FINANCIAL SERVICES REPORT

Quarterly News, Fall 2017

IN THIS ISSUE

Beltway Report
Page 2

Bureau Report
Page 2

Mobile & Emerging Payments Report
Page 3

Mortgage & Fair Lending Report
Page 4

Operations Report
Page 4

Preemption Report
Page 5

Privacy Report
Page 6

Arbitration Report
Page 7

TCPA Report
Page 8

BSA/AML Report
Page 9

MOFO METRICS

1 in 36	Chances of being called from the audience to be a contestant on The Price Is Right
1 in 167	Chances of someone who applies becoming an astronaut
1 in 250	Chances of having identical twins (without fertility drugs)
1 in 8,100	Chances of having triplets (without fertility drugs)
1 in 649,739	Chances of getting a royal flush in a poker hand
1 in 1,600,000	Chances of being killed by an asteroid
1 in 11,500,000	Chances of getting attacked by a shark
1 in 175,000,000	Chances of winning the Powerball lottery

Attorney Advertising

MORRISON FOERSTER

EDITOR'S NOTE

Through hurricanes, wild fires, the publication of Hillary Clinton's book, the birth of Amal and George Clooney's twins, and the Dodgers' historic losing streak, Director Richard Cordray and the CFPB's Final Arbitration Rule are still standing. As my colleague Ollie Ireland explained, these days, it's easier to predict the weather than it is to predict what will happen in Congress. So we wait.

To provide some distraction, focus on this: September is National Mortgage Professional Month. (If you think I made that up, check out this link!) So say hello to your friendly neighborhood mortgage professional. For further distraction, we've packed this Report with all the blockbusters from the last quarter — read on for the latest in Privacy, Preemption, Arbitration, Mortgage, the CFPB, etc.

BELTWAY

Hot Topic

The OCC released frequently asked questions (FAQs) that supplement its 2013 Third-Party Relationships: Risk Management Guidance. This Guidance was broad in scope, setting forth the OCC's expectation for banks' due diligence and ongoing monitoring of third-party service providers. In addition to affirming the OCC's 2013 guidance, the FAQs also provide substantial flexibility for banks to manage third-party risk, including with respect to Fintech. In particular, the FAQs signaled that the OCC understands that not all third-party relationships present the same level of risk, and provided banks with flexibility to determine the risks associated with each third-party relationship and to adjust risk management practices to ensure that the risk management practices are commensurate with the level of and complexity of the risks. The OCC repeatedly reminds banks in the FAQs that, ultimately, the bank's board is responsible for overseeing the development of effective third-party risk management process.

For more information, read our Client Alert or contact Oliver Ireland at oireland@mofo.com.

Alleged Lax Oversight

The FRB announced an enforcement action against a foreign bank and its U.S. subsidiaries related to the bank's alleged failure of oversight and lack of internal controls over its FX traders who purchased and sold currencies for the bank's customers and its own accounts. The enforcement action resulted from an investigation by the NYDFS and the Bank's own review of its FX traders' activities between 2007 and 2013. The FRB alleged, among other things, that the bank lacked adequate governance, risk management, compliance, and audit policies and procedures that prevented it from detecting actions by some of its FX traders. For example, the FRB claimed that certain FX traders using chatrooms routinely disclosed to other FX traders at other financial institutions trading positions and coordinated trading strategies. Under the terms of the Consent Order, the bank is required to pay approximately $264 million in civil money penalties in addition to being subject to compliance and risk management monitoring.

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

Faster Payments by 2020?

The FRB's Faster Payments Task Force's goal is to develop a payments system that is faster, ubiquitous, and secure by 2020 according to Part Two of the Faster Payments Tasks Force Final Report. The Final Report is a follow-up to Part One of the Faster Payments Task Force Final Report, which the Task Force published in January 2017. In the Final Report, the Task Force summarized the specific faster payments solution proposals that were submitted to and analyzed by the Task Force, and detailed its goals and recommendations for developing an ecosystem for the development of faster payments solutions.

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

Back to the Future?

