FINANCIAL SERVICES REPORT

Quarterly News, Spring 2018

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MOFO METRICS

69	Percentage of children ages 2-5 who can use a computer mouse
11	Percentage of children ages 2-5 who can tie their shoes
20	Percentage of songs on Spotify that have received zero plays
15	Percentage of Google searches that have never been searched before
8	Percentage of people who pronounce wi-fi “wiffy”
5,000	Number of new computer viruses released every month
80	Percentage of emails sent daily that are spam
20	Number of hours of video uploaded to YouTube every minute

EDITOR’S NOTE

The 2018 Winter Olympics are over. We watched two 17-year-olds win gold medals in sports that didn’t exist when we were 17. The Garlic Girls, with nicknames from their favorite breakfasts, and the U.S. men’s team won medals in curling. No Miracle on Ice for the U.S. men’s hockey team, but the U.S. women’s team won gold. With almost 3,000 athletes representing 90 countries plus the Olympic Athletes of Russia, it was three weeks of kissing, cursing on national TV, stress knitting, and cheerleading.

Here at home, Acting CFPB Director Mick Mulvaney has lost no time in issuing a new mission statement and announcing a “call for evidence” about every aspect of the CFPB’s functions. Senator Elizabeth Warren and others are actively and loudly opposing these actions every step of the way. Fasten your seatbelts, we are in for a bumpy ride.

Read on for all the news on the CFPB, the other federal banking agencies, AML/BSA, FinTech, privacy, and the rest of our Reports.

BELTWAY

Call Report Lite

The OCC, the Federal Reserve Board, and the FDIC have sent [changes] to streamline the Consolidated Reports of Condition and Income (call reports) requirements for supervised entities to the OMB. The changes: (1) delete or consolidate certain reporting items, (2) raise certain reporting thresholds, and (3) reduce the frequency of reporting for a number of items. The changes also expand the scope of the FFEIC 031 report form to require *all* institutions with consolidated assets of $100 billion or more to file an FFEIC 031 report, regardless of whether the institution has any foreign offices. The call report changes become effective on June 30, 2018.

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

Spotlight on BSA and Other Key Risks

The OCC released its Semiannual Risk Perspective for fall 2017, highlighting the risks facing the federal banking system and the OCC's priorities with respect to supervised entities. In its report, the OCC noted that credit, operational, and compliance risks remain key risks, largely resulting from competitive pressure to increase lending and embrace innovative new products and services. The OCC highlighted incremental easing in commercial credit underwriting standards, an increase in cybersecurity threats, increasing concentration of third-party vendors for critical operations, and ongoing challenges for BSA compliance. In particular, the OCC noted that supervised entities should focus on refining or updating BSA compliance programs when using new or evolving funds delivery channels.

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

Don't Blame Us

Comptroller Otting took the opportunity to respond to criticism of the OCC's oversight of Wells Fargo's sales practices in a letter to Senator Menendez, a member of the Senate Banking Committee. In reply to a letter from Senator Menendez and several other Democratic members of the Committee, the Comptroller disputed their claim that the OCC had not implemented recommendations from the OCC's April 2017 review of its supervision of Wells Fargo's sales practices. He explained that the OCC has completed eight of the nine review recommendations, and expects to complete the final recommendation by June 2018. Comptroller Otting added that a horizontal review of the sales practices of supervised banks had not identified any systemic issues with the opening of accounts. He noted that the OCC continues to use "heightened awareness" in its quarterly quality assurance reviews of supervised banks.

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

BUREAU

A Change in Outlook

Just before the new year, the CFPB released its biennial report on the consumer credit card market, which summarizes the agency's views on the state of the market over the past two years. The report is noteworthy because it provides the first insight into the post-Cordray CFPB's views on the state of the consumer credit card market. Taking a more neutral tone than past reports, the CFPB does not identify supervisory or enforcement priorities, specify CFPB policy, or list "areas of potential concern." Instead, it finds that "[t]he quantitative and qualitative indicators outlined generally suggest a positive picture for consumers," with new views on deferred interest products, access to credit scores, and products marketed to "non-prime borrowers."

