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Financial Services Report

Editor's Note

Consider this Editor's Note your *amuse bouche*. We start you off with a confection that didn't exist three months ago when we last broke bread: "Pension envy." Go ahead and weep, but don't expect another diatribe about California corrections officers retiring at age 55 and drawing $135,000 a year, with COLA. No, we are talking about former heads of state denied access to the Swiss bank accounts that would see them through their sunset years.

It's one thing to be toppled by a mass of mutineers. That risk goes hand in glove with personal militias and private Beyonce concerts. But getting one's assets frozen by Jürgen is so unexpected (*unmöglich!*) and so…so *un*-Swiss. What's worse, the market for places of exile has tightened. Thirty years ago, Idi Amin found safe haven in Libya and Saudi Arabia, where he lived happily ever after. Scotch that now. Blame the baby boom.

There's a lesson here: hire a retirement professional. The rest of us worry about Roth IRAs and long-term nursing care. But despots need to plan too. And they need to start building that nest egg during their most productive years: Middle-dictatorship. That's when you make the down payment on the "Dr. No" island fortress in the Seychelles. If you had, you wouldn't be crying over spilled mustard gas now. Don't get me wrong. There are advantages to absolute tyranny — the epaulets, the dress swords, the voluptuous Ukrainian nurses — but the Swiss betrayal is enough to make a young tyrant consider the private sector.

As an appetizer, and still on the subject of Swiss banking, we are offering in these pages a fondue of Basel III, because stuff happened. (*See* Operations Report.) And for your main course, there is a full platter of Dodd's Franks (see Beltway Report and Mortgage Report) with a side of debit interchange (*see*, e.g., "The Interchange Bulldozer"). If you have room for dessert, we're suggesting a mélange of privacy initiatives from a number of sources (*see* Privacy Report) or an assortment of arbitration developments (see "Class Action Waivers"). Finally, if you have the stomach, you can finish with the California Supreme Court's new zip code case (*see* "Zapping with Zip Codes").

Until next time, think before you start a mildly suggestive end-zone dance, avoid Jeopardy with Watson, and take a drink every time this newsletter mentions Lady Gaga or Justin Bieber.

William Stern, Editor-in-chief

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MoFo Metrics

94: Global car production per year, in millions

64: Global demand for cars per year, in millions

26: Percentage of Americans who are baby boomers

40: Percentage of baby boomers who are overweight

65: Pounds of beef consumed annually by average American

33: Pounds of that average comprised of hamburger

52: Percentage of world's nations that are true dictatorships

38: Golf score of N. Korea's Kim Jong Il (incl. 11 holes in one)

Beltway Report

CFPB Goes Viral

Psst. Hey buddy. Wanna see Miss April? You can view Special Advisor Elizabeth Warren's calendar online as part of the Treasury Department "beta" CFPB website, at http://www.consumerfinance.gov/. One component of the CFPB "beta" website is the "Open for Suggestions" app, a feature through which you can communicate directly with the CFPB implementation team through YouTube video questions. The "About the Bureau" section includes an animated video tracing the origins of the financial crisis and explains what the CFPB will do to protect families and improve markets. The video is narrated by financial wizard and Hollywood director, actor, and producer Ron Howard.

Coming soon: Cute, stuffed CFPB animal mascots, exclusively at Toys "R" Us.

Finger Pointing? Or Finger Painting?

Thank goodness! Now we know. On January 27, 2011, a divided Financial Crisis Inquiry Commission released its final 662-page report regarding the causes of the 2008 financial crisis. The six-member majority concluded that the crisis was avoidable, and assigned culpability to a number of factors and players, including all of the usual suspects: failures of corporate governance, too much risk taking, compensation that rewarded short-term gain, lack of preparation by key agencies, and failures of credit reporting agencies. The five minority members beg to differ, and in their dissent they identify 10 different causes.

What did you expect, Camus? This is more like Gilligan's Island (Season Two), except there's less character development. For a copy, see http://www.fcic.gov/report.

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

R U "Important"?

Who matters? Under Dodd-Frank, a nonbank financial company can be designated as "systemically important" by the Financial Stability Oversight Council if at least 85% of the company's revenues or assets are related to activities that are financial in nature under the Bank Holding Company Act. The proposed rule also defines the terms "significant nonbank financial company" and "significant bank holding company" as firms that have at least $50 billion in total consolidated assets or have been designated by the Council as systemically important. Comments on the proposal must be submitted by March 30, 2011. Publication in the *Federal Register* is expected shortly.

ON MARCH 14, MOFO WILL UNVEIL AN ONLINE RESOURCE THAT TRACKS RULEMAKING PURSUANT TO THE DODD-FRANK ACT.