The Treasury Department released what is intended to be the first in a series of reports examining the financial regulatory system following on the President's February 2017 Executive Order on Core Principles for Regulating the U.S. Financial System. Treasury highlighted seven findings: (1) banks and credit unions are critically important to serve many Americans, (2) capital, liquidity, and leverage rules can be simplified to increase the flow of credit, (3) Treasury must ensure banks remain globally competitive, (4) improving market liquidity is critical for the economy, (5) the CFPB must be reformed, (6) regulations should be better tailored, more efficient, and effective, and (7) Congress should review the organization and mandates of the independent banking regulators to improve accountability. The report's view of the CFPB was particularly disapproving, noting the CFPB's "unaccountable structure and unduly broad regulatory powers have led to regulatory abuses and excesses."

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

BUREAU

Credit Repair Companies to Repair Marketing Tactics

The Bureau settled allegations against four California-based credit repair companies and three individuals that the companies charged unlawful fees and made misleading claims concerning their ability to remove negative items from consumers' credit reports and increase consumer credit scores. Although credit reporting agencies are only obligated to remove negative entries

under certain circumstances, the Bureau found that the companies' marketing created the "net impression" that their services would or would likely result in the removal of material negative entries on consumers' credit reports, regardless of whether the entries were inaccurate or obsolete. The companies also allegedly represented that their services increased credit scores by an average of over 100 or more points, when they had never measured the impact of their services on customers' credit scores. The companies also allegedly charged a variety of fees for their services before demonstrating that the promised results had been achieved as required by law.

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

Pay-by-Phone Fees Focus

The Bureau issued a July 2017 Compliance Bulletin advising regulated entities that "failing to disclose the prices of all available phone pay fees when different phone pay options carry materially different fees" and "misrepresenting the available payment options or that a fee is required to pay by phone" are two problematic practices that can get regulated entities in trouble, which is compounded by the fact that pay-by-phone fees are often disclosed over the telephone by representatives who now need, apparently, to disclose the fees associated with every other available payment option.

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

Model Overdraft Forms: Know Before You Owe-verdraw

In August, the Bureau released four "prototype" model overdraft disclosure forms as part of its "Know Before You Owe" initiative. The CFPB explained that the forms were designed to clarify the risks and costs of overdraft coverage for consumers. Similar in concept and design to the CFPB's "Know Before You Owe Disclosures" for mortgages and prepaid accounts, the model form prototypes seek to simplify the current overdraft model disclosure form that financial institutions must provide before a consumer opts into the payment of overdraft fees on ATM and one-time debit card transactions, per Regulation E. The CFPB's prototype forms seek to help consumers "evaluate the risks and benefits of opting-in." The release does not request comments on the prototypes, which the CFPB indicates it is still "currently testing."

For more information, read our Client Alert or contact Oliver Ireland at oireland@mofo.com.

I've Seen the FCRA on Both Sides Now

The Bureau entered into a Consent Order with a national bank in August, alleging failures in reporting accurate information and disclosing credit information used to deny a customer's application. The Bureau alleged that the bank did not have adequate policies and procedures in place for reporting information about consumer deposit accounts and did not provide customers the results of investigations into their disputes. In addition, when denying a checking account application, the bank allegedly failed to supply consumers with the name and contact information of the consumer reporting company that supplied the information on which the bank's denial was based. The Consent Order imposed a civil money penalty, along with required changes to policies and procedures.

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

Self-Reporting Playbook

American Express settled allegations that it discriminated against consumers in Puerto Rico and other U.S. territories by offering them less favorable credit card terms than those available to customers in the 50 states, and by not extending customers with Spanish-language preferences debt collection offers that were available to other consumers. According to the Bureau, approximately 200,000 consumers have received or will receive $96 million in redress for the alleged practices. But the big story here? The Bureau declined to assess a penalty because American Express "self-reported the violation, self-initiated remediation for the harm done to affected consumers, and fully cooperated with the bureau's investigation."

