FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Winter 2014

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MORRISON FOERSTER

Editor's Note

The election is over, but we are still reeling from the aftermath of the November shock. We're talking of course about North Korean Supreme Leader Kim Jong-un's hacking into Sony Pictures. Oh my! If your missiles miss you can always launch embarrassing emails, dress up in a mid-60s Mao jacket, kick back with a few close generals and a supersized bag of kimchi popcorn, and wait for the fun to begin. Yikes! Naughty pics? Check. Angelina Jolie, a "spoiled, untalented, egomaniacal brat."? Check. Kevin Hart a "money whore"? Check. Who knew that people in Hollywood would think that saying such things would . . . stay private? Cue the tie-in.

This issue is all about privacy. Well, not exactly all. And maybe not even most. OK, we have seven privacy items. But you won't want to miss even one. And as we said, that's not all. This writer's secret shame is running to his inbox so he can be the first on the block to read the Bureau Report, and this issue's won't disappoint. (No spoilers.) Or sipping a scotch while reading Beltway Report; talk about getting belted. Arbitration, mortgages, TCPA, preemption, mobile payments, operations . . . we've got it all. And we're gluten-free.

Until next year, bundle up, watch out for incoming missiles, and don't rile unstable foreign heads of state with tasteless newsletter leaders or you might get yourself hacked.

BELTWAY REPORT

Unfair Yesterday, Today, and Tomorrow

The Federal Reserve Board proposed to repeal Regulation AA, which contains the "credit practices rule" prohibiting banks from using certain provisions and remedies in consumer credit contracts. The proposed repeal is a matter of housecleaning to reflect changes required by the Dodd-Frank Act. Concurrently, the Board, the CFPB, the FDIC, the NCUA, and the OCC issued joint guidance clarifying that the repeal of the credit practices rules is not a determination that the prohibited practices contained in such rules are now permissible. The guidance explains that the conduct prohibited by Regulation AA may still be considered unfair or deceptive practices under the Federal Trade Commission (FTC) Act and the Dodd-Frank Act, even in the absence of specific regulation.

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

Unbanked and Underbanked

The FDIC released the results of the 2013 FDIC National Survey of Unbanked and Underbanked Households. The survey, conducted every two years in partnership with the U.S. Bureau of the Census, provides the banking industry and policy makers with insight and guidance on the needs of unbanked and underbanked households. The survey indicated that the number of households that are unbanked has decreased to 7.7% in 2013 from 8.2% in 2011. The number of underbanked households has remained unchanged at 20%. Among other findings, the survey found that 29.2% of underbanked households used mobile devices to access their accounts compared to 21.7% of fully banked households.

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

Military Lending Limitations

On September 29, 2014, the Department of Defense (DOD) published a proposed rule to expand the scope of its regulation implementing the Military Lending Act to reach new types of creditors and credit products. The proposed revisions would limit interest rates charged to servicemembers on payday loans, vehicle title loans, refund anticipation loans, deposit advance loans, installment loans, unsecured open-end lines of credit, and credit cards. The proposed rule would establish a maximum military annual percentage rate (MAPR) of 36% for these transactions and would require creditors to determine whether an applicant for a covered transaction is an active duty servicemember or spouse or dependent of such a person.

For more information, read our Client Alert or contact Leonard Chanin at lchanin@mofo.com.

BUREAU REPORT

Say Grace

Recent CFPB guidance reinforced its concern that consumers don't understand balance transfer, deferred interest, or convenience check offers. The CFPB's September 2014 Bulletin focused on the impact of promotional offers on a customer's grace period. It warned that customers—particularly those who usually pay off their balances in full every month—may not understand that if they don't pay off the entire promotional balance as well, they will lose the grace period so interest will accrue on any new purchases during the next billing cycle. The Bulletin cautions that failure to disclose that accepting a promotional offer may cause the loss of a grace period could be deceptive or abusive under Dodd-Frank section 1036, even though these disclosures are not required by Regulation Z.

