcker Rule. The first new FAQ clarified the circumstances under which a "foreign public fund," which under certain circumstances may be excluded from the definition of "covered fund," could be deemed to be a banking entity, and thus subject to the Volcker Rule's restrictions on proprietary trading and covered fund activities. The second new FAQ clarified the scope of the exclusion from the definition of "covered fund" for certain joint ventures between a banking entity or one of its affiliates and one or more unaffiliated persons.

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

Standards for Diversity

On June 10, 2015, the CFPB, the Federal Reserve Board, the OCC, the FDIC, the National Credit Union Administration, and the SEC jointly published a final Interagency Policy Statement outlining standards for assessing the diversity policies and practices of the entities regulated by each Agency. The policy statement, which was required by Section 342 of the Dodd-Frank Act, sets forth standards for assessing the "diversity policies and practices of entities regulated by the agency." The final standards cover four key areas: organizational commitment to diversity and inclusion; workforce profile and employment practices; procurement and business practices/supplier diversity; and practices to promote transparency of organizational diversity and inclusion. Compliance is voluntary, although there's a "model assessment" a regulated entity may use to voluntarily disclose to the appropriate Agency or to the public the entity's efforts in promoting diversity.

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

GSIB Surcharge

On July 20, 2015, the Federal Reserve Board issued a final rule requiring the largest U.S. bank holding companies to further strengthen their capital positions. Under the final rule, these bank holding companies, so-called global systemically important bank holding companies (GSIB), will be required to "hold additional capital to increase its resiliency in light of the greater threat it poses" to U.S. financial stability. The final rule establishes the criteria to identify a GSIB, as well as a method to calculate a risk-based capital surcharge calibrated to each firm's overall systemic risk. It is expected that there will be eight U.S. GSIBs. Estimated surcharges for the eight GSIBs range from 1.0 to 4.5 % of each firm's total risk-weighted assets. The surcharges will be phased in beginning on January 1, 2016, becoming fully effective on January 1, 2019.

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

Phased Approach for GE Capital

On July 20, 2015, the Federal Reserve Board issued a final order that establishes enhanced prudential standards for General Electric Capital Corporation (GECC). GECC is a nonbank financial company designated by the Financial Stability Oversight Council for supervision by the Federal Reserve Board. The enhanced prudential standards that would be applied to GECC are similar to those that apply to large bank holding companies, and include capital requirements, capital-planning

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and stress-testing requirements, liquidity requirements, and risk-management and risk-committee requirements. The final order acknowledges that GECC's parent company, General Electric, has announced a plan to substantially shrink GECC's footprint, retain only those business lines that support GE's core industrial businesses, and seek de-designation by FSOC of GECC. As such, the final order provides for a phased approach to the enhanced prudential standards. In the first phase, effective January 1, 2016, GECC must comply with risk-based and leverage capital requirements, the liquidity coverage ratio rule, and related reporting requirements. In the second phase, if GECC remains designated by the FSOC prior to January 1, 2018, GECC would be required to comply with liquidity risk-management, general risk-management, capital-planning, and stress-testing requirements, as well as restrictions on intercompany transactions.

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PREEMPTION

Money Can't Buy You Preemption

A debt collector who purchases debt from a national bank cannot get the benefit of NBA preemption according to the Second Circuit. *Madden v. Midland Funding, LLC.* 786 F.3d 246 (2d Cir. 2015). The court looked to OCC guidance indicating that third-party debt buyers are not agents or subsidiaries of a national bank, and distinguished cases in which the national bank retained some interest in the debt. The court reasoned that debt purchasers are not exercising the powers of a national bank, so they were not entitled to NBA protection.