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

MOBILE & EMERGING PAYMENTS

Fighting for the Future of Fintech

The OCC is fighting back against lawsuits from the Conference of State Bank Supervisors (CSBS) and the NYDFS and is seeking to preserve its authority to issue special purpose charters to Fintech companies. The OCC moved to dismiss both lawsuits on standing grounds, arguing neither the CSBS nor the NYDFS can allege harm caused by the OCC's proposal because no charters have been issued. Moreover, according to the OCC, the OCC's

charter proposal does not constitute a "reviewable final agency action," and even if it did, the OCC argued in its motions that it has the authority to issue such charters under its authoritative interpretation of the NBA. The Fintech charter represents a rare initiative with bipartisan approval, as the OCC's proposal has managed to survive the change in administrations. In July 19, 2017 remarks, acting Comptroller of the Currency Keith Noreika vigorously endorsed the Fintech charter and expressed his hope that the OCC's proposal can bring Fintech companies "out of the shadows."

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

Buyer Beware

On August 31, 2017, the Financial Industry Regulatory Authority issued an Investor Alert detailing the potential risks posed by Initial Coin Offerings (ICOs). ICOs involve a company seeking to raise capital by creating a new virtual currency and offering it for sale to interested buyers who can acquire certain rights and benefits depending on the company involved. FINRA's investor alert presents six questions for investors to consider before participating in an ICO, including: whether the ICO is a securities offering; whether the persons involved are registered financial professionals; how investors can get their money back; and what protections are in place to guard against hacking and cybersecurity threats.

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

MORTGAGE & FAIR LENDING

HMDA Reprieve

The new HMDA requirements that go into effect on January 1, 2018 originally applied to all lenders that originated at least 100 HELOCs in each of the last two years. However, the CFPB has proposed an amendment that would increase that threshold to 500 for calendar years 2018 and 2019.

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

Another RESPA Loss for the CFPB

The Western District of Kentucky recently granted summary judgement to law firm Borders & Borders in its longstanding dispute with the CFPB regarding alleged RESPA violations. *CFPB v. Borders & Borders, PLC*, No. 3:13-CV-01047-CRS-DW, 2017 U.S. Dist. LEXIS 108384 (W.D. Ky. July 13, 2017). The Court found that the law firm joint ventures (Title LLCs) with nine real estate providers were valid Affiliated Business Arrangements under RESPA. The court found that alleged relationships—in which real estate providers regularly referred clients to Borders & Borders, and Borders & Borders used the affiliated Title LLC for the title insurance—were legitimate. Consistent with RESPA's requirements, Borders & Borders disclosed the relationship and informed consumers there were other options, and the only compensation received by its partners was ownership distributions.

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

Whistling a False Claims Act Tune

PHH Corp. will pay DOJ $75 million to settle a False Claims Act investigation regarding its certifications to Fannie Mae and Freddie Mac. The settlements resolved allegations that PHH failed to comply with certain Fannie Mae and Freddie Mac, VA, and FHA origination, underwriting, and quality control requirements. Many of the allegations arose from a *qui tam* suit brought by whistleblower Mary Bozzelli, who will receive over $9 million for her role in the settlement.

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

OPERATIONS

Stress-Free Stress Test Results

In June 2017, the FRB released the results of its Dodd-Frank Act stress test (DFAST) and the results of its Comprehensive Capital Analysis and Review (CCAR). DFAST assesses the potential impact of various stress scenarios on the consolidated earnings, losses, and regulatory capital of large bank holding companies (BHC) over a nine-quarter planning horizon. CCAR assesses whether each BHC has sufficient capital to continue operations over the same time horizon, taking into account certain stress conditions, and whether the BHC has effective capital planning, accounting for risk conditions and supported by risk measurement and risk management practices. For the first time since the testing began, each of the 34 subject BHCs met the quantitative minimum capital requirements under the 2017 CCAR and DFAST exercise, and the FRB did not object to the planned capital distributions of any of the 34 subject BHCs. The FRB issued one conditional non-objection, which required the relevant BHC to address weaknesses in its capital planning process and resubmit a capital plan by December 2017.

