FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Spring 2020

IN THIS ISSUE

MOFO METRICS

30	Percentage of waking hours cats spend grooming themselves
9	Percentage of pet owners that will have birthday parties for their pets
57	Percentage of households that have at least one pet
735	Number of snakes kept as pets in the US, in thousands
5	Amount spent per year in the US on holiday presents for pets, in billions of dollars
72	Amount spent on pets in the US in 2018, in billions of dollars
2.43	Number of pets insured in the US and Canada, in millions
516	Cost of average annual pet insurance premium, in dollars

MORRISON FOERSTER

EDITOR'S NOTE

Punxsutawney Phil didn't see his shadow, so we're expecting an early spring. Maybe that's why mini-CFPBs are sprouting or expanding on both coasts. Governor Cuomo announced several key measures impacting financial services companies in his State of the State address. Among other initiatives, Governor Cuomo indicated he would propose legislation giving the NY DFS authority to license and examine debt collectors, and UDAAP authority mirroring the CFPB's authority granted by Dodd-Frank Title X, expanding the entities required to pay for examinations and increasing penalties for illegal conduct.

Not to be outdone, Governor Newsom announced his plan to create a mini-CFPB by greatly expanding the authority of the California banking regulator. This plan includes a new name – the Department of Financial Protection and Innovation (DFPI) – new authority to license and examine debt collectors and other previously unlicensed financial services providers, and a new law (the California Consumer Financial Protection Law) that would give the regulator UDAAP authority mirroring the CFPB's authority granted by Dodd Frank Title X and expanded enforcement authority. Governor Newsom's proposal also would create a new Financial Technology Innovation Office, and his proposed budget includes funds for increased staffing for the DFPI.

Former CFPB Director Richard Cordray has been making the rounds, talking to legislators about their ability to become influential policymakers in this area. Governor Newsom specifically called out the Trump administration in identifying the need for the California agency's expanded scope and authority. More developments to come as these proposals make their way through the New York and California legislatures.

In the meantime, get ready for spring and read ahead for all the developments in Beltway, Operations, Mortgage, Privacy, TCPA, AML/BSA, and the rest of our Reports.

BELTWAY

Alternative Underwriting Data Guidance

The CFPB, FDIC, Federal Reserve Board, OCC, and NCUA issued a joint statement on the use of alternative data for credit underwriting. The agencies highlighted the potential benefits of using alternative data in credit underwriting, including improving speed and accuracy of credit decisions and enabling consumers to obtain additional products or more favorable pricing or terms. In particular, they identified the use of cash flow data to evaluate a borrower's ability to repay and noted that such a cash flow evaluation may be particularly beneficial for consumers, because the data is specific to the borrower and generally derived from reliable sources, such as bank accounts. This example may be a helpful indication of the factors that the agencies will consider in determining legal and compliance risk related to the use of alternative data in credit underwriting. The Agencies encouraged firms to consult with appropriate regulators when planning for the use of alternative data.

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

Hemp Guidance

The Federal Reserve Board, FDIC, OCC, FinCEN, and the Conference of State Bank Supervisors, issued Guidance regarding BSA-related obligations in providing financial services to hemp-related businesses. Under the Guidance, banks are not required to file SARs on customers solely because the customer is engaged in the legal growth or cultivation of hemp. Banks should follow their standard procedures applicable to other customers, though, including with respect to customer identification and due diligence, SAR reporting, currency transaction reporting, and the collection of beneficial ownership information. FinCEN plans to issue additional guidance after its review of the US Department of Agriculture's October 2019 interim final rule addressing the legal cultivation of hemp.

