FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Summer 2021

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MOFO METRICS

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6	Increase in height of the Eiffel Tower due to expansion during the summer, in inches.
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900	Number of people sent to emergency rooms for sparkler-related injuries annually
70	Average number of hot dogs eaten per person in America between Memorial Day and Labor Day
15	Average amount of watermelon Americans eat annually per person, in pounds

EDITOR'S NOTE

As spring turns to summer, climate change is on our minds. A new day, a new story about how financial institutions are addressing climate-related risks. In the past few months, six major banks—Bank of America, JPMorgan Chase, Citi, Wells Fargo, Goldman Sachs, and Morgan Stanley—have announced goals to achieve net-zero emissions. Underscoring the importance of the issue, Jane Fraser made this announcement on her first day as Citigroup CEO.

These announcements recognize two aspects of achieving net zero emissions. First, achieving carbon neutrality in own operations. This is much easier than the second aspect, which is to ensure that the businesses they finance are carbon-neutral. We haven't yet seen much in the way of specifics. In the last few weeks, though, Chase released carbon reduction targets to align its financing activities with climate goals of Paris Agreement. Chase explains that it will work with clients in the auto manufacturing, electric power, and oil & gas sectors to achieve reduction in types of carbon intensity. Chase also announced it had achieved carbon neutrality across its operations in 2020.

Taking another approach, Mastercard announced that it will tie executive bonuses to environmental and social goals, evaluating executives on how they contributed to efforts to curb Mastercard's use of carbon, among other goals. And Amalgamated Bank went further, forming a holding company certified as a public benefit corporation, which means it has a commitment to social and environmental values in its charter and allows the Board to balance financial and nonfinancial interests in making business decisions.

We also are seeing President Biden, Congress, and the federal banking agencies join the field. President Biden issued an Executive Order on Climate-Related Financial Risk directing agencies to analyze and mitigate the risk climate change poses to homeowners, consumers, businesses, the financial system, and the federal government. Several bills have been introduced in Congress focused on understanding the threat climate change poses to the financial system; establishing an advisory committee on climate financial risk made up of experts in climate science, climate economics, and climate financial risk; and updating supervisory guidance on climate risk.

The OCC and FRB, in coordination with FSOC, are looking at the financial stability implications of climate change with a focus on safety and soundness. The FRB has established a committee to develop and implement a program to assess and address climate-related risks. The Treasury Department announced what it called a "coordinated climate policy strategy," including mitigating risks climate change poses to the stability of the U.S. and global financial system.

This is definitely an area we'll be keeping an eye on in the coming months. For these developments and all the rest of the news in Beltway, Bureau, Operations, Privacy, Mortgage, and more, read on!

BELTWAY

Risks and Benefits of AI

Several federal banking agencies published a joint request for information and comment seeking comments from financial institutions on their use of artificial intelligence (AI), including machine learning. The agencies requested specific comments on (1) financial institutions' risk management practices related to the use of AI, (2) barriers or challenges facing financial institutions when developing and managing AI and its risks, and (3) benefits to financial institutions and customers from the use of AI. Use of AI by supervised entities (particularly in connection with pricing and underwriting for credit) is increasingly becoming of interest to federal banking regulators. Comments were originally due June 1, 2021, but on May 17, 2021, the agencies announced an extension of the comment period. Comments will now be due by July 1, 2021.

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

Guidance on Guidance

The FRB adopted a final rule substantially codifying the September 2018 Interagency Statement Clarifying the Role of Supervisory Guidance. According to the Federal Reserve, the "core message" of the Interagency Statement was that "supervisory guidance does not have the force and effect of law, restating a well-established principle of administrative law." The final rule also confirms that the FRB will not pursue enforcement actions based on supervisory guidance. The FRB's move to finalize the Interagency Statement follows the FDIC's finalization of the Interagency Statement, which became effective on April 1, 2021.

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

Climate Change and Banking

At an FSOC meeting, then-Acting Comptroller of the Currency Blake Paulson issued a statement addressing financial stability implications of climate change. Acting Comptroller Paulson noted that the OCC operates as a prudential supervisor of the federal banking system and the risks that the OCC may monitor include "contexts that relate to climate change, either because of physical conditions or climate-related transitions in business and other environments." Former Acting Comptroller Paulson also noted that the OCC will be expanding its knowledge related to climate change by engaging with stakeholders.