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

Hail Hydra? Hail No, Says the CFPB

The CFPB sued online payday lender The Hydra Group in September, alleging that the lender used information bought from online lead generators to access consumers' checking accounts in order to illegally deposit payday loans and withdraw fees without consent, then used falsified loan documents to claim that the consumers had agreed to the online payday loans. The CFPB asserts that Hydra made $97.3 million in fake payday loans over a 15-month period, and collected $115.4 million from consumers in return. Shortly after filing, the CFPB won a temporary restraining order halting Hydra's operations and freezing its assets.

For more information, contact Michael Miller at mbmiller@mofo.com. And try Wikipedia for primers on classic and modern hydras.

Some Strings Attached

The CFPB announced a consent order with M&T Bank alleging that the bank had deceptively advertised checking accounts as "free" or "no strings attached" without disclosing in its ads that if customers failed to maintain minimum account activity, they would be switched to fee-bearing accounts. The consent order does not challenge the dormant-account fees themselves or the automatic-conversion feature; rather it targets the way the bank advertised its "free" checking accounts. The CFPB alleged that from 2009 to 2012, M&T assessed approximately $2.9 million in monthly maintenance fees, collecting approximately $2 million of these fees from about 59,000 consumers. M&T agreed to refund the fees collected, reduce charged-off balances reflecting the remaining fees assessed, and pay a $200,000 civil monetary penalty.

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

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CFPB Flexes Its Rulemaking Muscle

In November, the CFPB issued a long-awaited proposed rule on the regulation of prepaid card products. The proposal, which would amend Regulation E and Regulation Z, is broader in scope than anticipated, going beyond conventional network-branded general-purpose prepaid cards to include payroll cards; some federal, state, and local government benefit cards; student financial aid disbursement cards; tax refund cards; and peer-to-peer payment products (as discussed in the Mobile & Emerging Payments Report below). The proposed rule would regulate every aspect of covered products, including disclosures, fees, error resolution, and what the CFPB refers to as "credit features" or "credit plans." Of particular note, the provisions regarding credit features, which include proposed amendments to Regulation Z, represent a significant departure from the prior regulatory treatment of overdraft services for other accounts subject to Regulation E. Comments on the proposed rule are due by early March 2015.

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

Favors for Financial Innovations

The CFPB issued notice of a proposed policy allowing staff to issue no-action letters for "innovative financial products or services that promise substantial consumer benefit." The proposal is specifically designed for new financial products or services as to which the application of statutory or regulatory provisions is uncertain. The CFPB believes that such uncertainty may discourage market innovations by preventing development of or investment in consumer-friendly products because of the potential threat of enforcement or supervisory actions. To reduce the regulatory uncertainty around such emerging financial products or services, the CFPB is proposing a process by which an entity may submit a request for a no-action letter.

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

On the Blog: Fall 2014 Supervisory Highlights, Haiku Edition

CFPB Supervision published a new issue of *Supervisory Highlights*, which reports on recent exam findings and enforcement actions. As usual, the report reads like a hit parade of hot-button issues: detailed findings from mortgage and student lending exams, as well as observations concerning the sale of bad debt, credit reporting agencies' handling of consumer disputes, consumers' rights to dispute unauthorized charges on credit card accounts, debt collection, and more. Want the condensed version? Check out our Re-enforcement Blog post: Fall 2014 Supervisory Haiku-lights.

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

Can You Trust the CFPB with Your Data?

Not so much, according to a report issued by the Government Accountability Office (GAO). The GAO's report found that, although the CFPB has taken steps to protect personal information, "additional efforts are needed in several areas to reduce the risk of improper collection, use, or release of consumer financial data." The GAO pointed out that the CFPB lacks written procedures for a number of processes, including data intake and information security risk assessments. This failure to maintain written procedures caused the CFPB to retain sensitive data unnecessarily in two collections the GAO reviewed. The GAO also found that the CFPB had not fully implemented key privacy controls, recommending that the CFPB obtain periodic independent reviews of its privacy practices, and develop and implement targeted privacy training for relevant staff.

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

Another For-Profit College in the CFPB's Crosshairs

In September, the CFPB filed suit in federal court in Illinois against for-profit college chain Corinthian Colleges, Inc., for alleged illegal predatory lending. The complaint alleges Corinthian lured students into predatory loans by inflating job placement statistics, and deliberately inflated tuition to force these students to take out its high-cost private loans—on which 65% of students defaulted within three years. When students didn't pay, the CFPB alleges, Corinthian used aggressive collection tactics such as preventing students from attending class, pulling students out of class, and denying them access to computers. The CFPB alleges unfair and deceptive claims, as well as violation of the Fair Debt Collection Practices Act.