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

2 Big 2 Fail?

The FDIC Board voted to approve an interim final rule clarifying how the agency will treat certain creditor claims under the new orderly liquidation authority established under Dodd-Frank. The interim final rule differs from the notice of proposed rulemaking by clarifying the standard for valuation for collateral on secured claims and the treatment of contingent claims. The final rule provides that taxpayer money may not be used to cover losses associated with the failure of a large financial firm. The interim final rule also addresses other issues, including authority to continue operations, treatment of creditors, and application of proceeds from liquidation of subsidiaries.

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

More Vitamin Z

The Board proposed an amendment to Regulation Z increasing the threshold for exempt consumer credit transactions from $25,000 to $50,000. Under the proposal, future increases in the threshold will be tied to changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers. A separate proposal issued by the Board on the same date would increase the threshold amount for exempt consumer leases under Regulation M from $25,000 to $50,000. For additional information, see our client alert at http://www.mofo.com/files/Uploads/Images/101220-Proposed-Increase-in-Dollar-Threshold-for-Coverage-by-Regulation-Z.pdf.

For more information, contact Joseph Gabai at jgabai@mofo.com.

The Dodd-Frank, 24/7

On March 14, MoFo will unveil an online resource that tracks rulemaking pursuant to the Dodd-Frank Act. The database features a robust search function that will allow users to quickly navigate to particular sections of the Act and to find links to related regulatory materials as well as relevant MoFo commentary. The basic database is available free-of-charge by subscription only to Morrison & Foerster clients. You will receive additional materials and instructions for requesting a password from your MoFo lawyer. It will provide:
(i) Plain English descriptions of all the

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sections of the Act; (ii) links to regulatory materials; (iii) MoFo commentary; (iv) search by key word, title, section, substantive area, agency, type of regulatory action, action deadline, or any combination of criteria; (v) easily sortable data that can be downloaded in a print-ready, user friendly format; (vi) custom user alerts by act title, substantive area, and regulatory entity; and (vii) advanced data export compatible with may project management systems.

Volcker Rule Timing

On February 9, 2011, the Board published a final rule implementing the provisions of Dodd-Frank that give banking entities a defined period of time to conform their proprietary trading and hedge fund and private equity fund activities to the Volcker Rule. The Final Rule gives such entities a conformance period of two years, with the possibility of three one-year extensions, and an additional period of up to five years for investments in illiquid funds. For in-depth analysis of this rule, see our client alert at http://www.mofo.com/files/Uploads/Images/110214-Federal-Reserve-Publishes-Final-Rule-Conformance-Volcker.pdf.

For more information, contact Barbara R. Mendelson at bmendelson@mofo.com or Charles M. Horn at charleshorn@mofo.com.

History Defines the Safety Net

The FDIC Board of Directors set their insurance fund's designated reserve ratio ("DRR") at 2% of estimated insured deposits, much higher than the 1.35% minimum required by Dodd-Frank. The decision to set the DRR at 2% was based on a historical showing analysis of losses to the insurance fund that, in order to maintain a positive fund balance and steady, predictable assessment rates, the reserve ratio must be at least 2% as a long-term, minimum goal.

The final rule is part of a comprehensive fund management plan proposed by the Board in October 2010. The Board expects to act on the remaining aspects of the comprehensive plan, assessment rates, and dividends in the first quarter of 2011.

If that doesn't work, the FDIC will arrange for direct deposit into our Serta mattresses.

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

OTS — The End Is Near

The federal bank and thrift regulatory agencies announced proposed changes to reporting requirements for savings associations and savings and loan holding companies regulated by the OTS pursuant to Dodd-Frank. The proposed changes include a change from quarterly Thrift Financial Reports to quarterly Consolidated Reports of Condition and Income, commonly known as Call Reports. The proposed changes create uniform reporting systems and processes among all FDIC-insured banks and savings institutions and among all holding companies supervised by the Federal Reserve Board. The agencies are requesting comment on the proposed changes within 60 days of their publication in the Federal Register, which is expected soon.

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

Proposed Credit Score Disclosure Rules

Dodd-Frank amends the Fair Credit Reporting Act to require companies that use credit scores to include those scores, and related information, in adverse action and Risk-Based Pricing Notices provided to consumers. On March 1, the Federal Reserve Board and Federal Trade Commission proposed new rules to implement these provisions. For details, see our client alert at http://www.mofo.com/files/Uploads/Images/110302-Federal-Reserve-and-FTC-Propose-Credit-Score-Disclosure-Rules.pdf.

For more information, contact Andrew Smith at andrewsmith@mofo.com.

HMDA Exemptions

In December 2010, the Board published its annual notice of the asset-size exemption threshold for depository institutions under Regulation C, which implements the Home Mortgage Disclosure Act ("HMDA"). The asset-size exemption for depository institutions will increase to $40 million based on the annual percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers for the 12-month period ending in November 2010. Depository institutions with assets of $40 million or less as of December 31, 2010, are exempt from collecting data in 2011.