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

Treasury Climate Hub

The Department of Treasury announced a coordinated climate policy strategy under which Treasury will focus on climate-related policy work related to climate transition finance, climate-related economic and tax policy, and climate-related financial risk. In connection with this strategy, Treasury created a new Climate Hub led by a Climate Counselor who will coordinate Treasury's climate-related policy work and report directly to and advise the Secretary of the Treasury on a broad range of climate matters. John E. Morton was appointed as the first Treasury Climate Counselor to coordinate Treasury's climate-related policy work. Morton is a former partner at a specialist climate change advisory and investment firm who previously served as the White House Senior Director for Energy and Climate Change at the National Security Council during the Obama administration.

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

He's Baaaaaack!

Richard Cordray was appointed Chief Operating Officer of Federal Student Aid at the Department of Education. Cordray, who will be responsible for managing the student financial assistance programs authorized under Title IV of the Higher Education Act of 1965, is expected to strengthen the Department of Education's consumer protection role in connection with the agency's $1.6 trillion portfolio of federal student loans.

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

Two Unaffiliated Networks, One Solution

The FRB published a notice of proposed rulemaking to amend Regulation II. The proposed revisions and accompanying commentary would clarify that card-not-present transactions require issuers to enable at least two unaffiliated payment card networks for debit card transactions. The modifications to Regulation II and its accompanying commentary would emphasize the role of issuers in debit card transactions. The revisions would also address the use of certain terms in Regulation II. For example, the term "form factor" would be replaced with "means of access" to better align with current industry terminology. Comments are due by July 12, 2021.

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

FTC Is Out of the Money

The U.S. Supreme Court unanimously held in *AMG Capital v. FTC* that the FTC lacks authority to pursue equitable monetary relief in the federal court under section

13(b) of the Federal Trade Commission Act. This is a blockbuster ruling given that the FTC used section 13(b) to obtain more than $10 billion in consumer redress from 2016 to 2019. The FTC can seek monetary relief but only if it first secures injunctive relief and the respondent violates the injunction. Congress may act in response to the ruling, and we also may see the CFPB step in where it has concurrent jurisdiction with the FTC.

For more information, contact David Fioccola at dfioccola@mofo.com or read our Client Alert.

BUREAU

Stop; Reverse That

The CFPB rescinded its January 2020 Statement of Policy Regarding Prohibition on Abusive Acts or Practices. The CFPB indicated that took this action "to better protect consumers and the marketplace . . . and to enforce the law as Congress wrote it." The CFPB's action signals a return to the "Know It When You See It" standard for UDAAP abusiveness, which could essentially require regulated entities to "read the tea leaves" based on allegations in enforcement actions and statements in CFPB supervisory guidance and the CFPB examination manual.

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

The Tennis Match Continues

In a blog post, CFPB Acting Director Dave Uejio indicated that the agency would seek to revive the payday loan "ability to pay" standard the Trump administration revoked in 2020. The original rule, promulgated by the CFPB in 2017, required payday lenders to determine that a borrower had the financial means to repay before underwriting a loan. The ability-to-pay standard was challenged in federal court, and in 2020, the CFPB issued a rule rescinding the ability to pay requirement. Acting Director Uejio's recent blog post highlights the CFPB's belief that "the harms identified by the 2017 rule still exist" and resolve to "use the authority provided by Congress to address these harms."

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

No More Mr. Nice Guy

The CFPB rescinded seven policy statements issued during the pandemic that provided temporary flexibility to financial institutions in the mortgage, credit reporting, credit cards, and prepaid card spaces. The CFPB indicated that it rescinded the policies because financial institutions no longer need such relief and that the agency intends to exercise the full scope of its supervisory and enforcement authorities in certain key areas. The rescinded policy statements include statements on quarterly reporting under the Home Mortgage Disclosure Act, collections for credit card and prepaid account issuers, and the FCRA and Regulation V.

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

CFPB Complaint Against Student Loan Debt Relief Company

The CFPB filed a complaint against a student loan debt relief company and certain of its officers for allegedly violating the Telemarketing Sales Rule by collecting up-front fees. The complaint alleges that the defendants collected over $3.5 million in illegal advance fees from more than 3,300 consumers and seeks monetary damages, injunctive relief, and consumer redress. It also seeks to require a third-party marketing firm that is named as a relief defendant to disgorge the advance fees it allegedly received without any legitimate claim.