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

AGs Are Anti-Arbitration

In a November 19, 2014 letter, attorneys general from 16 states urged the CFPB "to use its statutorily-prescribed powers to protect the public interest by imposing prohibitions, conditions, or limitations on the use of pre-dispute arbitration clauses for consumer financial products or services." The AGs expressed concern that arbitration clauses and class action waivers are procedurally unfair to consumers and leave consumers without redress for their claims. The AGs assert that the arbitration clauses are found in contracts of adhesion; that consumers do not understand the clauses; that arbitration is costly and inconvenient, rendering it "economically irrational" for consumers to pursue small-dollar claims; and that "repeat player bias" is inherent in arbitration and is unfair to consumers.

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

MOBILE & EMERGING PAYMENTS REPORT

Cordray Comments on Mobile

In remarks to the Consumer Advisory Board of the CFPB, Director Richard Cordray addressed the growing

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consumer adoption of mobile banking and mobile payments. He noted that "oversight of the marketplace" must keep pace with the technological changes allowing mobile access to instantaneous information and communications, and that the agency intends to act alongside these technological developments. Director Cordray cited the CFPB's recent Request for Information related to mobile financial services as part of the agency's ongoing efforts to understand how emerging mobile technologies affect consumers, including how "mobile payment products can be used to improve the financial lives of underserved consumers."

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

FTC Weighs In on Mobile

The FTC submitted comments in response to the CFPB's Request for Information related to mobile financial services. The comments emphasize the agency's extensive efforts in connection with mobile financial services, including FTC enforcement actions. The FTC singled out mobile payments and virtual "wallets" as presenting consumer-protection issues because statutory protections in connection with first-party credit or debit transactions typically "do not apply when a consumer uses a prepaid or gift card, or moves money into a stored value account within the app [e.g., 'wallet'], to make a mobile payment transaction." The FTC also addressed other issues, including direct carrier billing (i.e., cramming), privacy, big data, and data security.

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

Consumer Groups Weigh In on Mobile

U.S. PIRG and the Center for Digital Democracy submitted joint comments in response to the CFPB's Request for Information related to mobile financial services. The consumer groups urged the CFPB to develop "a comprehensive set of principles and safeguards for the overall digital marketplace." They assert that contemporary mobile practices target economically vulnerable consumers, and that rulemaking is needed to ensure that these consumers will benefit from mobile financial services. The consumer groups urge the CFPB to coordinate with other agencies that have primary jurisdiction over broadband communication services, such as the FCC.

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

FinCEN Gives MSBs Some Support

On November 10, 2014, FinCEN issued a statement addressing "de-risking," which is a financial institution's decision to close or refuse to open accounts for particular types of customers in response to perceived risks from regulatory scrutiny. FinCEN expresses concern over the indiscriminate termination of accounts of money services businesses (MSBs) and "reiterates" FinCEN's regulatory expectations that financial institutions will properly manage and mitigate any risks arising from the provision of banking services to MSBs, on a case-by-case basis. The statement should be viewed as a positive development for MSBs. However, since the statement was issued solely by FinCEN and not jointly with prudential regulators, it is unclear whether the statement signals a material change in the regulatory environment.

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

The CFPB Makes Good on Its Promise to Regulate Mobile

In the prepaid card rule we discuss above, the CFPB expressly refers to the rule's applicability to "digital wallets" and "person-to-person" (P2P) transfers, and explains more broadly that the definition of a "prepaid account" would cover mobile and other electronic prepaid accounts that are "capable of holding funds." The CFPB's discussion indicates an entire mobile wallet would be subject to the new requirements in the proposed rule if a portion of the wallet is capable of storing funds. Many P2P payment products also would be subject to these requirements, even if the P2P product is limited for use at an affiliated group of merchants.

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

MORTGAGE & FAIR LENDING REPORT

Third Time's the Charm?