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

Know Your Rights

The FDIC Board of Directors issued a Notice of Proposed Rulemaking designed to improve consumer awareness of deposit insurance coverage. The proposed rule would require certain bank staff who open accounts or answer deposit insurance questions to receive annual training on the basic principles of deposit insurance coverage with a computer-based training module provided by the FDIC. Insured depository institution staff opening a new account would be required to inquire whether the customer has other accounts at that institution and whether the aggregate deposits may exceed the deposit insurance limit. If a customer's deposits exceed the deposit insurance limit, the institution would have to provide specific information to the customer, including a copy of the FDIC's publication, Deposit Insurance Summary.

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

1, 2, 3, Go

The federal bank, thrift, and credit union regulatory agencies, along with the Farm Credit Administration, announced that the Nationwide Mortgage Licensing System and Registry will begin accepting federal registrations. Under the Secure and Fair Enforcement for Mortgage Licensing Act (S.A.F.E. Act) and the agencies' final

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rules, residential mortgage loan originators employed by banks, savings associations, credit unions, or Farm Credit System institutions must register with the registry, obtain a unique identifier, and maintain their registrations. Following expiration of the 180-day initial registration period on July 29, 2011, employees of an agency-regulated institution subject to the registration requirements must meet these requirements in order to originate residential mortgage loans. More information regarding the registry and the registration process is available at the registry's website http://mortgage.nationwidelicensingsystem.org/fedreg/Pages/default.aspx.

For more information, contact Joseph Gabai at jgabai@mofo.com.

The Gang's All Here

The CFPB and the Conference of State Bank Supervisors ("CSBS") signed a memorandum of understanding to establish a foundation of state and federal coordination and cooperation for supervision of providers of consumer financial products and services. The CFPB and CSBS agree to consult each other regarding the standards, procedures, and practices used by state regulators and the CFPB to conduct compliance examinations of providers of consumer financial products and services. The MOU reflects the balance between state and federal regulation established under Dodd-Frank, and likely will be a starting point for additional agreements as needed.

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

NACHA Nachos

An amendment to the NACHA Operating Rules effective September 16, 2011, will allow originators to obtain oral authorization from a consumer over the telephone for a recurring-entry ACH transaction. NACHA Rules presently only allow originators to obtain telephone authorization for a single-entry ACH transaction in accordance with a previous version of the FRB's Commentary on Regulation E. According to NACHA, this amendment is intended to align the NACHA Rules with Regulation E. Originators obtaining oral authorizations for recurring transactions will have to ensure that the oral authorizations comply with Regulation E's writing and signature requirements for preauthorized transfers, and therefore the E-Sign Act.

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

Operations Report

Size Matters

The FDIC approved a final rule on Assessments, Dividends, and Assessment Base and Large Bank Pricing. The rule is mandated by Dodd-Frank and changes the deposit insurance assessment system from one that is based on domestic deposits to one that is based on average consolidated total assets minus average tangible equity. The Rule adopts a "scorecard" assessment scheme for larger banks and suspends dividend payments if the Depository Insurance Fund ("DIF") reserve ratio exceeds 1.5%. Related changes required by Dodd-Frank may delay this effective date. For more information, see our client alert at http://www.mofo.com/files/Uploads/Images/110210-FDIC-Approves-Final-Rule-of-Assessments.pdf.

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

FASB Cries Uncle

Remember the hockey game that broke out over "mark-to-market"? The FASB relented, and carved out loans originated or purchased for long-term cash-flow collection from its original proposal to adopt fair-value measurement as the standard for almost all financial instruments. The FASB's decision means that amortized cost less allowance for loan losses will remain the applicable measure for these loans. In contrast, the value of loans and debt securities acquired for liquidity management purposes will be measured by fair value. FASB and the International Accounting Standards Board will be seeking comment on two "expected loss" models for measuring impairment on these assets.

Bonus Deferred

The FDIC Board approved a joint proposed rulemaking to implement Section 956 of Dodd-Frank prohibiting incentive-based compensation arrangements that encourage inappropriate risk taking by covered financial institutions and are deemed to be excessive, or that may lead to material losses. For institutions with at least $50 billion in total consolidated assets, the rule would require that at least 50% of incentive-based payments be deferred for a minimum of three years for designated executives. Incentive-based compensation arrangements for covered persons that would encourage inappropriate risks or expose the institution to inappropriate risks by providing compensation that could lead to a material financial loss would be prohibited. Comments will be accepted for 45 days after publication in the Federal Register.

Compensation for Dummies

In the aftermath of the financial crisis, regulators in the United States and in Europe have focused on modifying compensation practices at financial institutions. We've stayed on top of those developments and you can too. For a side-by-side table comparing the various provisions, see http://www.mofo.com/files/Uploads/Images/110216-Regulatory-Developments-Affecting-Compensation-at-Financial-Institutions.pdf.

Capital Requirements and Basel III

A lot happened in the world of capital requirements. The next items attempt to summarize the key developments.