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

Tiger King and CFPB Complaints: America's Most Popular Quarantine Activities

The CFPB released its 2020 Consumer Response Annual Report to Congress, which reports that pandemic-related financial stress caused a 54% increase in consumer complaints over 2019 levels. The report indicates that credit or consumer reporting complaints accounted for the largest portion (59%) of total complaints received, followed by debt collection (15%), credit card (7%), checking or savings (6%), and mortgage complaints (5%). The report also indicates that consumers submitted approximately 32,100 complaints mentioning coronavirus-related keywords last year. The report highlights certain multiyear trends, including an increase in complaints about inaccurate credit reporting as compared to complaints submitted in 2019.

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

It's About Time

The CFPB published a proposal to extend the effective date of two debt collection rules to give affected parties additional time to comply. If promulgated, the agency's proposed rule would extend the November 21, 2021, effective date by 60 days until January 29, 2022. The first rule, published in November 2020, clarifies prohibitions on harassment and abuse, false or misleading statements, and unfair practices while collecting a debt. The second rule, published in January 2021, clarifies disclosures debt collectors must provide at the beginning of collections communications and prohibits collectors from suing or threatening to sue on time-barred debts. The CFPB cited pandemic-related stress as the reason for the proposed delayed effective date.

For more information, contact Calvin Funk at cfunk@mofo.com.

Circle of Friends

The CFPB settled with a debt settlement company over allegations that the company engaged in abusive acts and practices and violated the Telemarketing Sales Rule. According to the CFPB, the company took advantage of consumers by steering them to high-cost creditors in which the company had ownership interests without disclosing such interests, including creditors that have come under the CFPB's ire. The CFPB noted that the high-cost creditors had links on its website to the debt settlement company, and their employees transferred consumers directly to the debt settlement company's sales associates. The settlement agreement requires the company to return roughly $646,000 in fees to consumers, pay a $750,000 penalty, and stop settling debts for creditors with which it shares an ownership interest.

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

MOBILE & EMERGING PAYMENTS

California Staffs Up for Fintechs

The California Department of Financial Protection and Innovation continues to shore up its ranks and fill new positions outlined in the California Consumer Financial Protection Law, announcing the hiring of Christina Tetreault to lead the new Office of Financial Technology and Innovation (OFTI). Ms. Tetreault, who most recently served as Manager of Financial Policy for Consumer Reports, will be tasked with carrying out the OFTI's mission of fostering responsible innovation and will have broad new enforcement and oversight powers to regulate fintechs in the state. One of her first tasks in office will be to hold regular "office hours" for industry stakeholders to provide support and early guidance to emerging businesses and fintechs.

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

Got Crypto? These Agencies Want to Hear from You

The FDIC announced a request for information and comment on insured depository institutions' current and potential digital asset activities, with the goal of gaining a better understanding of consumer and industry demand for digital assets. Specifically, the FDIC is seeking to learn more about current and potential use cases involving digital assets, banks' risk and compliance management related to these use cases, ways the FDIC can adapt its supervision activities to better oversee digital asset activity, and the impact of digital assets on deposit insurance and the resolution process. Comments are due July 16, 2021.

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

Don't Call it Unfair: FTC Announces New Rulemaking Group

Regulating unfair or deceptive practices is at the core of the FTC's mission, but the FTC has traditionally regulated through enforcement actions and not rulemaking. That may be changing. Acting Chairwoman Rebecca Slaughter's announcement of a new, centralized rulemaking group within the FTC's Office of the General Counsel is intended to better position the agency to regulate through rulemaking, with a particular emphasis on new rulemakings. In a separate announcement, Austin King was announced as Associate General Counsel for the rulemaking group. With previous stints at the FTC and the CFPB, King will play a central role as the agency looks to strengthen existing rules and explore new rulemakings.

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

MORTGAGE & FAIR LENDING

Aggressive Action

The CFPB released a dire report on "Housing Insecurity and the COVID-19 Pandemic." December 2020 data show mortgage delinquencies at their highest since the 2010 recession. The number of homeowners behind on their mortgage has doubled during the pandemic, and millions are seriously delinquent. Nearly nine million renters are behind on their rent. All told, the CFPB warns that as legal protections begin to expire this summer, nearly 10% of U.S. households are at risk of losing their homes. The CFPB, which was created in the aftermath of the 2007-08 housing crisis, hears a call to action. Promising "aggressive action," it stated, "[w]here we can use our authority to keep people in their homes, we will." As we detail in this Report, the CFPB has been true to its word, issuing a slew of new guidance and rules for mortgage servicers.

