FINANCIAL SERVICES REPORT

Quarterly News, Summer 2020

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MOFO METRICS

71	Percentage of Americans who believe Alexander Hamilton was a U.S. President
60	Percentage of Americans who identified Franklin Pierce and Chester Arthur as U.S. Presidents
20	Percentage of Americans who can recall more than the last eight or nine U.S. Presidents in order
25	Percentage of Americans who can recall more than the first five presidents in order
33	Percentage of Americans who identified Thomas Moore as a U.S. President
20	Percentage of college students who remembered President Lyndon Johnson and his ordinal position
3	Number of first five U.S. Presidents who died on July 4

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EDITOR'S NOTE

Is it just us or does March 4—the date of our last issue—feel like a million years ago? Like you, and not necessarily in this order, we have been: doing our work; keeping up with COVID-19-related laws, guidance, and regulations; thinking hard about racial injustice; making sure our colleagues are safe and supported; welcoming home kids who thought they'd be out exploring the world; homeschooling the kids we thought would be at school; trying to keep up with family and friends by Zoom; and wondering what comes next. It's a lot. We feel it, and we know you feel it too.

So let's get right to it. In case you've missed anything, we've gathered in one place all of the COVID-19-related and other updates since our last issue in short, digestible bites, with links in case you want to read further. We've covered developments in the Beltway, Operations, the Bureau, Mortgage, Privacy, TCPA, arbitration, and more.

But wait, there's more! Please visit our Financial Services COVID-19 site, where we have gathered regulatory guidance for financial services providers.

Until our next issue, stay safe and take care.

BELTWAY

COVID-19, Part 1 – Access to Credit

In a Joint Statement, the Federal Reserve, OCC, CFPB, FDIC, and NCUA encourage financial institutions to offer responsible small dollar loans to consumers and small businesses impacted by COVID-19. The agencies encouraged financial institutions to consult with their primary federal regulator about small dollar loan products that the financial institution offers or plans to offer to consumers or small businesses and to consider workout strategies for borrowers who experience unexpected circumstances and are unable to repay. The agencies also released Lending Principles describing characteristics of responsible small dollar lending and core lending principles, including reasonable loan policies and risk management practices and controls. The Principles include guidance on loan structures, pricing, marketing, underwriting, and servicing. For example, the agencies suggested restructuring single-payment loans or open-end credit into installment loans as a reasonable workout strategy for struggling borrowers.

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

COVID-19, Part 2 – Keeping Up with the PPP

The SBA issued a series of interim final rules, including the interim Final Rules issued on June 1, 2020 seeking to clarify guidance on applying for PPP loans and the requirements for loan forgiveness. The SBA also issued FAQs to provide additional guidance to borrowers and answer lender questions concerning the PPP. According to the SBA, the FAQs will be updated on a regular basis, and borrowers and lenders may rely on the guidance as the SBA's interpretation of the CARES Act and the interim final rules. The FDIC also issued FAQs in connection with the PPP. They address issues such as liquidity constraints, legal lending limits, and regulatory capital treatment of PPP loans.

For more information, please contact Tina Reynolds at treynolds@mofo.com or read our recent blog posts on the Congress' modifications to the PPP, the SBA's implementation of the modifications to the PPP, and the SBA's new PPP rules on loan forgiveness and loan review procedures.

More on Madden

The OCC and the FDIC finalized rules that reaffirm the "valid when made" doctrine applicable to loans originated by a national bank and state-chartered banks. The Final Rules are intended to clarify that the permissible interest rate on a loan is determined at the time the loan is made and is not impacted by a subsequent transfer from a chartered entity to a non-chartered entity. Both agencies cited the legal uncertainty caused by the Second Circuit's decision in *Madden v. Midland Funding, LLC* to support the need for the rule. As the OCC explained, without clarification, *Madden* could "disrupt banks' ability to serve consumers, businesses and the broader economy efficiently and effectively."

For more information, please contact Crystal Kaldjob at ckaldjob@mofo.com or read our Client Alert regarding the OCC's final rule and our Client Alert regarding the FDIC's final rule.

BUREAU

President Can Say "You're Fired" to CFPB Director

The Supreme Court issued an opinion in *Seila Law LLC v. CFPB*, holding by a 5–4 majority along presumptive ideological lines that the CFPB's leadership by a single individual director, removable only for inefficiency, neglect, or malfeasance, violates the separation of powers. With a 7–2 majority, the Court found that the Dodd-Frank Act's removal protection provision is severable from other provisions of the Dodd-Frank Act that establish the CFPB. As a result, the CFPB remains intact and continues to receive funding directly from the Federal Reserve instead of through the Congressional appropriations process, but the director of the CFPB can now be removed by the President "at-will."

In response, the CFPB ratified a number of its previous actions. The CFPB explained that it was taking this action to "resolve any possible uncertainty" and "out of an abundance of caution."

For more information, please contact Joe Palmore at jpalmore@mofo.com or read our Client Alert.