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

$287M Restitution Rejected

The district court in the "true lender" suit against CashCall denied the CFPB's bid for $287 million in restitution and penalties, limiting recovery to a $10 million penalty. *See Consumer Financial Protection Bureau v. CashCall, Inc. et al.*, No. 2:15-cv-07522, 2018 WL 485963 (C.D. Cal. Jan. 19, 2018). Although the court held in September 2016 that CashCall was the "true lender" for payday loans issued to borrowers by a firm based on tribal lands, it found the CFPB had not shown that restitution was warranted. In its January 2018 findings of fact and conclusions of law, the court concluded that the Bureau hadn't put forth evidence that the lenders had knowingly pursued an unlawful scheme to defraud borrowers, finding that borrowers had gotten the benefit of their loan proceeds, the material terms of the loan were plainly disclosed before the loans were funded, and the defendants had not acted in bad faith or fraudulently in connection with the loans.

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

Vicarious Liability for Payment Processor Affirmed

In December 2017, the Eleventh Circuit Court of Appeals affirmed the decision of a Florida district court in finding a credit card payment processor jointly and severally liable, under a theory of aiding and abetting, for the full judgment entered against fraudulent telemarketers related to violations by those telemarketers of the Telemarketing Sales Rule. *See Federal Trade Commission v. WV Universal Management, LLC*, No. 6:12-cv-01618-ACC-KRS (11th Cir. Dec. 13, 2017). The court held that using an "aiding and abetting" theory borrowed from tort law was appropriate in this context because the FTC expressly stated that it took from tort law in formulating the Telemarketing Sales Rule.

For more information, contact Steve Kaufmann at skaufmann@mofo.com or read our Client Alert.

How's My Regulating? Call 1-800-RFI-CFPB

The CFPB announced in January that now that it is under new leadership, it would issue a series of Requests for Information (RFIs) to "ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers." So far, the CFPB has issued RFIs on civil investigative demands and associated processes, administrative adjudications, enforcement processes, the CFPB supervision program, external engagements, and public reporting practices of consumer complaint information. Over the coming weeks, the CFPB plans to continue issuing RFIs and has announced upcoming RFIs on rulemaking processes, adopted rules, inherited rules, guidance and implementation support, consumer education, and consumer inquiries.

For more information, contact Don Lampe at dlampe@mofo.com or read our Client Alerts on the CFPB's call for evidence, RFI on civil investigative demands and associated processes, RFI on administrative adjudications, RFI on enforcement processes, RFI on the supervision program, and RFI on public reporting practices of consumer complaint information.

Payday Lending Take Two

Last November, the CFPB finalized a Payday Lending Rule that would have required payday lenders to evaluate borrowers' ability to pay, among other major reforms. Under new leadership this January, the CFPB said it plans to reopen that controversial rule, suggesting it plans to weaken the rule significantly. The rule may already have been on the chopping block, with members of Congress introducing measures to repeal it using the Congressional Review Act, as they had with the CFPB's arbitration rule last year.

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

CFPB Says Never Mind

The CFPB voluntarily withdrew a lawsuit against four tribal lenders over allegedly abusive small-dollar loans in January. In its notice of voluntary dismissal, the CFPB did not offer a specific reason for the withdrawal, but stated in a December 5, 2017 filing that the Bureau wanted more time to "consult with new leadership" before additional briefing in the case. Acting CFPB Director Mick Mulvaney was already a known opponent of the CFPB's Payday Lending Rule, and the withdrawal may signify one of the largest policy shifts at the agency since the departure of Richard Cordray.

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

Final Amendments to the Prepaid Accounts Rule

On February 13th, the CFPB finalized amendments to its final Prepaid Accounts Rule, which was published in November 2016. The CFPB explained that the amendments finalize revisions proposed in June 2017 "generally as proposed, with certain modifications." The amendments address some of the issues raised by industry and delay the effective date for all provisions of the final rule until April 1, 2019.