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Publication of Final Basel III Rules

On December 16, 2010, the Basel Committee on Banking Supervision ("BCBS") published its final rules in relation to the Basel III capital and liquidity requirements for banks. As expected, capital requirements will be substantially increased and phased in between 2013 and 2015. The minimum amount of common equity (shares, share premium, and retained earnings) that a bank will have to hold will be increased to 4.5% of risk weighted assets ("RWAs") from the existing 2%. New regulatory adjustments will also be phased in and will require certain items to be fully deducted from capital, making the effect of the revised capital requirements even more stringent. Additional tier 1 capital investments meeting strict loss absorbency and other criteria will be permitted to form part of the overall total tier 1 capital requirements, which will rise to 6% of RWAs by 2015. The total amount of tier 1 and tier 2 capital to be held by a bank will remain at 8% of RWAs but the rules relating to what constitutes tier 2 capital will also be tightened. Tier 3 capital will be abolished. In addition to these minimum requirements, a capital conservation buffer comprising common equity of up to 2.5% of risk weighted assets will need to be built up by banks as an additional reserve for times of stress. To seek to curb excess credit growth, an additional counter-cyclical capital buffer can also be imposed on banks. Other important changes are also introduced under Basel III, including the introduction of a leverage ratio requiring tier 1 capital to be at least 3% of total gross exposures, and two new liquidity ratios that will require banks to hold liquid assets to cover obligations falling due over a 30-day period and a longer one-year period. Visit our Regulatory Reform webpage at http://www.mofo.com/resources/regulatory-reform/#basel.

For more information, contact Peter J. Green at pgreen@mofo.com.

Basel Committee — Loss Absorbency Requirements

Further to the publication by BCBS of its final Basel III rules in December 2010, it announced on January 13, 2011, its minimum requirements to ensure that all regulatory capital investments are capable of fully absorbing losses at the point a bank becomes non-viable. The paper envisages that all tier 1 and tier 2 capital investments will be required to provide for a mandatory write-down or conversion into common stock by reference to a trigger event. Such event will be a decision by a relevant regulatory authority that a write-down or conversion of the capital investment is necessary or, if earlier, a decision to make a public sector injection of capital. Both triggers require a determination by the regulatory authority that the bank would otherwise become non-viable. It is envisaged these requirements will be introduced from January 1, 2013, and recognition of existing tier 1 and tier 2 capital investments will be gradually phased out. For more information, see our client alert at http://www.mofo.com/files/Uploads/Images/110121-Minimum-Bail-In-Criteria.pdf.

BASEL III RULES...CAPITAL REQUIREMENTS [FOR BANKS] WILL BE SUBSTANTIALLY INCREASED AND PHASED IN BETWEEN 2013 AND 2015.

For more information, contact Peter J. Green at pgreen@mofo.com.

Agencies Seek Comment on Market Risk and Basel II Advanced Approaches

Three federal bank regulatory agencies announced they are seeking comment on a notice of proposed rulemaking that would revise the market risk capital rules for banking organizations with significant trading activity. The proposed rule would implement changes approved by the Basel Committee on Banking Supervision to its market risk framework. Separately, the Federal Reserve, the OCC, and the FDIC are seeking comment on a notice of proposed rulemaking that would amend the advanced approaches capital adequacy framework known as Basel II to be consistent with certain provisions of Dodd-Frank, and require a banking organization operating under the advanced approaches standards to meet, on an ongoing basis, the higher of the generally applicable and the advanced approaches to minimum risk-based capital standards. Visit our Regulatory Reform webpage at http://www.mofo.com/resources/regulatory-reform/#basel.

Charles M. Horn at charleshorn@mofo.com, Oliver Ireland at oireland@mofo.com, or Dwight Smith at dsmith@mofo.com.

How Low Can You Go?

The FDIC Board of Directors approved an interagency proposed rulemaking to implement certain provisions of the Collins Amendment, Section 171, of Dodd-Frank. Section 171 provides that the capital requirements generally applicable to insured banks shall serve as a floor for other capital requirements the agencies establish. The advanced approaches of Basel II were inconsistent with Section 171 because they allow for reductions in risk-based capital requirements below those required by that Section. The proposed rule replaces the transitional floors in the advanced approaches rule with permanent

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risk-based capital floors equal to the capital requirements computed using the agencies' general risk-based capital rules. The proposal also modifies the agencies' general capital requirements to provide the Federal Reserve Board with additional flexibility to craft capital requirements for nonbanks it supervises as a result of determinations by the Financial Stability Oversight Council. Other provisions of the Collins amendment will be addressed in subsequent rulemakings. Comments are due 60 days from publication in the Federal Register.