On October 2, 2014, the Supreme Court granted certiorari in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371, to decide whether disparate impact claims are cognizable under the Fair Housing Act (FHA). Of interest, the Court *declined* to grant cert. on the question of the appropriate standard for evaluating such claims. The plaintiff claims that the Texas agency disproportionately approved low-income-housing tax credits for developments in predominantly minority neighborhoods, which "creat[ed] a concentration of the [low-income] units in minority areas," which in turn "maintain[ed] and perpetuat[ed] segregated housing patterns" in violation of the FHA. The district court ruled for the plaintiff, and the Fifth Circuit affirmed, adopting the HUD rule that the District Court for the District of Columbia has since vacated (discussed below). Unlike the earlier *Mount Holly* and *Magner* disparate impact appeals—both of which were dismissed in connection with settlements engineered to avoid the Supreme Court's review—it appears likely that this case will go the distance.

For more information, see our Client Alert on the earlier disparate impact cases, or contact Tom Noto at tnoto@mofo.com.

No Rest for the RESPA

The CFPB's RESPA enforcement crackdown continued unabated this fall. The latest consent order, with a Michigan title company, relates to

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the company's marketing services agreements for advertising with third parties such as real estate brokers. The agreements allegedly violated section 8's kickback prohibition by tying payments for services to the "volume or value of the business referred." This action follows a series of consent orders during 2014, which emphasize basic compliance but also advance some more creative theories, and it parallels the CFPB's latest and ongoing enforcement action targeting mortgage reinsurance.

For more information, read our alerts chronicling the RESPA crackdown, from February, June, August, and October of this year, or contact Don Lampe dlampe@mofo.com.

Disparate Impact? Please!

On November 7, 2014, the District Court for the District of Columbia issued a decisive order vacating HUD's 2013 Fair Housing Act disparate impact rule. The American Insurance Association and National Association of Mutual Insurance Companies alleged that HUD violated the APA by exceeding its authority under the FHA, because the rule expanded the scope of the statute to provide not only disparate-treatment claims (intentional discrimination, which the FHA prohibits) but also disparate-impact claims (facially neutral practices with discriminatory effects, which the FHA does not mention). The wide-reaching order decides every substantive issue in plaintiffs' favor. Although the decision is limited to the FHA, the core reasoning—that the statute includes no "effects" language, as the Supreme Court has held is necessary to permit a disparate impact claim—applies equally to the ECOA, the statute the CFPB and DOJ rely on for their fair lending enforcement actions.

For more information, see our Client Alert on the rule, or contact Angela Kleine at akleine@mofo.com.

Strike Two for Alleged Loan Originator Compensation Violations

In November, the CFPB announced a $730,000 settlement with Franklin Loan Corporation (Franklin) based on alleged violations of the loan originator compensation rule in Regulation Z. The CFPB alleged that Franklin violated the rule by paying its loan originators quarterly bonuses based on the terms and conditions of the loans, as well as allegedly violating Regulation Z and the provision in Title X of the Dodd-Frank Act making it unlawful to offer consumer financial products that are not in conformity with federal consumer financial law. In the consent order, Franklin did not admit or deny the allegations in the Complaint, but issued a press release denying the CFPB's allegations. Although there are no actual steering allegations in the Complaint, it appears that the $730,000 in restitution constitutes the amount paid in bonuses. The CFPB did not require a civil monetary penalty, "based on Franklin's financial condition and the CFPB's desire to maximize relief directly from Franklin Loan to affected consumers."

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

Oh, Baby

This fall, HUD continued to aggressively police alleged discrimination against mortgage loan applicants who are on parental leave. It recently announced a multimillion-dollar settlement with a national bank to resolve allegations that a home mortgage unit discriminated against women on maternity leave. In September, HUD announced another settlement with a Tennessee-based mortgage lender regarding alleged FHA violations, when the lender allegedly denied a mortgage loan to a couple because one applicant was on unpaid maternity leave. The settlements follow a series of five- and six-figure settlements with mortgage lenders and mortgage insurers beginning in 2012, and parallel investigations of dozens of institutions. Similarly, HUD and DOJ continue to pursue the complaints of loan applicants with disabilities who were required to provide medical documentation in order to qualify for a loan.