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

Ushering in a New CRA Era

The FDIC and the OCC issued a Joint Proposed Rulemaking to make sweeping changes to the Community Reinvestment Act – a long-standing statute that requires depository institutions to undergo periodic evaluations to ensure that such institutions are helping to meet the credit needs of the communities in which they accept deposits. According to the agencies, the proposed rule would (1) clarify which activities qualify for CRA credit; (2) expand where activities count for CRA credit; (3) create more transparent and objective methods for measuring CRA performance; and (4) provide more transparent, consistent, and timely CRA-related data collection, recordkeeping, and reporting. Noting their recognition of the "evolution of modern banking[,] including the emergence of internet banks," the Proposed Rule would require banks to establish additional, non-overlapping, "deposit-based" assessment areas where a bank has significant concentrations (more than 50%) of retail domestic deposits. 85 Fed. Reg. 1204, 1208 (Jan. 9, 2020). The due date for comments on the Proposed Rule has been extended to April 8, 2020.

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

The "Mad[den]ness" Continues

On January 21, 2020, in response to the OCC's Proposed Rule to clarify the "valid when made" doctrine, 22 state Attorneys General and the Hawaii Office of Consumer Protection submitted a comment letter opposing the proposed rule. Among other things, the state officials took the position that the rule would exceed the OCC's authority and is contrary to law because it attempts to exempt from state law loan assignees that the OCC is not authorized to license or regulate. The state officials also asserted that the proposed rule would "facilitate" "rent-a-bank" arrangements by extending the federal preemption under the National Bank Act to non-bank entities, and therefore, the proposed rule was "arbitrary and capricious."

For more information, please contact Jessica Kaufman at jkaufman@mofo.com or read our Client Alert.

Joining the Choir – Part 1

Not to be outdone by state regulators, in a letter to the Comptroller of the OCC and the Chairman of the FDIC, several US Senators, including Sherrod Brown (D-Ohio), Elizabeth Warren (D-Massachusetts), and Chris Van Hollen (D-Maryland), expressed their opposition to the OCC's proposed rules on the "valid-when-made" doctrine. The Senators argued that the proposed rules would "eviscerate state laws that limit the interest rates on loans and allow unrelated predatory lending," such as payday lending and "enable the return of 'rent-a-bank' arrangements." The Senators also noted that it is the role of Congress and not the executive branch to address any disagreements with the Second Circuit's *Madden* decision.

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

Joining the Choir – Part 2

In addition, the House Financial Services Committee held a hearing entitled "Rent-A-Bank Schemes and New Debt Traps: Assessing Efforts to Evade State Consumer Protections and Interest Rate Caps," with plans to reconvene at the end of the month for "Part 2" of the hearing. The committee heard from a number of prominent witnesses in the financial services community and also considered a bill that would apply the Military Lending Act's 36% interest rate cap to all consumers. The bill does not have uniform support among committee

Democrats, with some expressing concern that the rate cap might curtail access to credit, especially for low- and moderate-income consumers.

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

BUREAU

Keeping the CFPB in Check

The CFPB settled a lawsuit brought by the California Reinvestment Coalition and other advocates alleging the CFPB failed to collect data on women-owned, minority-owned, and small businesses in violation of Section 1071 of the Dodd-Frank Act. Dodd-Frank requires the CFPB to collect and disclose data from financial institutions on loan applications from these businesses to support fair lending efforts and uncover discrimination patterns. The lawsuit alleged that the CFPB's slow implementation of Section 1071 has allowed lending discrimination to persist unchecked. Under the agreement, the CFPB must set forth proposed regulations for collecting this data by September 2020 and initiate consultation with small business advocates regarding the rulemaking process by October, before initiating formal rulemaking.

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

Clear as Mud

The CFPB published a Statement of Policy Regarding Prohibition on Abusive Acts or Practices to "convey and foster greater certainty" regarding how it will apply the "abusiveness" standard in exercising its broad UDAAP authority. 85 Fed. Reg. 6733 (Feb. 6, 2020). The CFPB previously had declined to provide rules or guidance on the meaning of "abusive." In the Statement, the Bureau announced that it will: (1) focus on citing or challenging conduct as abusive only when the harm to consumers outweighs the benefit; (2) seek to avoid "dual pleading" of abusiveness and unfairness or deception violations arising from the same facts; and (3) seek monetary relief for abusive acts or practices only when there has been a lack of a good-faith effort to comply with the law.