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

Regulatory Reform Resource

The regulatory reforms passed in 2010 impact all financial institutions, including commercial and investment banks, consumer finance and specialty finance companies, payment systems, derivatives and commodities dealers, broker-dealers and insurance companies. To keep our clients informed, we have created a one-stop-shopping resource, a website containing detailed summaries, charts, alerts, and memoranda relating to regulatory reform. Visit our Regulatory Reform webpage at http://www.mofo.com/resources/regulatory-reform/.

Plastics Report

The Interchange Bulldozer

Subtle it's not. In December 2010, as required by Dodd-Frank, the Board requested comment on a proposed rule that would establish debit card interchange fee standards and prohibit network exclusivity arrangements and routing restrictions. Under either of the two alternative proposals on fee standards, the maximum allowable interchange fee received by covered issuers for debit card transactions would be more than 70% lower than the 2009 average. One alternative is based on each issuer's costs, with a safe harbor (initially set at 7 cents per transaction) and a cap (initially set at 12 cents per transaction). The other alternative is a stand alone cap (initially set at 12 cents per transaction).

THE TREASURY DEPARTMENT ANNOUNCED THAT IT WILL ALLOW LOW- AND MODERATE-INCOME INDIVIDUALS TO RECEIVE TAX REFUNDS VIA PREPAID CARD THIS YEAR FOR THE FIRST TIME.

The proposed rule would prohibit issuers and networks from restricting the number of networks over which debit card transactions may be processed and from inhibiting a merchant's ability to direct the routing of debit card transactions over any available network. The Board seeks comments on two alternative approaches: one would require at least two unaffiliated networks per debit card and the other would require at least two unaffiliated networks per debit card for each type of cardholder authorization method (such as signature or PIN). Comments were due by February 22, 2011.

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

Prepaid Debit Cards and the Feds

There was action on both sides of prepaid debit cards this quarter. The Treasury Department Financial Management Service has amended its regulation governing the use of the Automated Clearing House system by federal agencies to permit the delivery of federal payments to prepaid debit cards that meet certain criteria. To be eligible to receive federal payments, a card must provide pass-through deposit or share insurance and the card account must not have any feature that triggers automatic repayment from the card account. The interim rule was effective January 21, 2011, and the deadline for filing comments has been extended to April 25, 2011.

Separately, the Treasury Department announced that it will allow low- and moderate-income individuals to receive tax refunds via prepaid card this year for the first time. Letters will be sent to 600,000 individuals inviting them to consider activating a prepaid card in time to have their tax refund direct deposited onto the card. The Treasury Department also began a companion pilot project to encourage thousands of current and potential payroll card users to direct deposit their tax refund onto existing payroll cards.

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

The Supreme Court Gets It Right

We know you'll be shocked, shocked to hear that the Supreme Court reversed a decision by the Ninth Circuit. Ruling 9-0, the Supreme Court held that, prior to amendments that took effect in 2010, Regulation Z did not require additional notice of a default rate increase after a consumer defaulted and before the rate increase took effect if the cardmember agreement disclosed the card holder's discretion to increase the rate due to default up to a specified maximum rate. Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871 (2011). The Supreme Court found the relevant provision of Regulation Z was ambiguous and deferred to the Board's interpretation of the provision in an amicus

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brief submitted to the Supreme Court. The Board had expressed the same interpretation in a brief requested by the First Circuit in a case brought by the same plaintiffs' counsel.

For more information, contact Bob Stern at rstern@mofo.com or Nancy Thomas at nthomas@mofo.com.

Mortgage Report

Mortgage Disclosure Clarifications

The Board has issued a new interim rule clarifying parts of its original interim rule implementing certain disclosure provisions of the Mortgage Disclosure Improvement Act of 2008. The clarifications address several issues, including calculation of total payments, disclosure of maximum rates that apply for the first five years, and escrow disclosures. They also narrow the definition of negative amortization loans. For more information, see our client alert at http://www.mofo.com/files/Uploads/Images/101229-Mortgage-Disclosure.pdf.

For more information, contact Joseph Gabai at jgabai@mofo.com, or Andrew Smith at andrewsmith@mofo.com.

Collective Appraisal and Evaluation Guidelines

On December 2, 2010, the OCC, the Board, the FDIC, the OTS, and the National Credit Union Administration issued their long-awaited revision to the Interagency Appraisal and Evaluation Guidelines, which were first issued in 1994. The Guidelines, applicable to regulated banking institutions, identify the components of a safe and sound program for performing appraisals and evaluations for real estate-related financial transactions. The Guidelines contain both regulatory requirements and prudent banking practices. For more information, see our client alert at http://www.mofo.com/files/Uploads/Images/101216-Final-Interagency.pdf.