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

Volcker Burden Reduction Review

On August 2, 2017, the OCC issued a notice and request for comment (Notice) on how the Volcker Rule implementing regulations should be revised to better accomplish the purposes of the Rule, decrease compliance burdens, and foster economic growth. The OCC is seeking public input on all aspects of the Volcker Rule implementing regulations, with particular attention to: (1) the scope of entities subject to the regulations; (2) the proprietary trading prohibition; (3) the covered funds prohibition; and (4) the compliance program and metric reporting requirements. The Notice emphasizes that "it is especially important for those commenting to provide evidence demonstrating the nature and scope of the problems they identify and the likely efficacy of any solutions they propose." Comments are due September 21, 2017.

For more information, read our Client Alert or contact Barbara Mendelson at bmendelson@mofo.com.

No-Action Is a (Positive) Action

On July 21, 2017, the FRB, the OCC, and the FDIC ("Banking Agencies") released a Joint Statement regarding the treatment of certain foreign funds under the Volcker Rule. The Joint Statement concluded that the Banking Agencies will not enforce the Volcker Rule prohibitions and restrictions with respect to the activities of certain "qualifying foreign excluded funds" controlled by "foreign banking entities" through July 21, 2018. During this enforcement moratorium, the staffs of the Banking Agencies, the SEC, and the CFTC will consider appropriate action to avoid any unintended consequences of the Volcker Rule for foreign excluded funds in foreign jurisdictions.

For more information, read our Client Alert or contact Jiang Liu at jiangliu@mofo.com.

PREEMPTION

FCRA Focus

A federal court in Pennsylvania considered whether claims for violation of a state UDAP statute and for negligence and invasion of privacy based on furnishing of information to a credit reporting agency (CRA) were preempted by FCRA. *Becker v. Verizon Pa., Inc.*, 3:16-cv-170, 2017 WL 2418312 (W.D. Pa. June 2, 2017). The court rejected plaintiff's argument that the narrower preemption provision in section 1681h(e) applied to these claims, explaining that this section applies only to claims based on information disclosed under sections 1681g, 1681h, and1681m. The first two sections the court found apply only to CRAs and the third section applies only to users of consumer reports. Accordingly, that section does not apply to furnishers. Instead, the court found the broad preemption provision in section 1681t(b)(1)(F) applies to furnishers and preempts plaintiff's common law and statutory claims.

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

California Diversion

We noted an interesting discussion of HOLA preemption and the California Unfair Competition Law (UCL) in a recent labor and employment case. In *Robinson v. Open Top Sightseeing San Francisco, LLC*, 14-cv-00852-PJH, 2017 WL 2265464 (N.D. Cal. May 24, 2017), the court considered the statute of limitations applicable to a UCL claim premised on an alleged violation of federal law. Plaintiff relied on the discussion in *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008), to argue the statute of limitations specified in a federal statute applies to a UCL claim premised on a violation of that statute rather than the four-year UCL statute of limitations. The court disagreed, citing the Ninth Circuit's ruling in *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1180 (9th Cir. 2016), limiting the *Silvas* court's finding that the one-year TILA statute of limitations applied to a UCL claim premised on a TILA violation to a case in which HOLA field preemption applied.

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

DIDA Demotion

A federal court in Hawaii held that DIDA does not provide a basis for complete preemption for usury claims asserted against a state-chartered bank. *Robinson v. Bank of Haw.*, 17-00072-HG-RLP, 2017 WL 2901333 (D. Haw. July 7, 2017). The court disagreed with defendant's argument that the Supreme Court's finding that the NBA completely preempts state usury laws applies equally to DIDA, finding DIDA includes "limiting language" that does not appear in the NBA. The court noted that its decision conflicted with rulings by another Hawaii federal court and three federal appellate courts, but found their reasoning "unpersuasive." *Id.* at *6. Another federal court in Hawaii relied on this ruling in rejecting the same argument. *Robinson v. First Hawaiian Bank*, 17-00105 DKW-RLP (D. Haw. Aug. 24, 2017).