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

Wayback Machine, CFPB Style

The CFPB filed a complaint against a national bank for alleged violations of TILA, including provisions contained in the Fair Credit Billing Act and CARD Act. The CFPB alleged that the bank: (1) automatically denied consumers' billing error notices and claims of unauthorized use in instances where the customer did not complete an affidavit requested by the bank; (2) failed to refund all charges to consumers when it did resolve a billing error notice or claim of unauthorized use in consumers' favor; (3) failed to deliver written notices of acknowledgment and denial of billing error notices; and (4) failed to provide credit counseling referrals to consumers that called the toll-free number set up for that purpose. The bank has publicly stated that it will challenge the CFPB's lawsuit and that the bank discovered and resolved the alleged issues years ago.

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

Spotlight on Consumer Reporting

The CFPB issued a special-edition Supervisory Highlights on consumer reporting. Despite "significant improvements" in the consumer reporting arena noticed by examiners, the CFPB detailed weaknesses in furnisher policies and procedures and violations of FCRA, including: (1) reporting information with knowledge of errors; and (2) failures to comply with dispute notice obligations, obligations to correct and update information, and obligations to provide notice of delinquency of accounts. The CFPB also identified weaknesses in procedures to ensure "maximum possible accuracy" of information, permissible purpose, restriction of information resulting from identity theft, and dispute investigation obligations. The report states that the CFPB's supervisory work in the consumer reporting market is "ongoing and remains a high priority."

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

MOBILE & EMERGING PAYMENTS

Plastic Pushback

On January 23, 2020, the New York City Council enacted a local law prohibiting cashless businesses, requiring "food store[s]" and "retail establishment[s]" to accept cash payments and barring surcharges on cash payments. Under the new law, businesses could be fined $1,000 for a first violation and $1,500 for each subsequent violation. New York City joins Philadelphia and San Francisco as major US cities with bans on cashless establishments, while New Jersey and Massachusetts both have statewide bans. Meanwhile, the House Financial Services Committee held a hearing on January 30, 2020, to examine the role of cash in a payments landscape increasingly dominated by credit cards and mobile payments. The committee also considered a bill that would enshrine a prohibition on cashless establishments into federal law.

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

Go Ahead, Be a Teacher's Pet: FRB to Hold Innovation Office Hours

On December 17, 2019, the Federal Reserve Board announced that it will hold "fintech innovation office hours" across the country in coordination with local Federal Reserve Banks. The Federal Reserve Board sees the sessions as an opportunity to increase dialogue and discussion between banks, FinTech companies, and regulators. The first "office hours" session was held at the Federal Reserve Bank of Atlanta on February 26, 2020. The Board also launched a new section of its website to act as an information hub on innovation-related matters.

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

Crypto-Curmudgeon

In response to an inquiry from two members of the House Financial Services Committee, Federal Reserve Board Chairman Jerome Powell reportedly indicated in a letter to the Committee that the Federal Reserve Board is "not currently developing a central bank digital currency" (CBDC), but is monitoring digital currency developments around the globe. Chairman Powell cites the continued use of cash in the US market and the highly diversified American payments ecosystem as primary reasons for the lack of interest in an American CBDC. Meanwhile, the Bank for International Settlements (BIS) reports surging interest in CBDC among global central banks. In its most recent survey on CBDC, the BIS notes that some 80% of central banks surveyed are engaged in some sort of CBDC work and 40% of central banks surveyed report their CBDC projects are at the proof-of-concept stage.

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

MORTGAGE & FAIR LENDING

No-Action Letter Win-Win

The CFPB issued a no-action letter (NAL) to a mortgage lender regarding the bank's funding arrangements with housing counseling agencies certified by HUD. Last year, the CFPB granted HUD's request for a NAL Template for applications by mortgage lenders that enter into funding arrangements with housing counseling agencies that participate in HUD's Housing Counseling Program. Pursuant to that program, the mortgage lender operates a program by which it pays a fee to participating counseling agencies that provide homebuyer counseling services for consumers who complete the counseling program and apply for a mortgage loan with the lender. The NAL provides that the CFPB will not bring supervisory or enforcement action against the lender under its UDAAP authority or RESPA.