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

MOBILE & EMERGING PAYMENTS

FinTech Friendship

On February 6th, the Conference of State Bank Supervisors (CSBS) announced that seven states are launching a streamlined licensing process for money services businesses (MSBs) that is expected to commence in April. The multi-state compact seeks to streamline the licensing process by standardizing key elements of the application process to benefit non-bank financial companies. Under the streamlined process, if one of the participating states has reviewed and accepted a key element of an application, such as a background check or business plan, then the other states agree to accept the findings. At the time of the announcement, the participating states included Georgia, Illinois, Kansas, Massachusetts, Tennessee, Texas, and Washington. The agreement represents the first step in CSBS's Vision 2020 initiative, which aims to have an integrated, 50-state system of licensing and supervision for FinTech companies by 2020.

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

Crypto-Crackdown

Federal and state regulators have begun to show an increased interest in cryptocurrency oversight and enforcement. The heads of the SEC and CFTC signaled in February 6th testimony to the Senate Banking Committee that their agencies may seek greater supervisory powers over the growing virtual currency market to protect retail investors. Meanwhile, the SEC took its most significant action yet related to an initial coin offering (ICO) when, on January 29th, it froze the assets of AriseBank, which had raised some $600 million through an ICO. In a similar move, the Texas State Securities Board took action on February 5th against cryptocurrency company DavorCoin for allegedly selling unregistered securities and making misleading claims to potential investors.

For more information, contact Susan Gault-Brown at sgaultbrown@mofo.com.

ILCs Get Some TLC

On January 23, Jelena McWilliams, President Trump's nominee to lead the FDIC, signaled her support for FinTech firms pursuing industrial loan company (ILC) charters as a path toward broadening lending options. ILC charters, which have largely been on ice since the mid-2000s, allow non-financial firms to establish their own bank overseen by state regulators and the FDIC, while avoiding compliance requirements applicable under the Bank Holding Company Act. McWilliams told the Senate Banking Committee that she does not believe that FinTech firms holding ILC charters would pose a risk to the safety and soundness of the U.S. financial system. McWilliams' position could come as a boon to FinTech firms as the OCC's special purpose charter for non-bank financial institutions remains in limbo. See the Preemption section for information on the status of litigation relating to the OCC's special purpose charter.

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

Some FinTech Reading

The Federal Reserve Bank of Boston recently published two noteworthy reports: *U.S. Consumers' Awareness and Use of Marketplace Lending* and *Mobile Banking and Payment Practices of U.S. Financial Institutions: 2016 Mobile Financial Services Survey Results from FIs in Seven Federal Reserve Districts*. In the marketplace lending report, the authors find that consumers are generally unaware of marketplace lenders as a distinct form of lender. In the mobile banking report, the authors provide a broad view of the current landscape of consumer and commercial use of mobile banking and mobile payments in each of the seven Federal Reserve Districts.

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

MORTGAGE & FAIR LENDING

The Gift That Keeps Giving

There was something for everyone in the D.C. Circuit's January 31st *PHH Corp. v. CFPB* decision. Although the spotlight has been on the separation of powers aspect of the decision, other parts of the order will likely be of even greater day-to-day significance to the mortgage industry. First, the decision concludes that Section 8(c) of RESPA is a real safe harbor that allows captive reinsurance arrangements in exchange for "bona fide payments." Second, it holds that RESPA's three-year statute of limitations, not the general five-year limitations period under 28 U.S.C. § 2462, applied. And third, it concluded that imposing a $109 million disgorgement penalty on PHH was inconsistent with fair notice principles because the government had never before found similar conduct to violate RESPA. The decision provides much certainty for the mortgage industry and serves as notice to all agencies that they cannot penalize conduct without providing clear notice that it is prohibited.

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

Fair Play?