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

MOFO *RE* ENFORCEMENT
THE MOFO ENFORCEMENT BLOG

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

Visit us at **moforeenforcement.com.**

MORRISON
FOERSTER

PRIVACY

GLBA, OK?

The FTC recently reached a settlement with an online tax preparation service that allegedly did not comply with the GLBA privacy rule, which requires financial institutions, among other things, to deliver privacy notices to customers. The company also allegedly did not comply with the FTC's GLBA safeguards rule, which requires financial institutions to protect the security, confidentiality, and integrity of customer information, including by having written information security programs. The enforcement action is a reminder to non-bank companies providing financial services (including in the payments space) that the FTC will continue to look for opportunities to enforce the GLBA's requirements against "non-traditional" financial institutions.

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

Ransomware – There's a Patch for That

In late June, a new wave of ransomware spread around the globe in a matter of hours, affecting the Ukrainian government, Russian enterprises, and companies throughout Western Europe. Just like the WannaCry ransomware that struck worldwide in May, the new attacks apparently involved malware that encrypts or otherwise restricts access to computers and systems—and apparently this new malware exploited some of the same vulnerabilities as WannaCry. These attacks highlight the global nature of ransomware and its ability to circle the globe in a short time. There are a number of key steps that a company can take to protect itself from the inevitable next attack, including ensuring that software patches are routinely applied, training employees on spotting phishing emails, and backing up critical data.

For more information, read our Client Alert or contact John Carlin at jcarlin@mofo.com.

Breach, Incorporated

Delaware has expanded the scope of its data breach notification law. For example, the amended law (which becomes effective on April 4, 2018) expands the types of personal information covered by the law to include, among other things, username or email address in combination with password, biometric data, medical information, and health insurance policy numbers. The amended law also requires credit monitoring for breaches involving Social Security numbers. In addition, the amended law will require notice to the Delaware Attorney General for security incidents for which more than 500 Delaware residents must be notified.

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

And Then There Were Three

Following the lead of Illinois and Texas, Washington has passed its own comprehensive biometric law, requiring notice and consent before any person "enroll[s] a biometric identifier in a database for a commercial purpose." A biometric identifier is defined to include a "fingerprint, voiceprint, eye retinas, irises, or other unique biological patterns or characteristics." Without obtaining consent, a person who has enrolled a biometric identifier of an individual "may not sell, lease, or otherwise disclose the biometric identifier" unless the activity comes within certain exceptions. Unlike the Illinois Biometric Information Privacy Act that has been heavily litigated in recent years, however, the Washington law does not provide a private right of action.

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

Injuries Abound

The D.C. Circuit recently overturned a lower court ruling that plaintiffs did not have standing in a data breach case. The panel found plaintiffs had standing because they "would face a substantial risk of identity theft" if the stolen social security numbers and credit card data were accessed. *Attias v. CareFirst, Inc.*, 865 F.3d 620, 628 (D.C. Cir. 2017). Citing *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015), the court reasoned that "at the very least, it is plausible" to infer that an unauthorized party that has accessed personal information "has both the intent and the ability to use that data for ill." *Attias*, 865 F.3d at 628-29.

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

The Path to Reasonableness

Recent challenges to the FTC's authority to police data security practices have criticized the agency's failure to provide adequate guidance about the types of security practices that are "reasonable" in the view of the FTC. A series of blog posts that the FTC began on July 21, 2017, titled "Stick with Security," follows promises from Acting Chair Maureen Ohlhausen to provide more transparency about practices that contribute to reasonable data security. In posts to date, the FTC has provided some general statements about why it has closed investigations (*e.g.*, "companies typically had effective procedures in place to . . . keep sensitive information secure"), but also some specific suggested implementations, such as that systems should be designed to automatically reject passwords that are too obvious or simple and to suspend accounts whenever multiple incorrect logins have been attempted.

For more information, read our Client Alert or blog post, or contact Julie O'Neill at joneill@mofo.com.