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

Nothing Common About Loan Mod Claims

A federal court in New York denied a motion for class certification in a class action alleging a mortgage loan servicer violated the federal RESPA regulation requiring servicers to use reasonable diligence in processing loan modification applications. *Jackson v. Bank of America, N.A.*, No. 16-cv-787, 2019 U.S. Dist. LEXIS 222511 (W.D.N.Y. Dec. 30, 2019). The court found that the plaintiffs could not meet their burden to show commonality or predominance because a determination of whether a servicer exercised "reasonable diligence" would require a file-by-file review, and liability would be "contingent on the particular facts related to [each] particular application." *Id.* at *23.

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

End with a Whimper, Not a Bang

The City of Miami voluntarily dismissed cases it was pursuing against large national banks claiming that the banks steered minority homeowners into high-priced mortgages they could not repay, which caused the City to lose tax revenue and pay to maintain the foreclosed properties. Two of the cases were filed in 2015, dismissed, and then reinstated by the Supreme Court in a ruling that allowed cities to bring Fair Housing Act claims against banks. Upon remand, the Eleventh Circuit allowed the cases to proceed. The dismissal orders do not provide any explanation for the decision to drop the cases.

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

OPERATIONS

FDIC Proposes Amendments to Brokered Deposits Regime

The FDIC published a Proposed Rule intended to modernize the regulatory treatment of brokered deposits. 85 Fed. Reg. 7453 (Feb. 10, 2020). The Proposed Rule would set forth an amended scheme for determining whether deposits placed through deposit placement arrangements are classified as brokered deposits. At a high level, the Proposed Rule would: (1) add a definition of "facilitating the placement of deposits" to the definition of "deposit broker"; (2) amend the "primary purpose" exception to the definition of deposit broker; (3) extend the exception for insured depository institutions (IDIs) to

wholly-owned operating subsidiaries of parent IDIs; and (4) expressly designate brokered CDs as brokered deposits. In the supplementary information accompanying the Proposed Rule, the FDIC also stated that it intends to evaluate existing staff opinions pertaining to brokered deposits to codify staff opinions of general applicability that remain applicable and rescind those that do not. The Proposed Rule includes 26 specific questions about the FDIC's proposal. Answers to these questions, and comments on the Proposed Rule generally, are due by April 10, 2020.

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

Agencies Propose Volcker Rule "Covered Funds" Revisions

Five federal agencies requested public comment on a proposal to modify the regulations implementing the Volcker Rule's general prohibition on banking entities investing in or sponsoring hedge funds or private equity funds. This Covered Funds Proposal would modify the restrictions for banking entities investing in, sponsoring, or having certain relationships with covered funds. The Covered Funds Proposal is intended to streamline the covered funds portion of the rule, address the treatment of certain foreign funds, and permit banking entities to offer financial services and engage in certain other permissible activities. The Covered Funds Proposal is an important step toward liberalizing the covered funds provisions of the Volcker Rule and, if adopted, will provide relief to banking entities by providing banking entities with greater latitude to conduct activities through a fund structure. Comments on the proposal are due April 1, 2020.

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

Key Risks for Banks

The OCC issued its Semiannual Risk Perspective Report focused on issues that pose threats to national banks. The Report is intended to serve as a resource to the banking industry, bank examiners, and the public, and it addresses operational, credit, and interest rate risks. For example, the Report identified elevated operational risk as banks adapt to a changing and increasingly complex operating environment, including as it relates to ongoing cybersecurity threats. The Report also identified accumulated credit risk and recommended preparations for cyclical change, including as it relates to credit review, problem loan identification and workout, collections, and collateral management. The likely cessation of LIBOR as an active index by the end of 2021 is another risk discussed in the Report.