For more information, contact Joseph Gabai at jgabai@mofo.com

The Board Punts on Mortgage Disclosure Rules

The Board announced that they will not finalize three pending rulemakings under Regulation Z prior to the transfer of authority for these rulemakings to the CFPB. The proposed rules were published as part of the Board's comprehensive review of its mortgage lending regulations under TILA. The first phase of the review consisted of two proposals issued in August 2009, that would have reformed the consumer disclosures under TILA for closed-end mortgage loans and home equity lines of credit. The third proposal, issued in September 2010, included changes to the right-to-rescind disclosures and reverse mortgage disclosures, as well as new disclosures for loan modifications. The Board received more than 5,000 comments expressing divergent views on many substantive and technical issues in the three proposals. Any new disclosure requirements adopted by the Board would be subject to the CFPB's further revision in carrying out its mandate to combine TILA and RESPA mortgage disclosures. In addition, a combined TILA-RESPA disclosure rule could well be proposed by the CFPB before any new disclosure requirements issued by the Board could be fully implemented. For these reasons, the Board decided proceeding with these proposals would not be in the public interest.

THE BOARD ISSUED A FINAL RULE TO REVISE THE ESCROW ACCOUNT REQUIREMENTS FOR HIGHER-PRICED, FIRST-LIEN "JUMBO" MORTGAGE LOANS.

For more information, contact Joseph Gabai at jgabai@mofo.com

Watching the Jumbo-Tron

The Board issued a final rule to revise the escrow account requirements for higher-priced, first-lien "jumbo" mortgage loans. This rule implements a Dodd-Frank provision that increases the APR threshold used to determine whether a mortgage lender is required to establish an escrow account for these kinds of mortgages to 2.5 percentage points or more above the applicable prime rate offer. The final rule is effective for covered loans originated based on applications received on or after April 1, 2011.

While we are on the subject of escrows, the Board also proposed a rule to increase the minimum period for mandatory escrow accounts for first-lien, higher-priced mortgage loans to five years. In certain circumstances, including delinquency or default, the mandatory escrow period would be longer. The rule would require disclosures explaining how the escrow account works and disclosures three days before an escrow account is closed. The 60-day comment period begins when the proposed rule is published in the Federal Register. For all the details see our Client Alert at: http://www.mofo.com/files/Uploads/Images/110303-Final-Rule-Escrow-Accounts.pdf.

For more information, contact Joseph Gabai at jgabai@mofo.com

Military and Mortgages

The Servicemembers Civil Relief Act (SCRA) has been front and center in the

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news and Congress this year. The SCRA provides certain protections for active duty servicemembers, including a cap on credit card and mortgage interest rates and a prohibition on foreclosures. JPMorgan Chase Bank officials testified before the House Committee on Veterans' Affairs in February, explaining the bank had uncovered errors in the handling of active servicemembers' accounts and had begun a comprehensive effort to correct those errors. A servicemember's suit against Deutsche Bank alleging foreclosure in violation of the SCRA was the subject of press coverage. Stay tuned for more to come — the U.S. Attorney General has several ongoing investigations into alleged violations of the statute, and the Delaware Attorney General has demanded access to records of several financial institutions.

For more information, contact Michael Agoglia at magoglia@mofo.com.

HAMPered

First there was HAMP; then there was HAMP litigation. Plaintiffs across the country have filed class actions against the major servicers based on two theories. The first posits that borrowers are third-party beneficiaries of the Servicer Participation Agreement with Treasury or its agents and entitled to pursue alleged breaches of those Agreements. Courts have almost uniformly held otherwise. The second theory is premised on breach of contract and promissory estoppel claims, alleging that by entering into a Trial Period Plan, servicers promised to permanently modify plaintiffs' loans regardless of whether they qualified for a permanent modification. District courts in Massachusetts have allowed claims based on this theory to proceed past the pleading stage, although at least one of those judges expressed doubt that any such claims are amenable to class treatment. Courts elsewhere have rejected this theory, reasoning that the Trial Period Plan is part of the application process rather than an enforceable contract and that plaintiffs cannot identify any unambiguous promise, much less detrimental reliance on any such promise, as required to pursue a promissory estoppel claim.

For more information, contact Michael Agoglia at magoglia@mofo.com.

THE FTC TO PROMULGATE STANDARDS TO PROVIDE AN ONLINE MECHANISM FOR CONSUMERS TO OPT OUT OF THE COLLECTION AND USE OF THEIR PERSONAL INFORMATION ONLINE.

Jumping on the Bandwagon

The Executive Office of the United States Trustee, part of the Department of Justice, has embarked on an initiative to investigate bankruptcy-related practices of the major mortgage servicers. The United States Trustees have not identified any authority to conduct an investigation beyond specific matters pertaining to individual debtors or their estates. But that hasn't stopped them from filing hundreds of motions in cases across the country seeking documents and testimony regarding individual cases in which servicers have filed proofs of claim and motions for relief from stay, as well as documents regarding the servicers' practices and procedures on a wide range of issues.

For more information, contact Michael Agoglia at magoglia@mofo.com or Nancy Thomas at nthomas@mofo.com.