We Can See (More) Clearly Now, the CFPB Hopes

The Bureau announced the launch of a Pilot Advisory Opinion Program and issued a Procedural Rule with details about the Program. Similar to SEC "no action" letters, the Bureau intends its advisory opinions to provide guidance to address uncertainty regarding existing regulations and to provide further guidance to regulated entities. The Bureau also announced that it is seeking comments on the new proposed program it intends to implement at the conclusion of the Pilot Program. The advisory opinion programs are one of the three steps announced by the CFPB to advance its strategy of preventing consumer harm. The two other steps include submitting proposed legislative language to Congress that would authorize the CFPB to award whistleblowers who report violations of Federal consumer financial law, and reissuing an amended responsible business conduct bulletin.

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

Same Alleged Story, Different Bank

The CFPB sued a national bank, alleging that the bank opened customer accounts without authorization. The CFPB alleges that bank employees opened fake accounts for customers in order to hit aggressive sales targets and that this practice had been ongoing since at least 2007 and up through 2016. In countering the lawsuit, the bank issued a statement explaining that it became aware of this issue years ago and has already taken steps to address it, such as by reimbursing customers.

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

COVID-19, Part 3 – CFPB Facilitates CARES Act Payments to Individuals

The CFPB has loosened some restrictions to make it easier to distribute COVID-19-related relief to consumers. Regulation E's "compulsory use" prohibition generally forbids government agencies from requiring consumers to establish accounts with a particular financial institution to receive a government benefit. This can make it difficult to distribute funds to consumers who do not have direct deposit with an institution already. But on April 13, 2020, the Bureau issued an interpretive rule to agencies distributing COVID-19-related relief, stating that, under certain circumstances, certain pandemic relief payments will not be considered "government benefits" for purposes of Regulation E, meaning that the payments will not be subject to the compulsory use prohibition. The Treasury Department subsequently entered into contracts with two prepaid card issuers to issue prepaid cards with COVID-19 relief payments to individuals who do not have bank account information on file with the IRS for direct deposit.

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

COVID-19, Part 4 – Loosening the Reins

In a further effort to assist consumers in the face of the COVID-19 pandemic, the CFPB issued three guidance documents highlighting regulatory flexibility and reminding financial institutions of the flexibility already inherent in certain regulations. The first document informs credit card issuers and other open-end creditors that the CFPB will provide supervision and enforcement flexibility during the pandemic with respect to the timeframe for a creditor's completion of billing error investigations under Regulation Z. The CFPB also issued FAQs on existing flexibility in Regulation E and Regulation DD for providers of checking, savings, or prepaid accounts, noting that providers can change account terms without advance notice to consumers where the change in terms is clearly favorable to the consumer. Third, the CFPB put forth FAQs on existing flexibility for open-end credit in Regulation Z, such as that the advance notice of a change in terms is not required under certain circumstances.

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

CFPB Seeks Comments to Aid Taskforce

The CFPB issued a Request for Information seeking recommendations on harmonizing, modernizing, and updating federal consumer financial laws to assist the CFPB's Taskforce on Consumer Financial Law. The CFPB's five-member Taskforce was created in January 2020 to examine the existing legal and regulatory financial services environment and make recommendations to the CFPB on ways to improve consumer financial laws and regulations, including resolving inconsistencies, reducing regulatory burdens, and improving consumer understanding of markets and products. The RFI is broad and open ended, but it includes specific questions related to access to consumer financial services, protection and use of consumer data, modifications to CFPB regulations, federal and state coordination, and overall improvements to consumer protect

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

COVID-19, Part 5 – CFPB Loosens E-Sign Consent Requirements

The CFPB granted regulatory flexibility in connection with credit reporting and certain E-Sign consent requirements. In one policy statement, the CFPB indicated that due to reduced staffing at many lenders and consumer reporting agencies, it will not enforce timing requirements for investigating disputes as long as the institution is making good-faith efforts to investigate disputes as quickly as possible. In another statement, the CFPB indicated that in light of high call volumes and reduced staffing for many issuers, the CFPB will provide regulatory flexibility in connection with issuers not obtaining E-Sign consent in connection with certain types of oral telephone conversations that trigger written disclosure requirements under Regulation Z.

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

New Rule Amends Remittance Transfer Rule

The CFPB issued a Final Rule amending the Remittance Transfer Rule. The Final Rule increases the safe harbor threshold for persons making remittance transfers in the normal course of business from 100 transfers to 500 transfers annually. It also creates two new exceptions that are aimed at addressing the upcoming expiration of a temporary statutory exception that allows insured institutions to disclose estimates of the exchange rate and

covered third-party fees instead of the exact amounts. The two new exceptions will permit insured institutions to estimate the exchange rate and covered third-party fees if certain conditions are met.

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

COVID-19, Part 6 – There's Still Time for Time-Barred Debt Comments (Again)

In light of the COVID-19 pandemic, the CFPB has once again extended the comment period for comments on its Supplemental Notice of Proposed Rulemaking on time-barred debt disclosures. Comments are now due to the CFPB by August 4, 2020. The Proposed Rule would require debt collectors covered by the FDCPA to provide a disclosure to consumers when using non-litigation means of collecting on a debt that the debt collector knows or should know is time-barred under applicable statutes of limitations. The CFPB has indicated that it will "carefully consider all comments received" from interested parties.