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

Federal Reserve Board Issues Final Rule on Control Regulations

The Federal Reserve Board approved a Final Rule revising the regulations related to the determination of "control" of banks under the Bank Holding Company Act and of federal savings associations under the Home Owners' Loan Act. The Final Rule is intended to improve transparency and predictability relating to control questions; however, the determinations of control remain complex. The Final Rule does not grandfather existing investments nor provide for a transition period, but the Federal Reserve Board does not expect to revisit structures it has already reviewed, unless such structures are materially altered from the facts and circumstances of the original review. The Final Rule will take effect on April 1, 2020.

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

PREEMPTION

Contract; Not Contract

A federal court in California found a breach of the implied covenant claim preempted as applied to a federal thrift. *Asare-Antwi v. Wells Fargo, N.A.*, No. SACV 19-887 JVS (KESx), 2019 WL 6620509 (C.D. Cal. Oct. 25, 2019). Plaintiff's mortgage loans were originated by a federal thrift. Plaintiff alleged the current owner breached the implied covenant of good faith and fair dealing by refusing to provide an accounting of the amount in arrears, added unauthorized and unsubstantiated charges, and refused to consider a loan modification in good faith. The court found the claim was preempted because plaintiff sought to rely on the implied covenant to impose additional requirements on the defendant. The court explained that a claim for breach of an express contractual term is not preempted, but that plaintiffs may not use an implied covenant or unfair and deceptive acts and practices claim "to gloss or add a contract term," including by alleging "an abuse of some discretion afforded by the contract." *Id.* at *6.

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

PRIVACY

Child's Play

Stepped-up enforcement of COPPA by the FTC resulted in a record-breaking fine of $170 million against Google and its subsidiary YouTube late last year. But state AGs are now encouraging the FTC to do more and assert that the FTC's rules to implement COPPA "should be strengthened significantly." For example, the AGs believe that the definition of "web site or online service directed to children" should be amended so that platforms can no longer effectively "turn a blind eye" to what content publishers are putting on their platforms. The AGs also believe that "marketing technology" firms should be captured within the definition of a website "operator" subject to the rule based on the nature and extent of the data they collect.

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

Breach Laws Get Broader

Oregon, Illinois, and Texas each recently amended their state data breach notification laws, effective January 1, 2020. Oregon SB 684 expanded the scope of its law to cover a person that "owns, licenses, maintains, stores, manages, collects, processes, acquires or otherwise possesses personal information" and also imposed distinct notice requirements for companies that are service providers to other businesses. Illinois SB 1624 added a requirement to provide notice to the Illinois AG of any breach where notice must be provided to more than 500 Illinois residents. Texas HB 4390 added a timing requirement for when Texas residents must be provided breach notices ("without unreasonable delay and . . . not later than the 60th day after the date on which the person determines that the breach occurred"), as well as an obligation to provide notice to the Texas AG of any breach where notice must be provided to at least 250 Texas residents.

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

Equifax Still Paying

A court in the Northern District of Georgia has approved a settlement in the class action litigation arising out of the 2017 Equifax breach. *In re Equifax, Inc. Customer Data Sec. Breach Litig.*, No. 1:17-md-2800-TWT, 2020 WL 256132 (N.D. Ga. Jan. 13, 2020). Equifax will pay more than $380.5 million into a fund for class participants, as well as attorneys' fees and notice and administration costs. *Id.* at *2. Equifax also may have to pay an additional $125 million "if needed to satisfy claims for certain out-of-pocket losses." *Id.* And, Equifax could pay up to $2 billion more if "all 147 million class members sign up for credit monitoring." *Id.* Equifax also agreed to a consent order requiring the company to spend a minimum of $1 billion for data security and related technology improvements over five years, as well as comply with comprehensive data security requirements. *Id.* at *3.

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

A New Framework for Privacy?

NIST has released a voluntary privacy framework that is intended to help companies manage privacy risk. The report notes that organizations "may not realize the full extent" of potential privacy consequences of consumers' interactions, "which can affect their brands, their bottom lines, and their future prospects for growth." The privacy framework uses the same structure as NIST's cybersecurity framework. This new privacy framework starts with a "core" of activities and outcomes, provides a mechanism for companies to develop "profiles" of current privacy activities or desired outcomes, and then works through "Implementation Tiers" that provide a point of reference on privacy risk and the adequacy of processes and resources in place to manage relevant risks.