Foreclosure Roadblocks

The Massachusetts Supreme Judicial Court affirmed a Land Court ruling invalidating foreclosure sales because the trustees of two securitized trusts could not show they were the mortgage holders at the time of sale. U.S. Bank, N.A. v. Ibanez, 458 Mass. 637 (2011). The court rejected post foreclosure assignments to the trusts, finding Massachusetts law requires the foreclosing entity to hold the mortgage at the time of notice and sale. The court found evidence of pre foreclosure assignment was not sufficient either. Although both trustees provided assignment agreements, those agreements did not include any listing indicating the loans in question were assigned or any evidence the assigning entity ever held the mortgage being assigned.

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

MERS Clouds

MERS's authority to assign mortgages was called into question by a bankruptcy court in New York. In *re Agard*, 2011 Bankr. LEXIS 488 (Bankr. E.D.N.Y. Feb. 10, 2011). In response to the servicer's motion for relief from the automatic stay, the debtor challenged the servicer's standing on the ground that MERS lacked the authority to assign the mortgage to the servicer. Because a state court had previously entered a judgment of foreclosure and sale in favor of the servicer, the court was compelled by the *Rooker Feldman* doctrine to reject the debtor's claims. However, in lengthy dicta, the court opined that neither the designation of MERS as "nominee" or "agent," nor the rights bestowed upon MERS in the mortgage instrument, authorized MERS to effectuate the assignment absent specific written directions by its principal.

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Privacy Report

Congress Likes Its Privacy

Privacy is busting out all over on Capital Hill. Representative Jackie Speier (D-CA) introduced an online tracking bill (H.R. 654) that would direct the FTC to promulgate standards to provide an online mechanism for consumers to opt out of the collection and use of their personal information online and would require online advertisers and website operators to disclose their data collection, use, and disclosure practices. Representative Bobby Rush (D-IL) reintroduced a more comprehensive privacy bill (H.R. 611) that doesn't include a do-not-track provision, but would require disclosure of personal information handling practices and opt-in consent before disclosing personal information to third parties. Representative Speier also introduced H.R. 653, which would dramatically amend the Gramm-Leach-Bliley Act to require opt-in consent before financial institutions could share customer information with nonaffiliated third parties and to allow customers to opt out of affiliate information sharing.

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Murky Guidance from the FTC

On December 1, 2010, the FTC released its long-awaited staff report on privacy. Although the FTC set out to develop a framework for applying its existing authority under Section 5 of the FTC Act to modern privacy practices, the report is long on recommendations, but short on which of those recommendations constitute Section 5 requirements. The FTC's proposed framework consists of three major elements: (1) "privacy by design," in which a company should incorporate substantive privacy and information security practices into its everyday business (e.g., collecting only the data needed for a specific business purpose); (2) simplified consumer choice with respect to non obvious or implied uses and disclosures of information; and (3) greater transparency, including reasonable access to clearer, shorter, and standardized privacy policies. The FTC expects to release a final report, which may be more concrete, later in 2011.

For more information, please contact Reed Freeman at rfreeman@mofo.com, or Julie O'Neill at joneill@mofo.com.

Commerce Department Weighs In

On December 16, 2010, the Commerce Department released a green paper on privacy, which provides an initial set of recommendations to help further the discussion around a commercial data privacy framework. The report identifies recommendations for a comprehensive framework for commercial data privacy under four broad categories: (1) enhancing consumer trust online through recognition of revitalized Fair Information Practice Principles; (2) encouraging the development of voluntary, enforceable privacy codes of conduct; (3) encouraging global interoperability; and (4) ensuring nationally consistent security breach notification rules.

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Are You a Confident Online Shopper?

On December 29, 2010, President Obama signed the Restore Online Shoppers' Confidence Act ("ROSCA") into law. The law targets common promotional practices, including the use of negative option features. ROSCA prohibits online merchants from sharing the billing information with post-transaction third-party sellers, and also from charging any consumer for goods or services sold through a negative option feature unless it complies with specified requirements. ROSCA makes it easier for the FTC to target allegedly deceptive negative option features and authorizes civil penalties of up to $16,000 per violation.

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FCRA Red Flags Fix

On December 18, 2010, President Obama signed into law the Red Flag Program Clarification Act of 2010 to amend FCRA section 615(e). That section directs the federal banking agencies and the FTC to establish red-flag guidelines and regulations for use by financial institutions and creditors regarding identity theft. The new law clarifies that it only applies to "creditors" that pull credit reports, furnish information to credit bureaus or "advance funds" to borrowers. Although the purpose of the law was to exempt from the FTC's red flags rule persons who are "creditors" solely because they bill in arrears, the amendment also exempts anyone who invoices customers for products and services. Retailers that handle credit card applications for a credit card-issuing bank, should now be exempt as well.

For more information, contact Andrew Smith at andrewsmith@mofo.com.