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

MOBILE & EMERGING PAYMENTS

Who Needs a FinTech Charter . . .

The OCC continues to assert its authority to issue bank charters to FinTechs, even if they do not take deposits. The OCC filed its opening brief in an appeal of the ruling of a federal court in New York finding otherwise in a suit brought by NY DFS. The new acting Comptroller of the Currency, Brian Brooks, released an introductory statement defending the OCC's authority to issue FinTech charters and promising to "support banks' use of new technology, products, and models that safely and fairly accelerate the velocity of money, create greater financial inclusion, and empower consumers and businesses with more control over their financial affairs."

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

. . . When FinTechs Can Apply for Traditional Charters?

FinTechs are not holding their breath on the outcome of the OCC's legal battle. The FDIC approved deposit insurance applications for two FinTechs in March, and a third FinTech has applied for a de novo national bank charter with the OCC. FinTechs continue to show interest in taking deposits as industrial loan companies ("ILCs"), a state charter that subjects the bank to regulation by the FDIC and the applicable state banking agency. On March 17, 2020, the FDIC released a Notice of Proposed Rulemaking regarding ILCs. According to the FDIC's Fact Sheet, the Proposed Rule is intended to "[e]nsure that the parent of [an ILC] would serve as the source of strength for the [ILC] . . . and provide transparency to future applicants and the broader public as to what the FDIC requires of parent companies of [ILCs]."

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

Changing with the Times

The OCC released a Notice of Proposed Rulemaking to update or eliminate "outdated regulatory requirements," as well as an Advanced Notice of Proposed Rulemaking to solicit comments on digital innovation in the banking industry. Among other changes, the NPR would codify a number of interpretations the OCC has made over the years, giving more flexibility to permissible activities of national banks and the types of authorized transactions. The ANPR asks a number of questions regarding the scope and interpretation of the OCC's regulations relating to national bank electronic activities and operations.

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

MORTGAGE & FAIR LENDING

COVID-19, Part 7 – Forbear With Us!

After the COVID-19 pandemic hit, federal agencies and many states and localities stepped in quickly to provide foreclosure and eviction relief. The approaches to providing this relief have varied greatly, creating significant operational challenges for servicers operating in multiple jurisdictions. HUD temporarily suspended foreclosures, and FHFA directed Fannie Mae and Freddie Mac to do the same. Multiple federal agencies issued an Interagency Statement encouraging financial institutions to work with borrowers on loan modifications for all loans for customers impacted by COVID-19.

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

COVID-19, Part 8 – Work with Me

Regulators have also stepped in to encourage mortgage servicers to work with homeowners affected by COVID-19. Multiple federal agencies issued a Joint Policy Statement to provide regulatory flexibility. They explained that the guidance is meant to facilitate servicers' ability to place consumers in short-term payment forbearance programs, such as the one established by the CARES Act. The CFPB and Conference of State Bank Supervisors issued further joint guidance to mortgage servicers to assist in complying with the CARES Act forbearance provisions. Servicers of federally-backed mortgages must grant forbearance to borrowers with pandemic-related hardships that may last as long as two consecutive 180-day periods. Additional interest, fees, or penalties beyond the amounts scheduled

or calculated should also be waived with no negative impact to the borrower's mortgage contract during the forbearance.

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

At Your Service

The CFPB issued a Bulletin and Guidance for mortgage servicers handling servicing transfers. The Bulletin and Guidance provide specific examples of practices that servicers "may consider as contributing to compliance," including: (1) developing a robust servicing transfer plan; (2) performing quality control after transfer; (3) determining servicing responsibilities for legacy accounts; (4) conducting a post-transfer review or debrief; (5) monitoring consumer complaints and loss mitigation performance metrics, including post-transfer; and (6) identifying any loans in default, active foreclosure, forbearance, and/or bankruptcy. The Bureau noted that this Guidance was in the works well before the pandemic. The Bureau further explained that it "recognize[es] the particular challenges" the pandemic may cause, so it intends "to consider such challenges, including operational and time constraints related to the transfer, and to be sensitive to good-faith efforts demonstrably designed to transfer the servicing without adverse impact to consumers." The Bureau will, however, "correct[] deficiencies and ensur[e] appropriate remediation for consumers" if needed.

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

OCC Makes First Move on CRA Revamp Creating Regulatory Split

The OCC published a Final Rule intended to modernize the rules implementing the Community Reinvestment Act (CRA). Because neither the FDIC nor the FRB joined the overhaul, the new rule will apply only to entities chartered by the OCC. The CRA was passed to combat redlining practices and requires banks to invest in low- and moderate-income populations in geographic proximity to the bank. The revamp is intended to address concerns that the CRA is outdated in light of the increase in online banking. Community groups have already expressed their doubts about the new rule. According to the OCC, though, the Final Rule will provide banks with an incentive to invest in low- and moderate-income communities by achieving specific performance goals that account for the unique characteristics of the populations served by each bank. At a high level, the Final Rule: (1) establishes clear criteria for the types of activities that qualify for CRA credit; (2) expands the locations where CRA activity counts; (3) establishes new quantifiable CRA performance standards based on the dollar value of legally binding commitments to qualifying activity; (4) requires banks to collect and maintain, but not report, data related to retail domestic deposits; and (5) defers numerical targets until the OCC collects more data.