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

Keep an Eye Out

The FDIC and the OCC issued an Interagency Statement on heightened cybersecurity risk. The Statement is a reminder to supervised financial institutions of sound cybersecurity risk management principles, spurred in particular by the increasing frequency and severity of attacks involving ransomware and other "destructive" malware. The agencies recommend that senior management "reevaluate the adequacy of information technology safeguards" to address these types of threats in particular, including as it relates to enhanced response, resilience, and recovery capabilities. The Statement also notes the continued threat of phishing attacks and other types of credential compromises and reiterates the importance of identity and access management controls. In addition, the Statement addresses network configuration and system hardening, employee training, security tools and monitoring, and data protection.

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

Beware Ransomware

The National Cybersecurity Center of Excellence has released for comment a draft of a new publication from NIST on *Identifying and Protecting Assets Against Ransomware and Other Destructive Events*. The draft practice guide (NIST SP 1800-25) would apply the NIST cybersecurity framework to inform organizations on how to identify and protect against a data integrity attack, and, in turn, understand how to manage data integrity risks and implement the appropriate safeguards. The practice guide addresses measures to protect against such attacks, including secure storage, backup capabilities for databases, VMs, and file systems, log collection, asset inventories, and file integrity checking mechanisms. The guide would be intended to be used by an organization's decision makers, technology or security program managers, and IT professionals.

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

ARBITRATION

Not So Fast, Says a Federal Judge to the California AG

A California federal court issued a preliminary injunction barring the California AG from enforcing a new California law that purports to ban mandatory arbitration agreements between employers and employees from coming into effect. *See Chamber of Commerce v. Becerra*, No. 2:19-cv-02456-KJM-DB, 2020 WL 605877 (E.D. Cal. Feb. 7, 2020). The California Governor signed the legislation after the prior Governor vetoed it twice because it was preempted by the FAA. Industry groups, including the US and California Chambers of Commerce, sued to block enforcement. As we reported, before the law took effect, the court issued a temporary restraining order barring the AG from enforcing it. The court found the plaintiffs had raised "serious questions" regarding whether the statute is preempted by the FAA and agreed with the plaintiffs that there was a risk of irreparable harm if the law were to go into effect even briefly. After hearing oral argument and considering supplemental briefing, the court then issued a preliminary injunction. The AG has filed a notice of appeal, but the preliminary injunction remains in effect.

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

Be Careful What You Wish For

Never one to mince words, Northern District of California Judge William Alsup issued a strongly worded opinion denying a defendant's motion to stay individual arbitrations regarding whether the plaintiffs were properly classified as independent contractors pending a ruling on a pending class action settlement. *Abernathy v. DoorDash, Inc.*, No. C19-07545, 2020 WL 619785 (N.D. Cal. Feb. 10, 2020). The contract governing the relationship between the parties includes a mutual arbitration agreement requiring individual arbitration and waiving the right to participate in class actions. The defendant was hit with over 5,000 arbitration claims, which would result in millions of dollars in initial filing fees alone. The defendant has entered into a putative class settlement in California state court and asked the court to stay the individual arbitrations until the deadline for claimants to opt out of the settlement or remain in the class and release the claims pursued in arbitration. The court refused, finding it ironic that defendant was trying to enjoin arbitration based on a class action settlement even though the agreement barred employees from participating in class claims.

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

TCPA

Supreme Court to Review TCPA's Government Debt Exception

The Supreme Court granted certiorari to review a First Amendment challenge to the government debt collection exception to the TCPA's restrictions on autodialed and prerecorded calls to cell phones. *Barr v. Political Consultants*, No. 19-631, 2020 WL 113070 (Jan. 10, 2020). The Fourth Circuit held that the debt collection exception was unconstitutional, as it is a content-based ban that "subverts . . . privacy protections" and "deviates from the purpose of the automatic call ban[.]" *Am. Ass'n of Political Consultants v. FCC*, 923 F.3d 159, 168 (4th Cir. 2019). In its petition to the Supreme Court, the United States argued that the exception is not content-based because it depends on "the call's economic purpose" and "the existence of a specified economic relationship with the federal government." Petition, at 6-7.