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

Ready, Set, Go

In September, the CFPB issued continuing guidance on the new TILA-RESPA integrated disclosure rule taking effect in August 2015. First, it updated its mortgage rules readiness guide to include the TILA-RESPA integrated mortgage disclosures. Second, it issued an updated Small-Entity Compliance Guide, which provides additional resources on the rule and clarifies questions related to the seven-day waiting period, the Loan Estimate form, and the timing of revisions to the Loan Estimate form. The CFPB encourages market participants to visit the broad range of resources available on the CFPB's regulatory implementation website, which the CFPB recently updated with a revised guide to the integrated disclosure forms and a sample timeline to illustrate the process and timing of issuing the integrated disclosures. In addition, the CFPB conducted two webinars to discuss the integrated disclosure rule and frequently asked questions.

For more information, contact Leonard Chanin at lchanin@mofo.com.

Get in Line

On September 2, 2014, New York's attorney general, Eric Schneiderman filed a federal suit against a Buffalo-area bank for alleged redlining, asserting violations of the FHA and New York law. The complaint alleges that the bank defined its lending area to include most of Buffalo and its surroundings, but purposely excluded the predominantly African-American neighborhoods on Buffalo's East Side. The bank also allegedly located its branch offices and ATM machines, and targeted its marketing efforts, outside of African-American communities. The bank disputed the allegations and expressed disappointment that the AG pulled the plug on negotiations after months of good-faith talks. Schneiderman stated that this is part of an "ongoing, wider investigation"

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into mortgage redlining, a practice he asserts has reemerged after the financial crisis.

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

CRA Q&A?

On September 10, 2014, the Federal Reserve Board, FDIC, and OCC issued proposed revisions to Interagency Questions and Answers Regarding the Community Reinvestment Act (CRA). The proposed revisions are in response to questions and comments recently raised about the Agencies' CRA regulations. The Agencies seek to revise two questions and answers in the existing guidance, addressing: (1) alternative systems for delivering retail banking services and providing additional examples of innovative or flexible lending practices; and (2) community development-related issues, including clarification on what activities the Agencies consider to be revitalizing or stabilizing underserved communities. The Agencies also are proposing to add four new Q&As addressing how the Agencies evaluate community development services and the responsiveness and innovativeness of a financial institution in responding to community development needs.

For more information, contact Leonard Chanin at lchanin@mofo.com.

OPERATIONS REPORT

Less Liquidity

The federal banking agencies issued the finalized liquidity coverage ratio (LCR) rule (Final Rule). The Final Rule follows an October 2013 proposed rule (Proposed Rule) that would have required covered entities to maintain high-quality liquid assets (HQLA) in an amount equal to their estimated net cash outflows over a 30-day stressed liquidity period. The Final Rule is more relaxed than the proposal in certain respects. For example, the Final Rule will not cover systemically important financial institutions, and a simpler, modified version of the rule will apply to depository institutions that are not already "covered companies" as defined in the Final Rule, do not have significant commercial or insurance operations, and have $50 billion or more in total consolidated assets. The Final Rule has a staged implementation, but all covered companies must begin calculating their LCR at the end of each month starting on January 1, 2015.

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

Risk Retention Rules Finalized

In October 2014, a number of federal regulatory agencies adopted final rules implementing the credit risk retention requirements for asset-backed securities (ABS) required by the Dodd-Frank Act (Final Rules). The risk retention rules initially were proposed in March 2011 and were re-proposed in August 2013. The Final Rules generally track the requirements of the August 2013 re-proposal, with a few notable differences. For example, the Final Rules do not require a minimum down payment for qualified residential mortgage loans, and do not include restrictions on cash flow payments to the holders of horizontal residual interests. The Final Rules take effect in October 2015 for residential mortgage-backed securities, and October 2016 for all other ABS.

For more information, see our Client Alerts here and here, or contact Jerry Marlatt at jmarlatt@mofo.com.

Governance Guidelines Finalized

The OCC finalized guidelines for governance and risk management at the largest financial institutions (Guidelines). Under the Guidelines, covered financial institutions are required to establish and follow a written risk governance framework to manage and control risk-taking activities, and impose minimum risk oversight standards for bank boards of directors. The Guidelines apply to all U.S. banks and thrifts and U.S.-based units of international banks with $50 billion or more in average consolidated assets, as well as other OCC-regulated banks if the bank's parent company controls a covered institution. The Guidelines require covered financial institutions to follow OCC requirements on how certain functions (e.g., internal audit and independent risk management) should operate and to have at least two independent directors on their boards of directors.