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

Stop, in the Name of COVID

The CFPB has proposed new rules to postpone foreclosure on principal residences until 2022. The rules would create a special "pre-foreclosure review period" that would generally prohibit starting foreclosure on principal residences until after December 31, 2021. The rules would also allow streamlined loan modifications and temporarily change servicer communications to get more information to borrowers sooner. The new rules would amend Regulation X to add or revise existing Mortgage Servicing Rule provisions. The CFPB plans for the final rulemaking to take effect August 31.

For more information, contact Nancy Thomas at nthomas@mofo.com or read the CFPB's Fast Facts Summary.

The Carrot and the Stick

The CFPB and other state and federal regulators issued a joint policy statement relaxing supervisory and enforcement practices for mortgage servicers. If servicers are making good-faith efforts to comply within a reasonable time, the agencies do not intend to take action for delays in sending certain early intervention notices, loss mitigation notices, or annual escrow statements. The agencies also relaxed timing requirements for servicers sending acknowledgement notices. Even as it signaled some leniency, though, the CFPB issued a stern warning to mortgage servicers: "unprepared is unacceptable." The agency advised servicers to take steps now to prevent a "tidal wave" of foreclosures when pandemic-related emergency mortgage protections begin expiring this summer. The CFPB said it will monitor servicers to ensure that they have sufficient resources and staff dedicated to engaging with borrowers and processing loss mitigation applications, act proactively to contact borrowers in forbearance, and comply with all other applicable federal and state rules and restrictions.

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

Landlords, You've Been Warned

The CFPB and FTC issued a joint statement describing their work to stop illegal evictions. The statement warns that the agencies are "monitoring and investigating eviction practices, particularly by major multistate landlords, eviction management services, and private equity firms." It reminds readers that a patchwork of rules protect renters, including CDC, state, and local moratoria, and that renters must be apprised of their legal rights under those moratoria.

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

The *Bostock* Stops Here

The CFPB has announced a new interpretive rule on the ECOA's prohibition against sex discrimination. The rule clarifies that the ECOA and Regulation B prohibit discrimination on the basis of sexual orientation and gender identity discrimination, including "discrimination based on actual or perceived nonconformity with traditional sex- or gender-based stereotypes, and discrimination based on an applicant's social or other associations." The rule follows the Supreme Court's landmark decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), which held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 includes sexual orientation discrimination and gender identity discrimination.

For more information, contact Calvin Funk at cfunk@mofo.com.

OPERATIONS

Specifying FedNow Messaging

The Federal Reserve released messaging specifications in anticipation of the 2023 launch of the Reserve Banks' FedNow Service. The FedNow messaging specifications are consistent with the ISO 20022 standard, an internationally accepted messaging format that is expected to provide uniformity and efficiency to interactions between users of the ACH systems. These specifications are expected to promote interoperability with other payments systems, and the Federal Reserve collaborated with The Clearing House to optimize compatibility between the two payments systems. The Federal Reserve's early release of the ISO 20022 standard allows banks and other payments providers to begin preparing their systems for the FedNow Service's 2023 release date.

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

Automating Bank Capital Stock Adjustment Process

The FRB issued a notice of proposed rulemaking and request for comment on its proposal to automate the bank capital stock adjustment process. Currently, Regulation I (12 C.F.R. pt. 209) requires member banks to submit applications to adjust their subscriptions to FRB capital stock at least annually. Banks' capital stock requirement depends on capital and surplus as determined by their most recent Call Report. The FRB's proposal is based on technological innovation that would allow Federal Reserve Banks to pull relevant data every time a member bank releases a Call Report and automatically adjust its capital stock on that basis. Comments are due by June 14, 2021.