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

If It Walks Like a Duck

A federal court in New York found that a New York City Local Law called the Responsible Banking Act was preempted by the NBA as well as New York banking laws. *New York Bankers Ass'n v. City of New York*, No. 15-cv-04001 (KPF), 2015 WL 4726880 (S.D.N.Y. Aug. 7, 2015). The law set up a Board that was authorized to collect enormous amounts of data from deposit banks, publish the data, and issue an annual report evaluating bank performance, identifying areas of improvement for each bank and banks that did not provide the requested data. Despite the City's assertions that the law did not impose any obligations on federal and state chartered entities, the court looked to the purpose of the law in concluding that the intent was to impose the City's views on core banking functions on federal and state chartered institutions. The Court therefore concluded the law conflicted with the visitorial powers granted exclusively to federal bank regulators in the NBA and that the invasive and burdensome data requirements were preempted as well.

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

Clear as Mud

The preemption provision in FCRA exempts section 54A(a) of the Massachusetts Credit Reporting Act (MCRA). That section imposes responsibilities on furnishers of information to credit reporting agencies. However, MCRA section 54A(g) creates a private right of action for violations of section 54A(a) and that section is not exempted from FCRA preemption. Courts in Massachusetts have split on whether consumers can sue for violations of the furnisher obligations in section 54A(a) or whether Congress intended to leave enforcement to the Attorney General. Recently, a federal court in Massachusetts concluded private actions were preempted by FCRA, dismissing an MCRA claim against a furnisher. *Kuppserstein v. Bank of America N.A.*, No. 14-13766-GAO, 2015 WL 4601704 (D. Mass. July 31, 2015). The court reasoned that the Attorney General has a general mandate to protect the public interest and agreed with other courts finding Congress did not intend to allow a private right of action.

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

PRIVACY REPORT

Senate (Again) Stalls on Cyber Information Sharing Bill

Since 2012, the Senate has considered cybersecurity legislation without much success. This year, there has been intense focus on the Cyber Security Information Sharing Act (S. 754). Among other things, S. 754 would provide liability protection for companies that share cyber threat information with third parties, including the federal government. There was hope that the Senate would consider and pass the bill before heading home for the August recess, but Majority Leader Mitch McConnell (R-KY) was forced to shelve the bill until September. McConnell and Minority Leader Harry Reid (D-NV), however, did reach an agreement on the number of potential amendments that will be debated on the bill (10 Republican amendments and 11 Democrat amendments). Anything is far from certain when it comes to Congress, but the financial industry is pushing for the Senate to consider and pass the bill this year.

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

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FFIEC Unveils Cyber Assessment Tool

The Federal Financial Institutions Examination Council released its much anticipated Cybersecurity Assessment Tool. The tool, which has two parts (Inherent Risk Profile and Cybersecurity Maturity), is intended to help financial institutions of all sizes identify their cybersecurity risks and assess their cybersecurity preparedness. The Inherent Risk Profile will help management assess the institution's inherent risk in five areas—technologies and connection types, delivery channels, online/mobile products and technology services, organizational characteristics, and external threat. The Cybersecurity Maturity aspect will help management evaluate the institution's maturity in five domains—cyber risk management and oversight, threat intelligence and collaboration, cybersecurity controls, external dependency management, and cyber incident management and resilience. By reviewing both the institution's inherent risk profile and maturity levels across the domains, management can determine whether its maturity levels are appropriate in relation to its risk. The FFIEC also made a number of additional resources available with the tool, including a User's Guide and a presentation explaining the tool.

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

FRB to Use Cyber Assessment Tool in Examinations

Following the FFIEC release of the Cybersecurity Assessment Tool, on July 2, 2015, the Federal Reserve Board announced its plans to use the Cyber Assessment Tool in examinations. Beginning in late 2015 or early 2016, the Federal Reserve Board expects to use the Tool "as part of [its] examination process when evaluating financial institutions' cybersecurity preparedness in information technology and safety and soundness examinations and inspections." Based on industry feedback from a public comment process related to the Tool, the Board indicated that it will work with the FFIEC "to minimize burden for financial institutions with low cybersecurity risk profiles and, potentially, supplement expectations for financial institutions with significant cybersecurity risk profiles."