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

Dealing with Stress

The OCC and the Board have issued a series of rulemakings concerning stress testing. In October 2014, the Board issued a final rule to modify the regulations for capital planning and stress testing, in particular by adjusting the due date for large bank holding companies (BHCs) to submit their capital plans and stress test results. The final rule imposes limitations on a BHC's ability to make capital distributions if its actual capital issuances are less than the amount indicated in its capital plan. The OCC also requested comment on its information-collecting rules concerning stress testing.

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

PREEMPTION REPORT

Charter Confusion

Courts continue to wrestle with the question of which charter determines the preemption analysis for loans originated by an institution with a different charter than the current holder of the note and deed of trust. The majority of courts have looked to the charter at origination. *See, e.g.*, *Kenery v. Wells Fargo, N.A.*, 2014 U.S. Dist. LEXIS 4672, at *9 (N.D. Cal. Jan. 14, 2014) (collecting cases). However, courts also have applied the charter at

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the time of the challenged actions, or the charter of the current holder. *See id.* at *10-11 (collecting cases). In *Kenery*, the judge considering the original motion to dismiss adopted the majority view (*id.*), but the case was reassigned to a new judge, who ruled that the charter at the time of the challenged events applied. *Kenery v. Wells Fargo, N.A.*, 2014 U.S. Dist. LEXIS 117550, at *12-15 (N.D. Cal. Aug. 22, 2014).

Some courts have adopted a third approach to this issue. *See, e.g., Carley v. Wells Fargo Bank*, 2014 U.S. Dist. LEXIS 158652 (N.D. Cal. Nov. 10, 2014). In *Carley*, the court looked to the loan documents, applying HOLA preemption because the deed of trust expressly incorporated "federal rules and regulations, including those for federally chartered savings institutions." *Id.* at *10-11. The court held claims for wrongful foreclosure in violation of state law, promissory estoppel, breach of the covenant of good faith, and unfair business practices were preempted by HOLA and OTS regulations.

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

Same as It Ever Was

In an early case analyzing the preemption provisions in the Dodd-Frank Act, a federal court in Los Angeles held the National Bank Act (NBA) preempts a state law requiring mortgage lenders to pay interest on escrow account balances, as applied to national banks. *Lusnak v. Bank of Am., N.A.*, 2014 U.S. Dist. LEXIS 154225 (C.D. Cal. Oct. 29, 2014). The court found Dodd-Frank did not change the applicable NBA preemption standard, but instead "simply affirmed that *Barnett Bank* is the appropriate standard for courts and the [OCC] to apply to NBA preemption decisions." *Id.* at *10-11. The court found the state law was preempted because it significantly interfered with the national bank's lending activities by imposing operational and administrative burdens and jeopardizing a helpful, free service offered to borrowers. *Id.* at *21.

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

If at First You Don't Succeed

Is a challenge to late fees assessed by a national bank a usury claim that is completely preempted by the NBA? According to one federal court, that depends on the nature of the claim. *See Powell v. Huntington Nat'l Bank*, 2014 U.S. Dist. LEXIS 136063 (S.D.W.Va. Sept. 26, 2014). The court explained that plaintiffs' claims asserting a national bank charged late fees that were not owed were not usury claims, as they did not challenge the amount of the fees. Therefore, complete preemption did not provide grounds for federal jurisdiction. The court found further that the national bank had sufficiently alleged a basis for diversity jurisdiction under CAFA in its removal petition, so the case would remain in federal court.

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

FCRA Preemption Convergence?