Spokeo Saga Continues

The Ninth Circuit issued another decision in favor of the plaintiff in the long-running case *Robins v. Spokeo*, Case No. 11-56843 (9th Cir. Aug. 15, 2017). As we've previously discussed, in May 2016, the Supreme Court overturned the Ninth Circuit's decision that plaintiff had standing to sue Spokeo over alleged inaccuracies in information Spokeo published about him. The Supreme Court held that, contrary to the Ninth Circuit's ruling, plaintiff's mere allegation of a statutory violation, without some showing of concrete harm, was insufficient. Instead, the issue was "[w]hether the particular procedural violations alleged . . . entail a degree of risk [of harm] sufficient to meet the concreteness requirement."

On remand, the Ninth Circuit held that plaintiff had met the Supreme Court's standing requirements. Specifically, it held that plaintiff had a concrete interest in accurate reporting about himself and that he had adequately alleged Spokeo's violation of the FCRA provisions protecting those interests. Now the case heads back to district court for a determination on the merits and a class certification decision.

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

ARBITRATION

It's Here: Arbitration Rule Published

The speculation over whether the CFPB would publish a final arbitration rule ended this summer when the CFPB published its final arbitration rule in the *Federal Register*. The substance of the rule, as expected, bars class action waivers in specified consumer financial product contracts, and creates reporting requirements for individual arbitrations conducted pursuant to pre-dispute arbitration agreements.

Before the congressional recess, the House passed a resolution to void the arbitration rule. Under the Congressional Review Act, the House and Senate have 60 congressional days from the publishing of a rule in *Federal Register* to overturn the rule and ban agencies from adopting a rule that is "substantially the same" in the

future without express congressional approval. Given congressional recesses, the 60-day limit is likely to expire in late October. Now that the House has passed a resolution, the ball is in Senate's court. A simple majority of the Senate could end the rule, and the White House has indicated it will sign a resolution to overturn the arbitration rule. It is not clear if the closely divided Senate will agree on this issue in a packed fall legislative agenda.

For more information, read our Client Alert or contact James McGuire at jmcguire@mofo.com.

A Very Public Spat

The arbitration rule was the subject of a series of public letters between Keith Noreika, the Acting Comptroller of the Currency, and Richard Cordray, Director of the CFPB. Noreika sent a letter to Cordray on July 17, 2017, requesting the CFPB delay publishing the arbitration rule in the *Federal Register* pending the OCC's opportunity to analyze the data. Cordray responded that the CFPB would share the requested data, but would not delay the publishing of the Rule, noting that Cordray failed "to see any plausible basis for your claim that the arbitration rule could somehow affect the safety and soundness of the banking system." The Rule itself was published the next day, on July 19, 2017. Two days later, Noreika issued a statement, reiterating that the OCC had not completed its review of the impact of the rule and urging Congress to overturn the rule.

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

Third Circuit Refuses to Compel Arbitration by Merchant Regarding Credit Card Discount

In a split decision, the Third Circuit refused to allow Sunoco to compel arbitration against a lead plaintiff in a putative class action who claimed that Sunoco did not properly apply a discount to gas purchases made using a rewards credit card. *White v. Sunoco, Inc.*, No. 2:15-cv-04595 (3d Cir. Sept. 5, 2017). The majority held that Sunoco was not a party to the contract between a card issuing bank and the plaintiff cardholder, was not mentioned in the credit card contract, and therefore could not benefit from the arbitration provision. One judge dissented, noting that marketing materials made clear that Sunoco was a party to a joint contract between the bank, plaintiff, and Sunoco for the provision of a rewards credit card, and noting that plaintiff was able to avoid arbitration only by artful pleading in failing to name the bank as a defendant.

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

TCPA

Standing Sinks Class Cert.