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

Account Access Requests

The FRB requested comment on proposed guidelines for FRB consideration of whether to grant institutions access to master accounts and payments services (Proposed Guidelines). According to the FRB, the purpose of the Proposed Guidelines is to help achieve the goal of applying a transparent and consistent process for all access requests, while considering the ramifications for the broader financial system. Under the Proposed Guidelines, when making an access determination, the Federal Reserve Banks would be expected to consider several factors, including whether the provision of an account or services presents or creates undue risk to the Reserve Banks, the payments system, U.S. financial system, or the broader economy. Comments on the Proposed Guidelines are due by July 12, 2021.

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

PREEMPTION

When Are Fees Not Fees for Purposes of NBA Preemption

A federal court in New York held that a state law prohibiting charging of paper statement fees is not preempted by the NBA and OCC regulations as applied to a national bank. *Manship v. T.D. Bank, N.A.*, 1:20-CV-0329, 2021 WL 981587 (N.D. N.Y. March 16, 2021). The court rejected the national bank's argument that OCC regulations specify that national banks may charge consumers non-interest charges and fees, finding paper statement fees do not "pertain to [the national bank's] banking practices and services." *Id.* at *7.

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

HBOR Preempted by HOLA

A Ninth Circuit panel followed prior Ninth Circuit authority in finding that HOLA preemption applies to claims brought against a national bank that acquired the mortgage loan at issue from a federal thrift. *Asare-Antwi v. Wells Fargo Bank, N.A.*, No 19-56383, 2021 WL 1944382, at *1 (9th Cir. May 14, 2021). The court affirmed the trial court's holding that plaintiff's breach of contract and breach of implied covenant claims were preempted by HOLA and OTS regulations because plaintiff had not identified any contract terms the national bank allegedly breached. The court also affirmed the trial court's holding that plaintiff's HBOR claims are preempted because the "the law's imposition of procedures on mortgage servicers, trustees, beneficiaries, and agents would more than incidentally affect lending operations." *Id.* at *2.

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

The Country and the Western

A federal court in Massachusetts found state law usury and related claims were preempted as applied to a national bank, rejecting arguments that a non-bank service purchaser of the loans could not charge interest at the rate authorized for the national bank and that the purchaser was the true lender. *Robinson v. National Collegiate Student Loan Trust 2006-2*, 20-cv-10203, 2021 WL 1293707 (D. Mass. Apr. 7, 2021). The court relied on the valid-when-made doctrine and explained that a national bank's ability to sell loans is part of the business of banking in finding the subsequent purchaser was not bound by state usury laws. On true lender, the court found the note purchase agreement and credit agreement were dispositive in identifying the national bank as the lender and requiring the national bank to place its own funds at risk. The court, therefore, dismissed the borrower's breach of contract, implied covenant, and violation of the Pennsylvania UDAP statute.

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

PRIVACY

Financial Institutions Exempt from New Virginia Privacy Law

Virginia Governor Northam signed into law H.B. 2307, the Virginia Consumer Data Protection Act (VCDPA), a comprehensive privacy law. Effective January 1, 2023, the VCDPA will apply to companies that do business in Virginia or that target their products or services to Virginia residents and that, among other things, control or process "personal data" relating to at least 100,000 Virginia residents during a calendar year. Similar to the California Consumer Privacy Act, the VCDPA will create a number of privacy rights for Virginia residents, such as the right to opt out of the "sale" of personal data, the processing of personal data for "targeted advertising," or "profiling in furtherance of decisions that produce legal or similarly significant effects concerning the consumer." Nonetheless, the VCDPA will not apply to financial institutions subject to the GLBA. Specifically, the VCDPA provides that it "shall not apply to any . . . financial institutions or data subject to Title V of the" GLBA.

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

Florida and Washington Fail to Pass Privacy Legislation

Industry has been closely tracking various privacy bills as they work their way through a number of state legislatures. Washington and Florida, in particular, were viewed as states most likely to enact comprehensive privacy laws this year. Nonetheless, both the Florida bill and the Washington bill failed to pass before their respective legislative sessions ended. This represented a win for industry as both bills were viewed as flawed. The issue that appeared to deadlock both legislatures was how the privacy bills would be enforced and, in particular, whether the bills would include private rights of action. Of note, this represents the third year in a row in which the Washington legislature has come close, but ultimately failed, to enact comprehensive privacy legislation.