Acting CFPB Director Mick Mulvaney emailed his staff on January 30th to announce that the Office of Fair Lending and Equal Opportunity is being stripped of its enforcement functions; vacating its current spot in the Supervision, Enforcement and Fair Lending (SEFL) Division; and becoming part of the Office of Equal Opportunity and Fairness, which is housed in the Office of the Director. The Office of Fair Lending will keep its focus on "advocacy, coordination and education," Mulvaney wrote. SEFL will continue its fair lending supervision and enforcement duties. "I am continuing to evaluate bureau operations, and will be making changes where I deem necessary," Mulvaney said. "These changes are intended to help make the Bureau more efficient, effective, and accountable, and I plan to seek both internal and external input as I continue to evaluate how we work."

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

Not That PHH Case

PHH reached a nationwide settlement with 49 states and the District of Columbia, which covered servicing and foreclosure issues during the housing crisis. Under the settlement, PHH will pay $30 million to borrowers who were either foreclosed upon or referred to foreclosure and $15 million to cover the cost of the investigation and penalties to state regulators. Although the housing crisis might be over, it is unlikely we have seen the last of these actions or settlements.

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

Fed Up

On January 12th, the Federal Reserve Board announced that it is terminating long-running enforcement actions against 10 banks accused of improper residential mortgage loan servicing and foreclosure processing, and imposing $35.1 million in civil penalties against five of those banks. The Board had already assessed penalties against the other five firms. In total, the Board reports that it has now "assessed penalties totaling approximately $1.1 billion against all Federal Reserve supervised firms under mortgage servicing enforcement actions."

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

OPERATIONS

Managing Managers

On January 11th, the Federal Reserve Board published proposed supervisory guidance on core principles of effective senior management, the management of business lines, and independent risk management and controls for large financial institutions (LFIs). These core principles for effective senior management are intended to ensure that senior management is managing risk in a way that is prudent and consistent with the LFI's business strategy and risk management capabilities. The proposed guidance is part of a broader Board initiative to develop a new rating system for LFIs that will align with the post-crisis supervisory program. The Board's August 2017 proposed guidance identifying attributes of effective boards of directors is intended to complement the new proposed guidance.

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

Do You FR Y-7?

On January 18th, the Federal Reserve Board finalized revisions to the Annual Report of Foreign Banking Organizations (FR Y-7). The revisions are intended to enable foreign banking organizations (FBOs) to comply with the certification requirements contained in the Board's Regulation YY, which imposes enhanced prudential standards on FBOs that meet certain asset thresholds. Specifically, the amendments to the FR Y-7 and its accompanying instructions create a new Report Item 5, which asks questions concerning compliance with applicable capital stress testing and risk committee requirements. In the Board's adopting release, the Board provides additional guidance on responding to Report Item 5, including with respect to risk committee composition, two-tier board structures, and home country capital adequacy standards. The revisions to the FR Y-7 are effective beginning with FR Y-7 reports submitted for fiscal year-ends on or after March 1, 2018.

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

PREEMPTION

Escrow Interest Doesn't Significantly Interfere

A Ninth Circuit panel ruled that the NBA does not preempt a state law requiring payment of interest on escrow account funds as applied to a national bank. *Lusak v. Bank of America*, No. 14-56755, 2018 U.S. App. LEXIS 5400 (9th Cir. Mar. 2, 2018). The court looked to the Dodd-Frank provision requiring that interest be paid on escrow funds "in the manner as prescribed" by applicable state or federal law, finding this provision reflected "Congress's view that such laws would not necessarily prevent or significantly interfere with a national bank's operations." *Id.* at *18. In reaching this conclusion, the court explained that the OCC preemption regulations were entitled "to little, if any, deference" because the regulations "purported to adopt the Supreme Court's articulation of the applicable preemption standards in prior cases, but did so inaccurately." *Id.* at *15.