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

You Can Do Better

The GAO released a report on July 2, 2015, suggesting that bank regulators need to do a better job of collecting data on security incidents from the institutions that they regulate. The report indicates that some examiners may not have sufficient IT expertise, which impacts examinations of smaller institutions. According to the GAO, the lack of expertise makes it difficult for regulators to assess the adequacy of institutions' information security practices. The GAO indicated that regulators are failing to routinely collect IT security incident reports, which limits the ability of regulators to "identify and analyze trends across institutions and use that analysis to better target areas for review at institutions."

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

FTC Proposes GLBA Relief for Auto Dealers

On June 19, 2015, the FTC proposed revisions to its Gramm-Leach-Bliley Act privacy rules to allow auto dealers that finance car purchases or provide car leases to provide consumers with their annual privacy policies online in certain instances, similar to a recent corresponding change by the CFPB. Under the proposal, an auto dealer would be eligible to use an alternative, online delivery method for annual privacy notices if it meets the following conditions: (1) it does not share customer information with nonaffiliated third parties except under GLBA exceptions; (2) it does not include an FCRA affiliate sharing opt out in its privacy policy; (3) if it provides an FCRA affiliate marketing opt out, it satisfies the FCRA requirements with a separate notice, outside of its annual privacy notice; (4) it has not changed the content of its privacy notice since it last provided an annual notice to its customers; and (5) it uses the FTC's Model Privacy Notice.

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

Android Plaintiffs Learn a Lesson in Standing

After three years of litigation, and four motions to dismiss, Android users, in a long-running dispute with Google regarding the alleged sharing of personal information with app developers without permission, found that they had pleaded themselves out of the case. In granting Google's motion to dismiss with prejudice, the court explained, "Plaintiffs' only alleged injury-in-fact was the depletion of battery and bandwidth resulting from systemic, repeated transmission of personal information from Android devices to third-party developers," but the plaintiffs did not allege this harm in their amended complaint. *In re Google, Inc. Privacy Policy Litig.*, No. 5:12-CV-001382-PSG, 2015 WL 4317479, at *1 (N.D. Cal. July 15, 2015). As a result, the plaintiffs pled no injury, economic or otherwise, and the complaint was dismissed.

For more information, contact Rebekah Kaufman at rkaufman@mofo.com.

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Seventh Circuit Sees Harm (Almost) Everywhere!

In contrast to the Android plaintiffs, plaintiffs suing Neiman Marcus relating to its 2013 payment card breach won a significant victory at the Seventh Circuit. The court ruled that the plaintiffs satisfied the Article III standing requirements by alleging that they faced two imminent injuries as a result of the breach: "an increased risk of future fraudulent charges and greater susceptibility to identity theft." *Remijas v. Neiman Marcus Grp, LLC*, 794 F.3d 688, 692 (7th Cir. 2015). The court reasoned that the plaintiffs had shown a substantial risk of harm from the breach ("Why else would hackers break into a store's database and steal consumers' private information?"). The court further found that the offer of credit monitoring and identity-theft protection by Neiman was itself evidence of harm, apparently concluding that the products are offered because of a risk of injury to consumers.

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

The FTC Wins Battle Over Unfairness

The FTC won a significant victory in one of two closely watched cases challenging the FTC's authority to use Section 5 of the FTC Act to police data security practices. *FTC v. Wyndham Worldwide Corp.*, No. 14-3514, 2015 WL 4998121 (3d Cir. Aug. 24, 2015). The Third Circuit ruled that the FTC was acting within its jurisdiction when it brought an enforcement action alleging unfair and deceptive practices against a hotel chain that suffered a series of breaches in 2008 and 2009. The court concluded that the FTC's authority to police unfairness was broad, and that there was no reason it could not encompass data security practices. Furthermore, the court rejected the argument that the government failed to provide fair notice of what Section 5 requires to avoid unfair data security practices because the hotel chain was on notice that its conduct *could* fall within the unfairness prong of Section 5.

For more information, contact Andrew Serwin at aserwin@mofo.com.