The blanket preemption view of FCRA preemption won the day in two decisions issued by district courts in circuits that have not yet ruled on the issue. Brief refresher: courts have split on how to reconcile the FCRA preemption provision in section 1681t(b)(1)(F) and the narrower preemption provision in section 1681h(e). Several circuits that have addressed the issue have adopted the blanket preemption approach, finding the broader provision trumps the narrower provision, and preempts all state-law statutory and common law claims based on alleged inaccurate credit reporting. A Florida federal court noted that the Eleventh Circuit had not yet addressed the issue, and adopted the Seventh Circuit's ruling that the later enacted, broader preemption provision governs. *Hillerson v. Green Tree Servicing, Inc.*, 2014 U.S. Dist. LEXIS 151196 (M.D. Fla. Oct. 24, 2014). Similarly, a Pennsylvania federal court stated that the Third Circuit had not considered the issue, but followed other district courts in the Circuit that had adopted the blanket preemption approach. *Goins v. MetLife Home Loans*, 2014 U.S. Dist. LEXIS 152014 (E.D. Pa. Oct. 24, 2014).

For more information, contact Jim McCabe at jmccabe@mofo.com.

PRIVACY REPORT

Banks Want to Chat

On November 6, 2014, the FCC requested public comment on a petition by the American Bankers Association (ABA) requesting that the FCC exempt from the TCPA certain time-sensitive automated calls and text message alerts from financial institutions to their customers. Specifically, the ABA's request focuses on no-cost calls and text messages from a financial institution to its customers designed to alert the customers about certain fraud risks, fraud events, and pending money transfers. Under the ABA's proposal, any exemption would apply only to messages that did not contain marketing, solicitations, or advertising content.

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

Congress Wants Info on Bank Breaches

On November 18, 2014, Representative Elijah Cummings and Senator Elizabeth Warren sent letters to financial institutions requesting information about their security breach experiences over the past year. The letter requested detailed information, including forensic investigation findings and estimates of fraud connected to the breaches. It also requested a briefing from each financial institution's Chief Information Security Officer. The stated purpose of this inquiry was to gather information from the financial sector to assist Congress in analyzing existing federal cybersecurity law and identifying potential areas for improvement.

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

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The President Jumps In as Well

President Obama issued an Executive Order requiring all executive agencies to transition payment processing terminals and payment cards to employ enhanced security features, including chip and PIN technology. The Order also directs certain agencies to prepare a plan that would ensure that all agencies making personal data accessible to citizens through digital applications require the use of multi-factor authentication and an effective identity proofing process, as appropriate. The Order includes procedures to streamline the remediation process as a way of reducing the burden on consumers who have been the victim of identity theft.

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

FFIEC Makes Cybersecurity Observations and Recommendations

On November 3, 2014, the Federal Financial Institutions Examination Council (FFIEC) issued a press release about, and published its observations from, its cybersecurity assessment of more than 500 community financial institutions. The examinations took place in the summer of 2014 and evaluated the institutions' preparedness to mitigate cybersecurity risks. FFIEC found that the level of inherited risk varies significantly across financial institutions, depending on, *inter alia*, the products and services offered and technologies used. The observations released by FFIEC include questions for CEOs and boards of directors to consider when assessing cybersecurity preparedness (e.g., "How do we evaluate evolving cyber threats and vulnerabilities in our risk assessment process for the technologies we use and the products and services we offer?").

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

Vet Your Apps

The National Institute of Standards and Technology published its draft guidelines for evaluating third-party mobile applications. The guidelines include recommendations on how organizations can take advantage of helpful apps while managing their security risks. They discuss the security and privacy risks associated with calendar apps, social media apps, wi-fi sensors, and utilities connected to a GPS. The guidelines also detail the types of tests security analysts should perform on apps before they are made available to consumers.

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

California At It Again

California Governor Brown signed into law a bill (AB 1710) that appears to impose the country's first requirement to provide free identity theft protection services to consumers in connection with certain security breaches. Although not a model of clarity, AB 1710 appears to amend the California breach law requiring that a company offer a California resident "appropriate identity theft prevention and mitigation" services, at no cost, if a breach involves certain personal information. AB 1710 also amends the California personal information safeguards law to impose the state's safeguards obligations directly on entities that "maintain" information, even if they do not own that information (*e.g.*, service providers). Finally, AB 1710 amends the California SSN law to prohibit any person from selling, advertising for sale, or offering to sell an individual's SSN. For further discussion of AB 1710, please see our Client Alert.