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

"X" Marks the Servicing Spot

The Bureau announced a Consent Order with a major mortgage loan servicer for alleged violations of RESPA, Regulation X, and the CFPA. The Bureau claims that the servicer initiated, and in some cases completed, foreclosures against mortgage borrowers who were entitled to protection from foreclosure, and failed to timely send required notices. The Order requires the servicer to pay $775,000 in monetary relief to consumers, waive $500,000 in borrower deficiencies, pay a $250,000 civil money penalty, and implement new compliance procedures.

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

Report Is In: Innovation at the Forefront of the Bureau's Priorities

In the Bureau's 2019 Fair Lending Report, Director Kathleen Kraninger and OFLEO Director Patrice Ficklin noted the Bureau's focus on innovation and exploring new ways to reach and serve the underbanked. Among other things, the Directors highlighted the Revised No-Action Letter Policy and the Bureau's potential use of "Tech Sprints"—the gathering of regulators, technologists, financial institutions, and subject matter experts from key stakeholders to encourage regulatory innovation. The report indicates, though, that innovation will not occur without oversight. The report also provides an update on the Bureau's first No-Action Letter, noting that the Bureau continues to monitor the company's use of alternative credit data.

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

Dirty Deeds

The Bureau recently announced a Consent Order resolving alleged FCRA violations by companies involved in issuing contracts for mortgage deeds. The defendant allegedly acquired foreclosed properties in bulk at auction from entities such as Fannie Mae and Freddie Mac and resold them to individual buyers who were unable to obtain conventional mortgage financing. The other defendants allegedly serviced the contracts as the primary defendant's agents. The Bureau alleged that consumers who called defendants to complain about consumer reporting errors were incorrectly told that they had to file a dispute with the consumer reporting agency. The Bureau also alleged that

the defendants' policies, procedures, and internal controls were inadequate. Under the settlement, the defendants agreed to injunctive relief and payment of a $25,000 CMP by the primary defendant and a $10,000 CMP by the alleged servicer defendants.

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

Smaller FIs Get Permanent HMDA Reprieve

The Bureau issued a new Final Rule permanently raising loan-volume thresholds for HMDA reporting. The new Final Rule raises the Reg. C reporting threshold from 25 to 100 closed-end mortgages. Institutions originating fewer than 100 closed-end mortgages in either of the two preceding years will not have to report such data as of July 1, 2020. Reporting for open-end lines of credit also will get a permanent increase from 100 to 200 once the current temporary threshold (500 open-end lines of credit) expires on January 1, 2022.

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

Take Two on Challenge to Single Director

Following the Supreme Court's *Seila Law* decision, the Court is now set to take up a similar challenge to the Federal Housing Finance Agency. In *Collins et al. v. Mnuchin et al.*, Case No. 19-422, and *Mnuchin et al. v. Collins et al.*, Case No. 19-563, the Court will decide appeals brought by the Trump administration and a group of Fannie and Freddie investors, arising out of the so-called "Net Worth Sweep," in which the FHFA directed Fannie and Freddie's profits to the U.S. Treasury. Both the FHFA and the CFPB are led by single directors who cannot be fired by the president except for cause. Among other issues, the Supreme Court will consider the remedy for any separation of powers violation.

For more information, please contact Brian Matsui at bmatsui@mofo.com.

OPERATIONS

Federal Reserve Establishes Unprecedented Lending Facilities

The Federal Reserve Board has established a series of lending facilities to provide liquidity to various parts of the U.S. economy. The lending facilities include: a) the Main Street Lending Program, which facilitates loans to small- and medium-sized businesses; b) the Money Market Mutual Fund Liquidity Facility (MMMFLF), through which a special purpose vehicle (SPV) will lend to certain eligible borrowers and takes as collateral certain types of high-quality assets that the borrower purchases from money market mutual fund; c) the Primary Market Corporate Credit Facility, through which an SPV will purchase qualifying bonds as the sole investor in a bond issuance and portions of syndicated loans or bonds at issuance; d) the Paycheck Protection Program Liquidity Facility (PPPLF), which will lend to PPP lenders on a non-recourse basis and take PPP loans as collateral; and e) the Municipal Liquidity Facility, through which an SPV will purchase up to $500 billion in eligible notes (e.g., tax and revenue anticipation notes, bond anticipation notes, and other similar short-term notes) from eligible issuers.

For more information, please contact Jeremy Mandell at jmandell@mofo.com or visit our Financial Services COVID-19 site.