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

NYDFS Drops a Hammer

The NYDFS announced a settlement with a mortgage broker and mortgage loan servicer for alleged violations of the cybersecurity regulations issued by the agency. The NYDFS alleged that the mortgage broker experienced a data breach that it failed to report to NYDFS, as required by the cybersecurity regulations. NYDFS also alleged that the mortgage broker failed to conduct a comprehensive risk assessment required by the regulations. As part of the settlement, the mortgage broker agreed to pay a $1.5 million penalty.

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

U.S. Security Agencies Issue Advisory on Russian Hackers

As part of the federal government's broader response to the highly publicized SolarWinds hacking campaign, the NSA, DHS's Cybersecurity & Infrastructure Security Agency, and the FBI issued a cybersecurity advisory regarding the Russian Foreign Intelligence Service's use of publicly known vulnerabilities to target public and private networks and systems. The advisory lists certain vulnerabilities that have been actively exploited by this threat actor, a description of the vulnerabilities, and recommended mitigations. It also lists general mitigation steps that are not specific to any given vulnerability, such as recommending that systems and products be updated and patched as soon as possible after patches are released.

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

Sunny with a Chance of Hacking?

The NYDFS released a report on the SolarWinds cyberattack. The report details regulated companies' responses and outlines key measures to prevent or mitigate against future supply chain attacks. In its report, the NYDFS found that regulated companies responded quickly, with some 94% removing the identified vulnerabilities and applying required patches within three days of the announcement of the SolarWinds attack. Of particular note to fintech companies and third-party service providers, the NYDFS identified assessing and addressing third-party risk as the foremost of its critical practices to mitigate future risks. In addition, the NYDFS highlighted adopting a "zero trust" approach and implementing multiple layers of security, addressing vulnerabilities through patch deployment, testing, and validation in a timely manner, and addressing supply chain compromise in incident response plans as critical practices. Although the report does not lay out any new requirements for regulated entities, it does reinforce the importance of cybersecurity measures to the NYDFS as it considers cyber risk and the threat of hacks to represent a major threat to the safety and soundness of the industry it regulates.

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

ARBITRATION

Alexa – Play Arbitration

A divided panel of the Ninth Circuit overruled a lower court decision in holding that an arbitration agreement between plaintiff's husband and Amazon-covered privacy claims brought by plaintiff regarding recordings by Alexa in plaintiff's home. *Tice v. Amazon.com, Inc.*, 2021 U.S. App. Lexis 4876 (9th Cir. Feb. 19, 2021). The panel majority found that claims based on alleged surreptitious recordings were within the scope of the agreement.

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

Tribal Loan Dispute Sent to Arbitration

The Sixth Circuit parted ways with the Second Circuit in ordering plaintiff to arbitrate her claims against a company that provided services to a tribal lender and the company owner. *Swiger v. Rosette,* 989 F.3d 501 (6th Cir. 2021). The arbitration agreement between plaintiff and the company required her to arbitrate her claims under tribal law subject to review by a tribal court. The court found that it was for the arbitrator to decide plaintiff's claim that the arbitration agreement was unenforceable and that the company owner could not enforce the arbitration agreement because the agreement included a broad delegation clause. The court agreed with defendant that the Second Circuit's refusal to enforce the same agreement ignored the delegation clause.

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

Keep on Fighting

The Eleventh Circuit reversed a district court's denial of a motion to compel arbitration and remanded for the district court to determine the enforceability of the agreement. *Hearn v. Comcast Cable Communications, LLC*, 992 F.3d 1209 (11th Cir. 2021). The plaintiff signed a subscriber agreement in 2016 that included a broad arbitration agreement covering all disputes, including disputes arising after the underlying services agreement was terminated. The subscriber canceled his subscription in 2017 and later called the company to discuss subscribing again. He sued after the company allegedly ran a credit check without his consent in violation of FCRA. The Eleventh Circuit found that the FCRA claim related to the original subscriber agreement because defendant could not have accessed plaintiff's credit information absent the original agreement.

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

Not a Party (For Arbitration Purposes)

A credit card issuer sued a customer in a collection action brought in state court. The customer brought a class action counterclaim and also brought claims against a merchant and a water-treatment equipment seller. The agreement between the merchant and the customer did not include an arbitration agreement, and the court rejected the merchant's argument that it was a third-party beneficiary of the arbitration agreements between the customer and the credit card issuer or the water-treatment equipment seller. *Jackson v. Home Depot, USA*, 857 S.E.2d 321 (N.C. Ct. App. 2021). The court found the Third Circuit's ruling on a similar argument also involving the language in the credit card issuer's agreement persuasive and followed it in finding the merchant's claims would remain in state court.