A federal district court in Illinois rejected a bid to certify a putative TCPA class action, reasoning that whether any putative class member had standing could only be decided on an individual basis. *Legg v. PTZ Ins. Agency, Ltd.*, No. 14 C 10043, 2017 WL 3531564, at *4 (N.D. Ill. Aug. 15, 2017). The defendant offered evidence that certain members of the putative class provided oral consent to receive communications. The court rejected plaintiff's argument that the TCPA requires express written consent, finding obtaining oral rather than written consent was a "technical violation" of the TCPA that could not satisfy constitutional standing requirements under the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

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

Single Call = Standing

The Third Circuit reversed a district court's dismissal at the pleading stage of a putative TCPA class action, finding that a single prerecorded call to a plaintiff's cell phone that went to voicemail could be a sufficiently concrete injury to establish standing. *Susinno v. Work Out World Inc.*, 862 F.3d 346 (3d Cir. 2017). The court rejected the district court's characterization of the call as a minor annoyance that could not confer standing, reasoning that a single prerecorded call is a nuisance and invasion of privacy—the exact types of harms that Congress sought to prevent under the TCPA. The court also explained that the named plaintiff's injuries, while intangible, were concrete because they hinge on allegations of "nuisance" and "invasion of privacy" that traditionally can be the basis for a lawsuit under common law.

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

No Records, No Class

The Sixth Circuit affirmed a district court's refusal to certify a putative TCPA class action based on a fax sent in 2010. *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017). The defendant had an 18-month retention policy for its fax logs, and it therefore disposed of the relevant logs long before plaintiff filed suit in 2013. Thus, there was no record of the individuals that received similar faxes, let alone records identifying individuals who consented to receive the faxes at issue. Accordingly, the Sixth Circuit held class certification was not a "superior method" of

resolving the claims of the putative class because the only way a court could determine which of the more than 40,000 intended recipients actually received the fax would be to ask each individual class member to testify. The Sixth Circuit further held that the case was not suitable for class certification because consent could only be determined on an individualized basis.

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

FCC Focus on Wrong Numbers

On July 13, 2017 the FCC voted to consider creating a database to help companies identify reassigned phone numbers. The Retail Industry Leaders Association (RILA) expressed support for the database, because it would help retailers minimize liability exposure for automated marketing calls and texts. RILA also proposed a short grace period, or "safe harbor," after phone numbers are reassigned, as well as a requirement that all phone providers participate in the database. AT&T, the Chamber of Commerce, the National Rural Electric Cooperative Association, CTIA—The Wireless Association, and others have expressed support for this "safe harbor" proposal.

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

TCPA Consent in a Contract Can't Be Revoked

The Second Circuit held that a consumer cannot revoke consent to receive communications if that consent was bargained for as part of a contract. *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51 (2d Cir. 2017). Plaintiff signed a contract with the defendant to lease a car and consented to receive communications from the defendant as a condition in the lease. Plaintiff later attempted to opt out of receiving collection calls from defendant by mailing a letter requesting that defendant stop calling his cell phone. But the district court held plaintiff could not nullify the consent that he had provided in the lease agreement. Applying well-established contract law principles, the Second Circuit affirmed, holding that a party to a contract may not unilaterally alter a material contract term. The Second Circuit reasoned that where consent to receive communications was bargained for, as opposed to freely given, it cannot be rescinded.

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

TCPA Consent Can be Partially Revoked

The Eleventh Circuit held that consent under the TCPA "need not be an all-or-nothing proposition," reversing the district court's holding that a consumer could not partially revoke consent to receive communications. *Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1274 (11th Cir. 2017). Plaintiff provided her cell phone number when she opened a Victoria's Secret credit card account, which the court assumed constituted consent. Plaintiff later told the credit card issuer that she no longer wished to receive calls "in the morning and during the work day." The Eleventh Circuit held plaintiff had the right to consent to receiving calls during only certain times of day and to revoke consent to be called at other times. Although the court recognized the logistical challenges in attempting to honor partial opt-outs, it reasoned that this was not enough to warrant limiting a consumer's authority under the TCPA. The Eleventh Circuit further held that determining whether plaintiff partially revoked consent was a question for a jury.