Agencies Finalize Covered Funds Volcker Amendments

The federal banking agencies finalized amendments to the Volcker Rule related to the prohibition on investing, sponsoring, and having certain relationships with "covered funds." The Final Rule is largely consistent with the Proposed Rule and is the final anticipated amendment in a series of recent changes to the Volcker Rule. The changes effected by the Final Rule include: (1) codification of relief previously provided for so-called "qualifying foreign excluded funds"; (2) modifications to certain existing exclusions from the definition of a "covered fund"; (3) adoption of a number of additional exclusions to the definition of a "covered fund"; (4) amendments to the Volcker Rule's provisions related to transactions with "covered funds" (i.e., the "Super 23A provisions"); and (5) revisions related to the determination of a banking entity's "ownership interest" in a covered fund. The final rule will take effect on October 1, 2020.

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

Bank Capital Rule Overhaul

The Federal Reserve Board revised bank capital rules with the intent of simplifying the capital framework. The Final Rule integrates the regulatory capital rule with the Comprehensive Capital Analysis and Review (CCAR). Specifically, the Federal Reserve Board will use the results of its supervisory stress test to establish the size of a firm's stress capital buffer requirement, rather than a static measure of risk-weighted assets. The Final Rule applies to bank holding companies and U.S. intermediate holding companies of foreign banking organizations that have $100 billion or more in total consolidated assets. According to the Federal Reserve Board, the Final Rule may mean increased capital minimums for certain large firms, but it will lessen capital minimums for many regional banks. For large firms, it also may lessen the burden by eliminating leverage limits previously used to evaluate the firm's stress test results and reducing assumptions for how much the firms would pay in dividends during a crisis. The Final Rule also limits the number of capital measurements for banks, leaving large lenders, according to the Federal Reserve Board, "subject to a single, forward-looking and risk-sensitive capital

framework." The revised stress capital buffer requirement, as determined under the Final Rule, will be effective October 1, 2020.

For more information, please contact Henry Fields at hfields@mofo.com.

LCR Rule Modifications

The federal banking agencies announced an Interim Final Rule that modifies the Liquidity Coverage Ratio (LCR) rule to support banking organizations' participation in the MMMFLF and the PPPLF. The Interim Final Rule is intended to support the flow of credit to households and businesses by facilitating participation in these liquidity facilities and neutralizing the LCR impact associated with the non-recourse funding provided by these facilities. The Rule does not otherwise alter the LCR rule, which generally requires large banks to hold a buffer of high-quality liquid assets so that they can meet their short-term liquidity needs. The Interim Final Rule took effect immediately upon announcement.

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

Policy Statement on Allowances for Credit Losses

The federal banking agencies approved a Policy Statement on allowances for credit losses. The statement is intended to promote consistency in the interpretation and application of the FASB credit losses accounting standard, which introduces the current expected credit losses (CECL) methodology. The Statement describes the measurement of expected credit losses using the CECL methodology, and updates concepts and practices detailed in existing supervisory guidance that remain applicable. It will take effect at the time of each institution's adoption of the credit losses accounting standard. At the same time, the agencies finalized interagency Guidance on credit risk review systems. The Guidance presents principles for establishing a system of independent, ongoing credit risk review in accordance with safety and soundness standards.

For more information, please contact Jiang Liu at jiangliu@mofo.com.

COVID-19, Part 9 – Federal Reserve Board Delays Effective Date for Revised Control Framework

The Federal Reserve Board announced it will delay by six months the effective date for its revised control framework. The Board finalized its revised control framework in January 2020. The framework is intended to simplify and increase the transparency of the Board's rules for determining when one company controls another company for purposes of the Bank Holding Company Act and HOLA. The delay, which extends the effective date to April 1, 2021, is intended to reduce operational burden and allow institutions to focus on COVID-19-related economic conditions.

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

COVID-19, Part 10 – Temporary Changes to Supplementary Leverage Ratio Rule

The federal banking agencies announced temporary changes to their supplementary leverage ratio (SLR) rule to provide flexibility to certain depository institutions to expand their balance sheets in order to provide credit to households and businesses in light of the challenges arising from the COVID-19 response. Specifically, the agencies issued an Interim Final Rule permitting depository institutions to choose to exclude U.S. Treasury securities and deposits at Federal Reserve Banks from the calculation of the SLR. A depository institution that changes its SLR calculation will be required to request approval from its primary regulator before making capital distributions (e.g., paying dividends to its parent company). The change will be in effect through March 31, 2021.

For more information, please contact Mark Sobin at msobin@mofo.com.

COVID-19, Part 11 – Capital and Liquidity Buffers

The federal banking agencies issued a Statement encouraging banking organizations to use their capital and liquidity buffers as they respond to COVID-19-related challenges. In the Statement, the agencies explain that the capital and liquidity buffers were designed to provide banking organizations with the means to support the economy in adverse situations and allow banking organizations to continue to serve households and businesses. The agencies further explain that they support banking organizations that choose to use their capital and liquidity buffers to lend and undertake other supportive actions in a safe and sound manner.