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

Apps Aren't Disclosing Clear Privacy Policies

A recent privacy survey conducted by 26 regulators that are part of the Global Privacy Enforcement Network (which includes the FTC and FCC) revealed that 85% of the approximately 50 apps surveyed did not clearly explain how they were collecting, using, or disclosing personal information. In 59% of the apps, users had a difficult time finding basic privacy information. The survey also found that 43% of the apps failed to tailor the privacy communications for the mobile device and, as a result, the text either was too small or required scrolling and/or clicking through multiple pages.

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ARBITRATION REPORT

Form Is as Important as Substance

A federal court refused to enforce an arbitration clause that was included in a warranty booklet. *Norcia v. Samsung Telecomm's Am., LLC*, 2014 U.S. Dist. LEXIS 131893 (N.D. Cal. Sept. 18, 2014). The warranty booklet included a question and answer section, which included a question-and-answer indicating disputes must be resolved through binding arbitration. The court found that the warranty booklet could not be considered an agreement to arbitrate, as there were no words indicating it was an "agreement" or "contract," and no requirement that consumers sign the booklet or even acknowledge having received it. The court noted that the purpose of a warranty is to highlight the seller's obligations, so a reasonable consumer should not be expected to assume that a warranty booklet contains a binding arbitration agreement.

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When in New Jersey, Watch for Waiver Language

The New Jersey Supreme Court reversed a lower court's decision compelling arbitration, because the arbitration clause did not state that consumers were waiving their right to sue in court. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014). The

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contract specified that "any disputes" related to the agreement would be subject to binding and final arbitration, but the court found that this language was not sufficient to inform consumers that they were waiving the right to bring an action in court. While not requiring "a prescribed set of words," the court concluded that in order to be enforceable, arbitration clauses must clearly and unambiguously explain that the consumer is waiving the right to pursue a claim in court.

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TCPA REPORT

No Means No

The Eighth Circuit reversed the district court's grant of summary judgment for a defendant student loan servicer on claims that defendant violated the FDCPA and TCPA by using an autodialer to make debt collection calls to plaintiff's cellphone. *Brenner v. Am. Educ. Servs*, 575 F. App'x 703 (8th Cir. 2014). A unanimous panel found that, although plaintiff had consented to receive automated calls by signing multiple forbearance agreements and providing the defendant with his telephone number, the district court failed to address plaintiff's argument that he revoked consent thereafter. Although remanding for further factual findings on the issue, the panel stated that summary judgment would be improper if plaintiff had revoked his consent.

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To Be or Not to Be (Part of the Transaction)

The Second Circuit reversed the district court's grant of summary judgment to defendant, and found that plaintiff did not consent to receive autodialed debt collection calls within the meaning of the TCPA. *Nigro v. Mercantile Adjustment Bureau*, 769 F.3d 804 (2d Cir. 2014). The district court had found that plaintiff consented to the calls when he gave his number to an electric company in connection with cancelling service for his deceased mother-in-law. Not so, said the panel. According to the FCC's recent declaratory ruling, a consumer expressly consents to receive automated collection calls only if he or she provides a wireless phone number to the creditor, and does so "*during the transaction that resulted in the debt owed*." *Id.* at 806. Under this definition, plaintiff "plainly did not consent." *Id.* He did not provide his number during the transaction resulting in the debt owed; he gave his number long after his mother-in-law had incurred the debt, and he was not responsible for the debt in any way. The panel therefore reversed the district court's decision and remanded for further proceedings.

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Dialing Back FCC's Autodialer Definition

A federal court in San Diego dismissed plaintiff's putative TCPA class action against gym chain Crunch Fitness, finding that Crunch did not use an "autodialer" within the meaning of the statute to send challenged text messages. *Marks v. Crunch San Diego, LLC*, 2014 WL 5422976 (S.D. Cal. Oct. 23, 2014). The court found Crunch's equipment did not have "the capacity to store or produce numbers" using "a random or sequential number generator" as required under the TCPA. The court explained that the FCC's broad interpretation of the term "autodialer" could subject many modern devices, including smartphones and computers, to TCPA liability. The court noted that "[i]t seems unlikely that Congress intended to subject such a wide swath of the population to a law designed to combat unwanted and excessive telemarketing." *Id.* at *3.

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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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