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

BSA/AML

NYDFS Targets Alleged BSA/AML Weaknesses

On September 7, 2017, the NYDFS entered into a Consent Order with Habib Bank Limited and its New York Branch (HBL). NYDFS alleged longstanding BSA/AML compliance weaknesses and "misconduct" at HBL, including that the New York Branch facilitated transactions with a Saudi private bank with reported links to al Qaeda, permitted unsafe "nested" activity, and improperly used a good guy list. Pursuant to the Consent Order, HBL has agreed to pay a $225 million penalty to NYDFS and expand a previously mandated lookback. The Consent Order also notes that HBL has agreed to surrender its branch license to NYDFS after an orderly wind down of the New York Branch.

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

FinCEN Targets Luxury Real Estate

On August 22, 2017, FinCEN announced the issuance of revised Geographic Targeting Orders (GTOs) relating to certain real estate transactions. The GTOs require title insurance companies to identify the beneficial owners of shell company purchasers in covered real estate transactions, including certain cash and check purchases in specified counties in New York, Florida, California, and Texas. The revised GTOs expand the scope of this requirement to capture transactions conducted through wire transfer, and also to include transactions conducted in the City and County of Honolulu. On August 22, 2017, FinCEN also issued an Advisory to Financial Institutions and Real Estate Firms and Professionals. Through these issuances, FinCEN addresses the particular money laundering risks associated with the high-end residential real estate market.

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

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

The firm members who specialize in financial services are:

Los Angeles

Henry Fields	(213) 892-5275 hfields@mofo.com
Joseph Gabai	(213) 892-5284 jgabai@mofo.com
Robert Stern	(213) 892-5484 rstern@mofo.com
Nancy Thomas	(213) 892-5561 nthomas@mofo.com

New York

James Bergin	(212) 468-8033 jbergin@mofo.com
David Fioccola	(212) 336-4069 dfioccola@mofo.com
Jessica Kaufman	(212) 336-4257 jkaufman@mofo.com
Mark Ladner	(212) 468-8035 mladner@mofo.com
Jiang Liu	(212) 468-8008 jiangliu@mofo.com
Barbara Mendelson	(212) 468-8118 bmendelson@mofo.com
Michael Miller	(212) 468-8009 mbmiller@mofo.com
Joan Warrington	(212) 506-7307 jwarrington@mofo.com

San Francisco

Roland Brandel	(415) 268-7093 rbrandel@mofo.com
Angela Kleine	(415) 268-6214 akleine@mofo.com
Adam Lewis	(415) 268-7232 alewis@mofo.com
Jim McCabe	(415) 268-7011 jmccabe@mofo.com
James McGuire	(415) 268-7013 jmcguire@mofo.com
William Stern	(415) 268-7637 wstern@mofo.com

Washington, D.C./Northern Virginia

Rick Fischer	(202) 887-1566 lfischer@mofo.com
Natalie Fleming Nolen	(202) 887-1551 nflemingnolen@mofo.com
Oliver Ireland	(202) 778-1614 olreland@mofo.com
Steve Kaufmann	(202) 887-8794 skaufmann@mofo.com
Don Lampe	(202) 887-1524 dlampe@mofo.com
Obrea Poindexter	(202) 887-8741 opoindexter@mofo.com
Nate Taylor	(202) 778-1644 ndtaylor@mofo.com

ABOUT MORRISON & FOERSTER

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

NEWSLETTER STAFF

Editor-in-Chief: Nancy Thomas

Arbitration Report
Natalie Fleming Nolen, Managing Editor

Beltway Report
Crystal Kaldjob

Bureau Report
Jessica Kaufman

Mobile & Emerging Payments Report
Trevor Salter

Mortgage & Fair Lending Report
Angela Kleine and Sarah Davis

Operations Report
Jeremy Mandell

Preemption Report
Nancy Thomas

Privacy Report
Nate Taylor and Adam Fleisher

TCPA Report
David Fioccola

BSA/AML
Marc-Alain Galeazzi and Meghan Dwyer

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

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

Taylor Birnbaum
Morrison & Forester LLP
250 West 55th St.
New York, NY 10019
tbirnbaum@mofo.com

©2017 Morrison & Foerster LLP