The agencies later issued responses to FAQs that arose in light of the Statement. They also issued an Interim Final Rule revising the definition of eligible retained income in the capital rules, which directly affects the amount of capital a banking organization may distribute if it falls below its capital buffer.

For more information, please contact Henry Fields at hfields@mofo.com.

PREEMPTION

FCRA Means What It Says and Says What It Means

Two courts considered the narrow state-law exceptions to the scope of FCRA preemption. The FCRA preemption provision expressly preempts section 54A(a) of the Massachusetts Credit Reporting Act and section 1785.25(a) of the California Consumer Credit Reporting Agencies Act (CCRAA). A federal court in Massachusetts explained that section 54A(g), which provides a private right of action for violations of section 54A(a) is preempted by the FCRA because that section is not included in the exemption. The court recognized conflicting decisions on the issue, but followed the line of cases finding that section 54A(g) is

preempted under the plain language of FRCA. *Logan v. Bank of Am., N.A.*, No. 19-cv-11483, 2020 U.S. Dist. LEXIS 45006, at *13-15 (D. Mass. Mar. 16, 2020).

Similarly, a federal court in California held that claims brought under CCRAA provisions other than section 1785(a) are expressly preempted by FCRA. *Faircloth v. AR Res., Inc.*, 19-cv-05830-JCS, 2020 U.S. Dist. LEXIS 93451, at *16-19 (N.D. Cal. May 27, 2020). The court rejected plaintiff's argument that the court should find other sections of the CCRAA preempted only if they are inconsistent with FCRA. Instead, the court found the plain language of the FCRA required a finding that claims brought under sections of the CCRAA not expressly exempted in the FCRA are preempted.

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

Don't Do What You Say – Don't Get Preemption

State law claims alleging a federal credit union imposed overdraft fees on debit card transactions in violation of the account agreement are not preempted by the FCAU according to a federal court in New York. *Lussoro v. Ocean Fin. Fed. Credit Union*, No. 18-CV-7400 (PKC) (ST), 2020 U.S. Dist. LEXIS 71057 (E.D.N.Y. Apr. 22, 2020). The court found that plaintiff's claim was "premised on Defendant's misrepresentations regarding its overdraft policy, and not on Defendant's ability to determine or charge these types of fees." *Id.* at *25. "This is a crucial distinction [the court explained,] as courts have only found claims alleging the latter to be preempted, not the former." *Id.* at *26.

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

Jump on the Escrow Interest Statute Bandwagon

A federal court in Maryland followed decisions by the Ninth Circuit and a federal court in the Eastern District of New York in holding a state law requiring payment of interest on escrow accounts is not preempted by the NBA and OCC regulations as to a national bank. *Clark v. Bank of Amer., N.A.*, No. SAG-18-3672, 2020 U.S. Dist. LEXIS 31454 (D. Md. Feb. 24, 2020). The court agreed with those other courts that the OCC preemption regulation was entitled to minimal deference and that Dodd-Frank section 1639d does not carve out statutes require payment of interest that are preempted by federal law. Instead, the court found the requirement to pay interest does not prevent or significantly interfere with core lending functions and therefore is not preempted. *Id.* at *20-25.

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

PRIVACY

Here Come the Regs, Here Comes the AG

The California AG submitted final regulations implementing the CCPA to the California Office of Administrative Law (OAL) for review and approval. The AG requested an expedited 30-day review given the CCPA's statutory mandate to promulgate regulations by July 1, 2020. The AG also requested that the regulations take effect concurrently with their filing with the Secretary of State if approved by the OAL. Nonetheless, as a result of a pandemic-related Executive Order issued by the California Governor, the OAL has up to 90 days to review proposed regulations. It is not clear when the regulations will be finalized if approved. Regardless of timing, however, the AG is empowered to begin enforcing the CCPA on July 1, and the AG has announced his intent to do so.

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

No Privacy Bill in Washington

Washington was widely expected to follow California's lead in 2020 and enact comprehensive privacy legislation. Nonetheless, the Washington Privacy Act ("the Act") (SB 6281) once again stalled in the legislature, in particular because the Senate refused to concur on House amendments, including a revision that would have created a private right of action for any violation of the Act. Similar to the CCPA, the Act would impose extensive obligations for the collection, use, and disclosure of personal information relating to Washington residents. Even leaving aside the private right of action, the legislation is in some ways broader than the CCPA and would include requirements that businesses develop internal appeals processes for individual rights requests, conduct and document data protection assessments for a broad range of processing activities, and obtain prior opt-in consent for the processing of sensitive personal information. It is expected that the Washington legislature will revisit the legislation when it reconvenes in January 2021.

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

Risks in the Cloud

The FFIEC has issued a Joint Statement on Risk Management for Cloud Computing Services. According to the FFIEC, financial institutions should engage in effective risk management for the safe and sound use of cloud computing services. The Joint Statement notes that "financial institutions may outsource the management of different controls over information assets and operations to [a] cloud service provider," and provides examples of management practices for assessing risks related to and implementing controls for cloud computing services. These include, among others, aligning the use of cloud computing with overall IT strategy, architecture, and risk appetite,

conducting appropriate due diligence to identify security-related risks, clearly defining and allocating responsibilities in agreements with the cloud service provider, and having an inventory management process to track systems and information assets in the cloud.