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

And Now, the Eleventh Circuit's Take on Autodialers

In a recent decision, the Eleventh Circuit refused to broaden the definition of an autodialer in addressing two actions alleging plaintiffs received numerous unsolicited phone calls from a timeshare marketer and a loan servicer. *Glasser v. Hilton Grand Vacation Co.*, 948 F.3d 1301 (11th Cir. 2020). Rejecting the Ninth Circuit's decision in *Marks* and furthering the circuit split, the court found that because neither system at issue used "randomly or sequentially generated numbers" and because one of the systems required human intervention, they were not

"autodialers" covered by the TCPA. *Id.* at 1304-05. The court did affirm an award of treble damages for 13 calls one plaintiff received using a prerecorded voice – a separate basis for liability under the TCPA. *Id.* at 1313.

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

No Liability Brewing Here

The Western District of Missouri granted a defendant's motion for summary judgment in a case alleging defendant's texts announcing plaintiff had won free happy hours violated the TCPA. *Beal v. Outfield Brew House, LLC*, No. 2:18-cv-4028-MDH, 2020 WL 618839 (W.D. Mo. Feb. 10, 2020). The court found that because the defendants' phone system required human intervention to deliver the text messages, and because the phone numbers had to be uploaded or entered into the phone system manually, defendant's platform did not qualify as an autodialer under the TCPA. *Id.* at *5.

For more information, contact Adam Hunt at ahunt@mofo.com.

What's Reasonable? Less Than 0.1% of Potential Damages

A California federal court preliminarily approved a settlement in an action alleging that defendants sent 13.5 million marketing texts without prior express consent. *Larson v. Harman-Mgmt. Corp.*, No. 1:16-cv-00219-DAD-SKO, 2019 WL 7038399 (E.D. Cal. Dec. 20, 2019). In the settlement, defendants agreed to deposit $4 million into a fund, $2.4 million of which would be distributed to class members who submit a timely, valid claim. *Id.* at *2. The settlement represents less than 0.1% of potential statutory damages, calculated at $500 per message under 47 U.S.C. § 227(b)(3)(B). *Id.* at *6. In granting preliminary approval, the court noted "the uncertainty of whether plaintiff could prevail in this action" or "could even maintain this action as a class action," as well as the fact that individual recoveries are in line with other TCPA class action settlements. *Id.* at *7.

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

BSA/AML

FinCEN Focus

In prepared remarks at an American Bankers Association/American Bar Association conference, FinCEN Director Kenneth A. Blanco focused on how FinCEN uses BSA data, the value of BSA data to both industry and law enforcement, and the importance of beneficial ownership information. FinCEN Deputy Director Jamal El-Hindi highlighted similar issues in his February 6, 2020 speech at the SIFMA 20th Anti-Money Laundering and Financial Crimes Conference. Both officials emphasized that there are approximately 30,000 searches on BSA data daily, and that FinCEN is committed to working with key stakeholders to address the need for the consistent collection of beneficial ownership information. Deputy Director El-Hindi also warned social media platforms establishing cryptocurrencies that FinCEN will strictly regulate this space to protect the financial system.

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

SEC Targets AML in Examination Priorities

The SEC Office of Compliance Inspections and Examinations (OCIE) released its 2020 examination priorities, which include a focus on AML. The OCIE noted that broker-dealers and investment companies are required to establish AML programs that are reasonably designed to identify and verify customer identities and beneficial owners of legal entity customers, perform customer due diligence, monitor for suspicious activity, and file Suspicious Activity Reports as needed. The OCIE stressed the importance of these requirements in combating money-laundering activities and noted it "will continue to prioritize examining broker-dealers and investment companies for compliance with their AML obligations."

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

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

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