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

HBOR But Not HOLA

A California federal court denied a national bank's motion to dismiss a claim alleging violation of the California Homeowner Bill of Rights (HBOR) requirement that mortgage servicers provide the net present value evaluation used to deny plaintiff borrowers' loan modification application. *Jacobik v. Wells Fargo Bank,* *N.A.*, No. 17-cv-05121-LB, 2017 WL 5665666 (N.D. Cal. Nov. 26, 2017). The national bank contended that the requirement was preempted by the NBA and OCC regulations authorizing national banks to make real estate loans without regard to state law limitations regarding disclosures and servicing of mortgages. The court stated that national bank preemption should be construed narrowly and that the net present value disclosure requirement was more akin to a law of general applicability because it did not impose requirements on pricing or other material loan modification terms. The court denied the motion to dismiss without prejudice, requesting "the benefit of the parties' further input as to whether the NBA preempts the HBOR claim." *Id.* at *7.

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

Personal Trainer Receipts Not Required

Plaintiff pays for personal training sessions using funds from a revolving line of credit offered by a national bank. Plaintiff's favorite trainer leaves, so she seeks a refund. Instead, she alleges she finds two new bills for additional training sessions. She pays the bills and files suit. One of her claims is for violation of a District of Columbia consumer protection statute that she claims requires the national bank to "procure and retain signed receipts whenever charges are made against a customer from a point-of-sale merchant." *McMullen v. Synchrony Bank*, No. 14-1983 (JEB), 2018 WL 443763, at *12 (D. D.C. Jan. 11, 2018). The national bank moved to dismiss the claim on grounds that it is preempted by the NBA. The district court agreed, finding that requiring a national bank to supply customer receipts would "'significantly burden [its] exercise of its . . . lending power' and could significantly disrupt the free flow of capital." *Id.*

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

Jumping the Gun

The NYDFS filed a highly publicized suit against the OCC challenging the OCC's "decision" to grant special-purpose national bank (SPNB) charters to FinTech companies. The problem, according to a federal court in New York, was that the OCC hadn't reached any final decision on whether to issue SPNB charters, so the Superintendent lacked standing and the claims were not yet ripe. *Vullo v. OCC*, 17 Civ. 3574 (NRB), 2017 WL 6512245 (S.D.N.Y. Dec. 12, 2017). The hook to report on this decision in the Preemption section is that the Superintendent argued that federal regulatory action that preempts state law can create injury in fact that satisfies the Article III standing requirement. The court explained that "[a]ny allegation of preemption at this point relies on speculation" because the OCC had not yet taken any regulatory action. The court distinguished the cases cited by the NYDFS on grounds that, in those cases, the regulatory agency had informed the states that federal law preempted provisions of the state laws at issue. *Id.* at *8.

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

PRIVACY

It's Here!

The deadline for the first certification of compliance with the NYDFS Cybersecurity Requirements for Financial Services Companies (the "Cybersecurity Regulations") was on February 15. In late January, the NYDFS issued a reminder of the impending certification deadline for all regulated entities and licensed persons covered by the "landmark" and "first-in-the-nation" Cybersecurity Regulations. The NYDFS also announced in the same press release that it "will now be incorporating cybersecurity in all examinations" in order "to ensure that proper cybersecurity governance is being practiced by our regulated entities." Even with the passing of the first certification, covered entities continue to grapple with what is required under the Cybersecurity Regulations, despite the frequent FAQs that the NYDFS has periodically added to its website.

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

Loose Lips

Add another to the growing body of case law on the pitfalls of maintaining the privilege of investigations in connection with cybersecurity incidents. Here, a mortgage company, United Shore Financial Services, engaged a third-party forensic firm to conduct an internal investigation into a breach. In litigation relating to the breach, United Shore responded to an interrogatory requesting information about investigations and remediation efforts by not only identifying the third-party firm, but also providing the firm's "conclusions from the investigation." In January, the Sixth Circuit affirmed the lower court's ruling that United Shore implicitly waived privilege with respect to the subject matter (i.e., the forensic firm's investigation into the breach) by disclosing the conclusions of the investigation. *In re United Shore Fin. Servs., LLC*, No. 17-2290, 2018 U.S. App. LEXIS 138 (6th Cir. Jan. 3, 2018).

For more information, contact Adam Fleisher at afleisher@mofo.com.