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It's Been a Privilege

In connection with class action litigation arising out of a 2019 data security incident, a large bank has been ordered to produce to plaintiffs an incident report prepared by a third-party forensic consultant. *In re: Capital One Customer Data Security Breach Litig*., MDL No. 1:19md2915 (AJT/JFA), 2020 WL 3470261 (E.D. Va. June 25, 2020). The court held that the bank failed to satisfy the burden of proving that the report would not have been prepared but for anticipated litigation under the work product doctrine. *Id.* at *6-7. In particular, the court observed that the work performed in connection with the incident was based on a letter agreement describing services identical to those the same consultant had been providing to the bank for years. *Id.* In addition, the bank's distribution of the report to certain third parties, including auditors, suggested to the court that the report was created for business purposes, not solely to defend against litigation. *Id.*

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

ARBITRATION

Take Two

The Supreme Court granted cert. for the second time in *Henry Schein, Inc. v. Archer and White Sales, Inc.* The first time around, the Court ruled that when an arbitration provision clearly states that an arbitrator (rather than a court) will decide whether a dispute must be arbitrated, the court must respect that decision even if the court believes that the argument in favor of arbitration is "wholly groundless." *Henry Schein*, 139 S. Ct. 524, 528 (2019). This time around, there is a new question before the Court: when the arbitration provision carves out certain claims (here, claims for injunctive relief), does that permit the court, rather than the arbitrator, to decide whether a claim falls within the carve-out? Circuit courts have come to different conclusions on that question, and the Supreme Court will consider it in the upcoming term.

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

Arbitrator Disclosures

In *Monster Energy Co. v. City Beverages, LLC*, Monster asked the Court to take up the question of whether an arbitration award can be vacated on the grounds of "evident partiality" of the arbitrator when the arbitrator does not disclose that: (i) he had a small ownership interest in the arbitration firm and (ii) the arbitration firm had conducted a non-trivial number of arbitrations with one of the parties. The Supreme Court denied the cert. petition. No. 19-1333, 2020 WL 3492685 (U.S. June 29, 2020). So, the Ninth Circuit's opinion vacating the arbitration award stands, and parties in the Ninth Circuit will need to think carefully about disclosures by arbitrators to protect arbitration awards. *Monster Energy Co v. City Beverages, LLC*, 940 F.3d 1130 (9th Cir. 2019).

For more information, please contact James Schurz at jschurz@mofo.com.

CA Evades *Concepcion* Yet Again

The Supreme Court also denied two cert. petitions that sought to challenge a decision of the California Supreme Court, *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017). In *McGill*, the California Supreme Court held that an agreement waiving a party's right to seek "public injunctive relief" in any forum is unenforceable under California law. The Ninth Circuit followed suit, rejecting the argument that *McGill* is preempted by the Federal Arbitration Act (FAA). *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 830-31 (9th Cir. 2019). Although this case was settled, the Ninth Circuit also issued unpublished memorandum dispositions in two companion cases, *McArdle v. AT&T Mobility LLC*, 772 F. App'x 575 (9th Cir. 2019), and *Tillage v. Comcast Corp.*, 772 F. App'x 569 (9th Cir. 2019), in which the defendants have petitioned for certiorari. The Supreme Court denied those petitions, so for now, the *McGill* rule stands.

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

TCPA

Here We Go Again

In *Barr v. American Association of Political Consultants Inc.*, the Supreme Court struck down the government-backed debt exemption in the TCPA as an impermissible content-based restriction that violates the First Amendment's free speech clause. As explained in the plurality opinion, "[a] robocall that says, 'Please pay your government debt' is legal. A robocall that says, 'Please donate to our political campaign' is illegal. That is about as content-based as it gets." 2020 WL 3633780, at *5 (2020). To the dismay of defendants everywhere, though, the Supreme Court further held that the unconstitutional provision was severable.

Three days later, however, the Court granted cert. to consider the autodialer question. So stay tuned for further developments.

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

Boom! – Second Circuit Deepens the ATDS Circuit Split

Joining the Ninth Circuit in broadly interpreting the definition of an autodialer (ATDS), the Second Circuit recently overturned the dismissal of a putative class action alleging that a nightclub operator violated the TCPA by sending consumers unsolicited texts. *Duran v. La Boom Disco*, 955 F.3d 279, 290 (2d Cir. 2020). The Second Circuit disagreed with the lower court's finding that the texts were not sent by an ATDS because they were scheduled by and dialed from lists prepared by humans rather than automatically generated. The Second Circuit found the TCPA applies to devices with the capacity to: a) "store lists of numbers," whether created by a human or by a random-or-sequential number generator; and b) "dial those stored numbers without human intervention." *Id.* Because defendant's program stored the human-created lists and required only that a person click "send" to initiate a texting campaign, the Second Circuit held that the system did not require human intervention to dial and therefore was an ATDS.