AGs On the Prowl

State AGs have had an active 2015 thus far on the data breach front. Following the rash of high-profile breaches of the past several years, state AGs (and large multistate groups of AGs) have been conducting numerous investigations of the data security practices of companies. And now settlements are beginning to percolate.
For example, in May, Vermont AG William Sorrell filed two settlements in Vermont court. One was with a hotel in California that allegedly failed to provide timely notice to consumers after a breach. The hotel reportedly was alerted by its customers in July 2013 that they were seeing unauthorized charges on their credit cards; the hotel sent notice to Vermont residents of a security incident almost six months later. The Vermont AG also reached a settlement with Auburn University regarding a separate breach. As part of these settlements, both entities agreed to implement policies and procedures to ensure future compliance with the Vermont breach law, but neither entity paid a monetary penalty.

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

Connecticut Requires Free Credit Monitoring

For nearly a decade, the Connecticut AG has requested that companies provide at least two years of free credit monitoring to Connecticut residents following security breaches. On June 11, 2015, Connecticut Governor Malloy signed into law SB 949 that will require companies to offer free credit monitoring to Connecticut residents (joining California as the only other state that has a credit monitoring requirement). Specifically, effective October 1, 2015, SB 949 will require a company that experiences a noticeable breach involving a Connecticut resident's name and Social Security number (SSN) to offer that individual, at no cost, "appropriate identity theft prevention services and, if applicable, identity theft mitigation services" for a period of not less than one year. The Connecticut AG issued a press release highlighting his belief that his enforcement authority allows him "to seek more than one year's protection – and to seek broader kinds of protection – where circumstances warrant."

For more information, read our MoFo Privacy Minute or contact Nathan Taylor at ndtaylor@mofo.com.

Delaware is All About the Privacy

On August 7, 2015, Delaware Governor Markell signed into law a package of four bills relating to privacy. One bill, which is substantially similar to the California Online Privacy Protection Act, will require a company that collects information from consumers online to post a privacy policy on its website. Companies that maintain website privacy policies will now need to remain cognizant of the fact that the Delaware AG (and not just the California AG) may issue guidance interpreting the scope of website privacy policy requirements. Another bill in the package is designed to protect employees from having to disclose information to their employers that would give the employer access to personal social media accounts. The other two bills signed into law would limit the sale and use of student data and would bar posting certain information

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about a victim of a crime or related individuals for purpose of inciting violence.

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

Can You Recognize My Face?

On July 28, 2015, the National Telecommunications & Information Administration convened another meeting of the Multistakeholder Process to Develop a Consumer Data Privacy Code of Conduct Concerning Facial Recognition Technology. The stakeholders currently have a draft set of guidelines for the collection and use of facial recognition technology that would, among other things, require notice regarding the use of the technology and meaningful control for users over the sharing of facial recognition data. The discussion draft of best practices also emphasizes transparency and data security. At the meeting, privacy groups pushed for an opt-in model for the use of facial recognition technology. Business groups are reported to instead support an opt-out regime.

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

FTC Closes a Data Security Case!

The FTC recently issued a closing letter regarding its investigation of Morgan Stanley Smith Barney's data security practices in relation to the alleged misappropriation of client data by a company employee. The FTC noted that Morgan Stanley had established and implemented comprehensive policies designed to protect against insider theft of personal information, and that the employee was able to access the information in spite of the controls because a control relating to a small set of reports was "improperly configured." This apparent error was fixed promptly fixed it came to the company's attention. The closing letter suggests that, at least with respect to smaller incidents, being able to demonstrate to the FTC that they were one-off events that occurred in spite of security measures in place can help avoid an enforcement action.