Cybersecurity a Winner

President Trump's newly released FY 2019 budget allocates more than $3 billion to the Department of Homeland Security's National Protection and Programs Directorate, the office charged with protecting and enhancing America's physical and cyber infrastructure. Of that, more than $700 million would support the Directorate's cybersecurity branch, $225 million would fund cyber readiness, and another $460 million would secure the federal government's cyber networks. The Directorate's research and development budget would also increase significantly, to nearly $50 million. The administration has acknowledged the crucial role of cybersecurity, and by extension the Directorate, in the nation's defense.

For more information, contact Adam Fleisher at afleisher@mofo.com.

One Country, One Notice

Congress, or at least the House of Representatives, is returning its attention to data breach legislation, continuing a nearly 15-year theme of considering the important issue. In early January, a number of trade organizations "representing companies across the American economy" sent a letter to members of the House Energy and Commerce Committee pushing for a federal notification regime. Key parameters of the regime would include "requiring timely notice to impacted consumers, law enforcement, and applicable regulators when there is a reasonable risk that a breach of unencrypted personal information exposes consumers to identity theft or other financial harm." And the House Financial Services Subcommittee on Financial Institutions and Consumer Credit held a hearing to examine the current data security and breach notification regulatory regime and opportunities for reform. Legislation on the House side is expected to be introduced in the coming months.

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

AMP Wasn't a Champ at Cybersecurity

The CFTC issued an Order and entered into a settlement with AMP Global Clearing LLC relating to the company's cybersecurity practices. The CFTC alleged that AMP failed to properly supervise its IT provider's implementation of the company's information systems security program, which left AMP customer information unsecure and accessible to third parties. The Order requires AMP to pay a $100,000 civil monetary penalty, diligently supervise its IT provider going forward, and provide follow-up reports to the CFTC regarding its efforts to enhance its network security and comply with its information systems security program requirements. This action may signal the CFTC's increasing desire to ensure regulated entities adequately protect customer information from cyber threats.

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

A Brand New FTC

President Trump announced his intent to nominate four new members to the FTC, which means that the days of a two-member commission with three vacancies are likely to be behind us soon. Joseph Simons, co-chair of the antitrust group at Paul Weiss and a former FTC official, was nominated as chairman. Other nominees are Noah Phillips and Christine Wilson (for the Republican seats) and Rohit Chopra (for the open Democratic seat). The FTC's two current commissioners, acting Chairman Maureen Ohlhausen and Terrell McSweeny, are expected to step down soon, likely leaving the FTC in completely new hands. The Senate Commerce Committee's processing of the nominees is currently underway. What this will mean for FTC privacy and data security enforcement is unclear.

For more information, contact Julie O'Neill at joneill@mofo.com.

ARBITRATION

You Have to Tell the Lawyers

In a decision related to the long-standing overdraft cases, the Eleventh Circuit affirmed a lower court decision denying a motion to compel arbitration. *Dasher v. RBC Bank (USA)*, No. 15-13871, 2018 U.S. App. LEXIS 3340 (11th Cir. Feb. 13, 2018). The court refused to enforce an arbitration clause, which was added to an amended agreement during the litigation, to retroactively bar an ongoing litigation because there was insufficient evidence of a meeting of the minds. The bank argued that by failing to close his account, the plaintiff agreed to the terms of the amendment. The court held that plaintiff's silence and continued use of his account had to be considered alongside plaintiff's active attempt to avoid arbitration and his pending suit in federal court. The court noted that the bank's failure to provide litigation counsel with a copy of the amended agreement undermined any argument that plaintiff consented to the retroactive and litigation-ending arbitration clause.