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

TCPA

SCOTUS Articulates a Common Sense Definition of an "Autodialer"

In a much anticipated and closely watched case, the U.S. Supreme Court unanimously reversed the Ninth Circuit and held that a "necessary feature of an autodialer . . . is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1173 (2021). The Court found that Facebook's text-notification system should not be considered an autodialer because it sent "targeted, individualized" texts to "numbers linked to specific accounts," instead of randomly or sequentially storing or producing those numbers. *Id.* at *1168. The Court concluded that the phrase "using a random or sequential number generator" applies to *both* "store" and "produce" telephone numbers, rejecting a broad interpretation that the plaintiffs' bar has pushed for years (with some success). *Id.* at *1173.

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

Brushing Away Vicarious Liability Claims Based on Sketchy Vendors

The Sixth Circuit rejected strict liability for products advertised via fax in *Lyngaas v. Curaden AG*, 992 F.3d 412 (6th Cir. Mar. 24, 2021). In this dispute, a dentist sued a Swiss toothbrush manufacturer and its U.S. subsidiary for allegedly sending unsolicited fax advertisements. The trial court found the parent company could not be held liable for the faxes because its subsidiary had designed and broadcasted the faxes on its own, without authorization. The Sixth Circuit affirmed, explaining "the TCPA does not impose strict liability on a manufacturer simply because its products wind up on the face of an unsolicited fax advertisement." *Id.* at * 424.

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

Once Is Enough!

The Fifth Circuit held that receipt of a single unsolicited text message is a concrete harm sufficient to confer standing to sue under the TCPA. *Cranor v. 5 Star Nutrition, L.L.C.*, No. 19-51173, 2021 U.S. App. LEXIS 15795 (5th Cir. May 26, 2021). The district court dismissed the suit for lack of standing on the grounds that one text message is not as intrusive as voice call to a residential landline. The Fifth Circuit disagreed, reasoning that a single unsolicited text message creates a nuisance and invaded plaintiff's privacy, the harm the TCPA was designed to address. The court directly addressed the Eleventh Circuit's decision in *Salcedo v. Hanna*, finding the ruling focused on traditional tort law of nuisance, not the TCPA. The ruling aligns the Fifth Circuit with the Second, Third, Seventh, and Ninth Circuits in finding a single unsolicited text message is sufficient to establish Article III standing.

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

BSA/AML

First Step in Implementing CTA

FinCEN recently published an Advance Notice of Proposed Rulemaking to implement the beneficial ownership reporting required under the recently enacted Corporate Transparency Act. FinCEN is required to promulgate regulations implementing the CTA by January 1, 2022. FinCEN seeks comment on 48 specific questions, including, among other things, (i) particular definitions under the CTA (e.g., "other similar entities"); (ii) what information to require from reporting companies and the protocols for reporting that information; and (iii) FinCEN responses to requests for beneficial ownership information from federal agencies.

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

Modeling BSA Risk Management for Banks

In 2011, the FRB and the OCC jointly issued the Supervisory Guidance on Model Risk Management, which the FDIC subsequently adopted in 2017. The Supervisory Guidance established principles for sound model risk management in three areas: (1) development, implementation, and use; (2) validations; and (3) governance, policies, and controls. The federal banking agencies, in consultation with FinCEN and the NCUA, have issued a joint statement addressing how the Supervisory Guidance's risk management principles relate to systems or models used by banks for BSA compliance. The agencies also released a request for information on the extent to which the Model Risk Management principles support compliance with BSA/AML and OFAC requirements, with the goal of better understanding bank practices and determining whether additional explanation may be helpful.

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

Odd Couple: Sanctions, Arts, and Antiquities Trading

FinCEN released a notice informing financial institutions of issues related to art and antiquities trading. In the notice, FinCEN cautions financial institutions with existing BSA obligations to be aware of illicit activity in the arts and antiquities trades. The notice also addresses the impact of the Anti-Money Laundering Act (which amended the BSA's definition of "financial institution" to include persons "engaged in the trade of antiquities") on such trading activities, sources of information about such activity, and instructions for filing related SARs. The AMLA also calls for various government agencies to study how money laundering and terrorism financing may be facilitated by art trading.

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

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