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

ARBITRATION

"To Stay or Not To Stay"

That was the question the Second Circuit considered in holding that the Federal Arbitration Action requires a district court to stay proceedings rather than dismiss the case after granting a motion to compel arbitration if one of the parties requests it. *Katz v. Cellco Partnership*, No. 14-138, __ F.3d __, 2015 WL 4528658 (2nd Cir. July 28, 2015). The FAA provides that the court "shall" stay the case pending arbitration of the claims if requested by one of the parties. In addition to this plain language, the Court reasoned that Congress did not intend to create an automatic right to appeal the grant of a motion to arbitrate that would result from dismissal of the case. Rather, the FAA authorizes an immediate appeal only if a court denies a motion to compel arbitration, which is consistent with the policy of encouraging arbitration reflected in the FAA.

For more information, contact Michael Miller at mbmiller@mofo.com.

As Sure as Night Follows Day

As expected, the CFPB has decided to go ahead with rulemaking to ban or limit use of arbitration agreements in contracts for consumer financial products. CFPB Director Richard Cordray confirmed what CFPB watchers had expected in testimony before the Senate Banking Committee in July. The Director did not provide any details and instead just explained that the CFPB would be moving ahead with rulemaking and would convene a small business review panel in deciding what steps to take.

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

No Forum, No Arbitration

What if the parties agree to arbitration, but their chosen forum won't arbitrate their claim? A federal court in New York decided that an arbitration agreement can't be enforced if the chosen forum is no longer available. *Moss v. BMO Harris Bank, N.A.*, No. 13-CV-5438 (JFB) (GRB), 2015 WL 4380841 (E.D.N.Y. July 16, 2015). Recognizing that courts had split on the issue, the court found that the parties' failure to agree to arbitrate before a different forum was dispositive. Although the FAA permits courts to appoint a substitute arbitrator in certain circumstances, it did not authorize substitution where a chosen forum became unavailable.

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

If At First You Don't Succeed

The Fourth Circuit held recently that a trial court erred in refusing to consider a renewed motion to compel arbitration. *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707 (4th Cir. 2015). Defendant's original motion to compel arbitration was denied on evidentiary grounds because defendants had failed to authenticate the loan agreement containing an arbitration agreement. Defendants then filed a renewed motion along with declarations to authenticate the loan agreements. The court denied the motion on grounds that defendants had not met the requirements for reconsideration and that the decision on the first motion was law of the case. Defendants appealed, and the Fourth Circuit reversed, finding that the FAA does not limit parties to one motion to compel arbitration and

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the renewed motion raised different issues than the original motion, so law of the case did not apply.

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TCPA

More Clarity or Not?

On July 10, 2015, in response to two dozen petitions from businesses, attorneys general, and consumers, the Federal Communications Commission released a 140-page Declaratory Ruling and Order on the scope of TCPA liability. Among other issues, the FCC clarified that, under the TCPA, companies must: (1) refrain from telemarketing with "autodialers" that have the *potential* to dial or random or sequential numbers; (2) honor a customer's request, made through any reasonable means, to stop receiving calls; and (3) make only one call to a "wrong number," regardless of whether someone previously consented to calls at that number. Trade associations and companies have filed multiple petitions for review in courts of appeals challenging the order.

For more information, read our Client Alert or contact Tiffany Cheung at tcheung@mofo.com.

Give a Number, Get a Call

The Eleventh and Sixth Circuits recently confirmed that providing one's cellphone number to a company constitutes express consent to receive autodialed calls (or text messages) from that company under the TCPA.

The Eleventh Circuit held that the defendant did not violate the TCPA when it sent the plaintiff two text messages years after his last blood donation, as the plaintiff had previously provided his cellphone number to DCI. The panel rejected the plaintiff's position that prior express consent required something more: "Under [the TCPA] and the FCC's interpretation of prior express consent, [the plaintiff's] provision of his cell phone number constituted his express consent to be contacted." *Murphy v. DCI Biologicals Orlando LLC*, No. 14-10414, 2015 WL 4940800, at *4 (11th Cir. Aug. 20, 2015). The Sixth Circuit reached a similar conclusion, holding that a debtor who provided his cellphone number to a creditor expressly consented to receiving calls. *Hill v. Homeward Residential, Inc.*, No. 14-4168, 2015 WL 4978464 (6th Cir. Aug. 21, 2015).

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