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

So You Think You Can Unilaterally Revoke?

The Eleventh Circuit held that a consumer could not unilaterally revoke consent to receive calls using an autodialer or prerecorded messages where she previously consented as part of the parties' bargained-for agreement. *Medley v. Dish Network, LLC*, 958 F.3d 1063, 1070 (11th Cir. 2020). The court agreed with the Second Circuit's reasoning in *Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51 (2d Cir. 2017) and applied common law contract rules regarding revocation, explaining that: "an 'agreement is a manifestation of mutual assent on the part of two or more persons,' [and thus] it is black-letter contract law that one party to an agreement cannot, without the other party's consent, unilaterally modify the agreement once it has been executed." *Id.* (quoting *Kuhne v. Fla. Dep't of Corrs.*, 745 F.3d 1091, 1096 (11th Cir. 2014)).

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

Not a Solicitation, Not an Autodialer, Not a Claim

A Texas federal court dismissed a consumer's TCPA claim where he failed to allege facts, giving rise to an inference that, despite being on the national do-not-call registry, the defendant sent him a "telephone solicitation" or that an autodialer was used to send the texts. *Suttles v. Facebook, Inc.*, No. 1:18-CV-1004-LY, 2020 WL 2763383, at *2–6 (W.D. Tex. May 20, 2020). The court found that texts that encouraged plaintiff to visit defendant's site did not promote a transaction, so they did "not qualify as a 'telephone solicitation' just because [they] may help a company sell advertisements to third-party businesses." *Id.* at *2–3. Further, finding that an autodialer is a device that randomly or sequentially generates numbers to be called, the court concluded plaintiff failed to plead use of an autodialer where he alleged only that he received "targeted" messages.

For more information, please contact Tiffani Figueroa at tfigueroa@mofo.com.

No Re-Routing Called Party Status

The Southern District of Florida held that a plaintiff did not qualify as the "called party" in a case where defendant attempted to reach plaintiff's cousin, who automatically routed all calls placed to him to go directly to other phone numbers, including plaintiff's cell phone: As the court explained, "[i]t hardly seems to be the case that the TCPA anticipated parties like Plaintiff would file suit against bona fide debt collectors for having called debtors who have re-routed their phone calls to other individuals." *Thompson v. Portfolio Recovery Assocs., LLC*, No. 19-cv-62220-SINGHAL/Valle, 2020 WL 1986991, at *2 (S.D. Fla. Apr. 25, 2020). The court further held that the software used by the defendant did not qualify as an ATDS, as it did not have the capacity to produce or store telephone numbers using a random or sequential number generator. *Id.*

For more information, please contact Tiffani Figueroa at tfigueroa@mofo.com.

BSA/AML

COVID-19, Part 12 – BSA Challenges

The OCC issued a Bulletin referring to a FinCEN Notice recognizing that financial institutions may struggle to meet their BSA obligations in dealing with the COVID-19 pandemic. The Notice provides certain regulatory relief, including exempting new loans to existing customers under the PPP from beneficial ownership requirements. The OCC announced its support for this relief while encouraging banks to follow a risk-based approach to BSA compliance. The OCC recognized that reasonable delays in compliance may be a suitable risk-based approach during the pandemic. Banks are encouraged to innovate responsibly, where appropriate, and to contact their examiners with any compliance concerns. The OCC noted that, in evaluating a bank's BSA compliance program, it would consider the bank's actions in responding to this crisis.

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

BSA/AML Examination Manual Updates

The FFIEC released updates to the BSA/AML examination manual (the "Manual"). The FFIEC notes that the updates do not establish new requirements, but they are intended to provide increased visibility into the examination process. The Interagency Statement announcing the updates advises that the revisions are designed to emphasize and enhance the risk-based approach to

BSA/AML supervision. The updates incorporate regulatory changes since the last Manual updates in 2014 and distinguish between mandatory regulatory requirements and supervisory expectations. Significant revisions include: (1) Risk-Focused BSA/AML Supervision; (2) Assessing the BSA/AML Compliance Program; (3) BSA/AML Risk Assessment; and (4) Developing Conclusions and Finalizing the Exam.

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COVID-19, Part 13 – FinCEN Weighs In

FinCEN issued a Notice regarding COVID-19-related criminal and suspicious activity. In the Notice, FinCEN recognizes that COVID-19 presents challenges, but reminds financial institutions to continue adhering to their BSA obligations. FinCEN explains that financial institutions should not mention COVID-19 in SAR narratives unless COVID-19 is tied to the suspicious activity. Financial institutions should also ensure that requests for SAR information are coming from legitimate agencies. The Notice stresses the importance of information sharing in preventing fraud and lists the agencies accepting reports of COVID-19-related crimes. Finally, FinCEN announced its temporary expansion of the Rapid Response Program to support the recovery of stolen funds. This notice is one of multiple COVID-19-related issuances available on FinCEN's website.

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

This newsletter addresses recent financial services developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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BSA/AML Report
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