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

No Third Wheels

A court in Wisconsin found that Discover could take advantage of an arbitration clause in its consumer contract, but a law firm that engages in debt collection for Discover could not compel arbitration. Plaintiffs alleged Discover and its law firm failed to redact credit scores, in alleged violation of the FDCPA. In *Johnson v. Discover Bank*, No. 17-cv-412-jdp, 2018 U.S. Dist. LEXIS 23145 (W.D. Wis. Feb. 12, 2018), the court found clear language that the arbitration clause covered disputes between Discover and the consumer. But in *Rizzo v. Kohn Law Firm S.C.*, No. 17-cv-408-jdp, 2018 U.S. Dist. LEXIS 22105 (W.D. Wis. Feb. 12, 2018), the law firm collecting debt for Discover was unable to convince the court that it was a beneficiary of the arbitration clause. Although the arbitration clause covered "third party co-defendants" in a case with Discover, the plaintiff dropped Discover as a defendant before the third party moved to compel arbitration. Thus, at the time of the motion, the third party was not a current "co-defendant" of Discover, and the court refused to invoke a "once a co-defendant always a co-defendant" rule.

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

TCPA

Flu Shot Reminder Texts Are A-OK

The Second Circuit recently affirmed a lower court decision dismissing a putative class action against a hospital group and medical practice challenging text messages encouraging individuals to get flu shots. *See Latner v. Mount Sinai Health System, Inc., et al.*, 879 F.3d 52 (2d Cir. 2018). The plaintiff went to a medical practice affiliated with the defendant for a routine health examination in 2003 and signed consent forms permitting the defendant to use his health information for "treatment and hospital operations purposes." The plaintiff returned to the same medical practice in 2011 and declined immunizations. In 2014, the plaintiff received a text message from defendant encouraging him to get a flu vaccine. The Second Circuit held that the plaintiff could not state a claim under the TCPA because: (1) defendant was exempt from TCPA liability under FCC guidelines carving out "health care" messages made by "covered entities" under HIPAA from the TCPA's prior written consent requirements; and (2) even if the "health care" message exemption didn't apply, the plaintiff's TCPA claim failed because he had provided prior express consent to receive the flu shot reminder by signing the consent form at his 2003 doctor's appointment.

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

Consent De-Cert

A federal district court in Illinois decertified a class that had received text messages from defendant based on evidence that was only uncovered when plaintiffs tried to provide notice to the certified class. *Johnson v. Yahoo! Inc.*, No. 1:14-cv-02028, 2018 WL 835339 (N.D. Ill. Feb. 13, 2018). In *Johnson*, plaintiffs relied on data from a third-party telecommunications company to identify class members and provide notice after the close of fact discovery. That data indicated that roughly a quarter of the certified class may have consented to receive the text messages at issue. Despite chiding defendant for failing to uncover the evidence during discovery, the court decertified the class because individual issues of consent would predominate. Rejecting the class's arguments that defendant did not "prove" consent, the court held that to defeat class certification, defendant "just needs to show that proving consent requires individualized analyses such that the class does not meet the predominance requirement." *Id.* at *4.

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

BSA/AML

BSA Beware

On February 15th, the U.S. Attorney for the Southern District of New York announced criminal charges against a national bank for violations of the BSA relating to the bank's alleged willful failures to maintain an adequate BSA/AML compliance program and file suspicious activity reports. The U.S. Attorney also announced a two-year deferred prosecution agreement with the bank, pursuant to which the bank agreed to pay $528 million, less the amount of any penalty assessed by the OCC. The bank and its national bank subsidiary also entered into consent orders with federal regulators requiring payment of additional penalties of $15 million to the Federal Reserve Board, $75 million to the OCC, and $185 million to FinCEN. In total, and taking into account offsetting credits provided by the terms of the settlements, the bank and its subsidiary will pay $613 million.

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

Congress Gets Into the (Bank Secrecy) Act

The Senate Banking Committee held two hearings concerning potential reforms to the Bank Secrecy Act. The hearings took place on January 9th and January 17th, featuring witnesses from government and industry. These are the latest in a series of congressional hearings on possible BSA reforms. Last November, the House Committee on Financial Services held a hearing on a draft bill that would modify a number of existing obligations under the BSA. Among other things, the draft "Counter Terrorism and Illicit Finance Act" would raise minimum monetary thresholds for currency transaction reports and suspicious activity reports and require beneficial ownership information to be filed with FinCEN.

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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