Spam Busters

On February 23, 2011, the FTC announced an enforcement action under section 5, alleging the delivery of unsolicited text messages caused substantial injury to consumers, which they could not reasonably avoid, and without countervailing benefits to consumers or competition. The FTC further alleges the sending of unsolicited text messages failed to honor opt-out requests from recipients. The injury is the charge to recipients of receiving the messages. Although the facts in this case are egregious, it is noteworthy in highlighting the FTC's willingness to bring enforcement actions regarding this type of direct marketing.

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

Zapped by Zip Codes

Collecting zip codes in California just got a lot more complicated. Despite appellate court rulings holding otherwise, the California Supreme Court ruled a retailer that requests

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and records zip codes from customers paying by credit card violates California's Song-Beverly Credit Card Act of 1971. The court concluded zip codes alone constitute "personal identification information" under the Act, and expressly declined to make its ruling prospective only. The Act authorizes penalties of up to $250 for the first violation and $1,000 for each subsequent violation — a tempting target for plaintiffs' lawyers, who have begun filing cases in droves.

For more information, please contact David McDowell at dmcdowell@mofo.com.

Arbitration Report

Class Action Waivers: Where Do Things Stand?

The future of class action waivers remains unclear. The U.S. Supreme Court heard oral argument in *AT&T Mobility LLC v. Concepcion, U.S. No. 09-983*, on November 9, 2010, in which the Court has been asked to decide whether the Federal Arbitration Act preempts states from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration. Now we wait.

Meanwhile, another state court struck down a class action waiver as unenforceable. In *Schnuerle v. Insight Communs. Co., L.P.*, 2010 Ky. LEXIS 288 (KY Dec. 16, 2010), the Kentucky Supreme Court held that a class action waiver contained in a cable Internet service provider agreement was unenforceable. The court, however, declined to strike the arbitration provision itself, noting the "long-standing public policy" in favor of arbitration. The result? On remand, the class action can proceed in an arbitration forum.

For more information, contact Rebekah Kaufman at rkaufman@mofo.com.

NAF = No Arbitration

The Illinois Supreme Court has permitted the plaintiffs in a putative class action against Gateway to proceed in court despite a provision in Gateway's service agreement requiring binding arbitration. *Carr v. Gateway, Inc.*, 2011 Ill. LEXIS 424 (Feb. 3, 2011). The arbitration agreement required the parties to use the National Arbitration Forum (NAF) for disputes. NAF, however, had stopped accepting consumer arbitrations by the time a dispute arose between the parties. The Illinois Supreme Court determined that the requirement that NAF be used was "integral" to the agreement, and that Section 5 of the Federal Arbitration Act did not permit the court to appoint a substitute arbitrator.

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Preemption Report

Musical Chairs

What preemption authority applies when the current holder of the loan did not originate the loan? Two federal courts in California found that the charter of the originating lender governs even if the conduct at issue occurred after the loan was transferred to an entity governed by a different statutory scheme. *Haggerty v. Wells Fargo Bank*, N.A., C 10-02416, 2011 U.S. Dist. LEXIS 9962 (N.D. Cal. Feb. 2, 2011); *Kahn v. World Sav. Bank, FSB*, 10-CV-04057, 2011 U.S. Dist. LEXIS 2442 (N.D. Cal. Jan. 11, 2011). Although one of the cases involved origination-based claims and the other challenged the transferee's actions, both courts concluded acquisition does not impact the applicable preemption law. Along the same lines, a Massachusetts bankruptcy court held that even though a state predatory lending statute was preempted by HOLA and the OTS regulations, the defendant federal thrift that had acquired the loan at issue could not assert the preemption defense because the originating lender was not a national bank or federal thrift. *In re Thomas (Thomas v. CitiMortgage, Inc.)* 10-40549, 2011 Bankr. LEXIS 472 (Bankr. D. Mass. Feb. 9, 2011).

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

Clear as Mud

The scope of FCRA preemption remains a hopeless muddle, with courts adopting different theories that lead to very different results. A recent decision from West Virginia clearly describes all three leading theories, complete or total preemption, the temporal approach, and the statutory approach. *Evans v. Trans Union LLC*, 2:10-cv-00945, 2011 U.S. Dist. LEXIS 14724 (S.D. W. Va. Feb. 14, 2011). Recognizing that the Fourth Circuit has not taken a position on the issue, the court noted that district courts in the Circuit had uniformly adopted the statutory approach, and the court followed suit.

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FCRA Means What It Says?

FCRA expressly exempts California Civil Code section 1785.25(a), part of the state Consumer Credit Reporting Agencies Act, from one of FCRA's preemption provisions. 15 U.S.C. § 1681t(b)(1)(F)(ii). In *Carvalho v. Equifax Info. Servs.*, LLC, 09-15030, 2010 U.S. App. LEXIS 25821 (9th Cir. Feb. 11, 2010), the Ninth Circuit refused to extend this exemption to any other provisions in the Act relating to servicers. The court affirmed the dismissal of a claim based on section 1875.25(f) of the California statute.

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