FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Fall 2014

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MOFO METRICS

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492	Projected US budget deficit in 2014, in billions of dollars
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48.4	Same number, college students
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MORRISON FOERSTER

Editor's Note

In law school, we are taught that if you change just one fact, you can change the outcome of a case. Does that work in real life? Let's see. Kid on skateboard = cool. Thirty-something weaving through crowded sidewalk on scooter = Dork. Artisanal cider = trendy. Artisanal matzo ball = even mom says no. Naked photo leak of celebrities on the web = potential criminal conduct, FBI investigates. Naked photos of law firm newsletter editor on the web = potential risk of worldwide retinal detachment, CDC investigates.

Speaking of facts, a lot happened this summer. This issue is chock full of them. And for a lot of these items, we would love a fact switch. For our Bureau Report, for example, take any item reported in these pages and insert "not." Or, "Gotcha, only kidding!"

BELTWAY REPORT

Shifting Cycles

The Federal Reserve Board issued a notice of proposed rulemaking that would amend the capital plan and stress test rules to modify the start date of the capital plan and stress test cycles from October 1 of a calendar year to January 1 of the following calendar year. The proposed rule would revise the Board's Policy Statement on the Scenario Design Framework for Stress Testing and the Board's Regulation YY to reflect the revisions to the start date of the stress test cycle. The proposed rule also would make additional changes to the current rules, including limiting a bank holding company's ability to make capital distributions to the extent that the bank holding company's actual capital issuances are less than the amount indicated in its capital plan under quarterly baseline conditions.

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

Debt Sale Scrutiny

On August 4, 2014, the OCC issued Bulletin 2014-37, advising banks of the OCC's supervisory expectations for structuring consumer debt-sale arrangements in a manner that is consistent with safety and soundness and promotes fair treatment of customers. The Bulletin discusses the need for appropriate due diligence on debt purchasers and transfer of accurate and comprehensive information regarding each debt sold. The Bulletin cautions against transferring accounts that "fail to meet the basic requirements to be an ongoing legal debt" and advises banks to refrain from selling debt that poses compliance and legal risk, such as debt covered by the Servicemembers Civil Relief Act.

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

OCC Price Increase

On July 9, 2014, the OCC adopted a final rule that increases assessments for national banks and federal savings associations with assets of more than $40 billion. The effective increase for an individual bank will depend on its total assets, with an average increase of 12 percent. The OCC will implement the increase in assessments by issuing an amended Notice of Office of the Comptroller of the Currency Fees and Assessments, which will become effective as of the semiannual assessment due on September 30, 2014. The final rule also updates the OCC's assessment rule to conform to the Dodd-Frank provision that reaffirmed the OCC's assessment authority.

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

BUREAU REPORT

Complaint Database: Ripoff Report 2.0?

The CFPB has proposed expanding its Consumer Complaint Database to include consumer narrative accounts and the institution's response. The proposal has drawn sharp criticism from impacted entities because the narratives would be published without any verification. The CFPB is of the view that providing an opportunity to respond addresses this issue, but it does not address the potential for reputational risk or the burden involved in responding. The comment period on the proposal has been extended through September 22, 2014.

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

Even More Complaints!

The CFPB's Consumer Complaint Database is expanding to accept complaints concerning prepaid cards—like gift cards, benefit cards, and general-purpose reloadable cards—and nonbank products such as debt settlement or credit repair services, and pawn and title loans. Additional complaint categories proposed for inclusion in 2015: in-laws, Miley Cyrus, the media's unfair treatment of Miley Cyrus, "selfies" and "relfies," people who read over your shoulder on the subway or at the doctor's office, and "this place only has Pepsi/Coke products."

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

Halt — the CFPB Goes There

In June, the CFPB published its final rule on temporary cease-and-desist orders (TCDOs), adopting the interim final rule without change after considering the lone public comment offered. TCDOs are authorized under Dodd-Frank Section 1053(c). The Bureau may issue a TCDO when it brings a cease-and-desist proceeding under Section 1053 and determines that a specified violation is likely to cause the person served to be insolvent or otherwise prejudice the interests of consumers before the completion of the proceedings. A TCDO is effective immediately upon service and remains in effect unless modified or terminated administratively by the CFPB or set aside on judicial review.

For more information, contact Michael Miller at mbmiller@mofo.com or David Fioccola at dfioccola@mofo.com.

No Good Deed Goes Unpunished

In June, the CFPB announced a $225 million settlement of two major credit card enforcement matters with Synchrony Bank, formerly known as GE Capital Retail Bank. First, the "Add-On Matter" targets alleged deceptive marketing of credit card add-on products in violation of Dodd-Frank's UDAAP prohibition. Second, the "Offer Exclusion Matter" addresses alleged discrimination against Hispanics in connection with debt relief offers to credit card customers, that excluded certain Spanish-speaking customers and all customers in Puerto Rico. The settlement underscores the Bureau's ongoing focus on UDAAP violations, particularly with respect to add-on products and "deceptive" marketing. The CFPB did not assess any civil monetary penalty for the "Offer Exclusion Matter," which was self-reported by Synchrony.

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However, it did assess a $3.5 million CMP for the "Add-On Matter."

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

Debt Collection Discussion

The FTC and the CFPB are co-hosting a roundtable in Long Beach, California to examine how debt collection issues affect Latino consumers, especially those with limited proficiency in English. The event will include consumer advocates, industry representatives, regulators, and academics. More information is available on the event page.

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

Remittance Transfers Report

New immigrants to the United States, who commonly have little credit history information, frequently use remittance transfers to send money to family members who remain behind. As required by Dodd-Frank, the CFPB studied the potential for remittance information to build consumer credit. The CFPB released its report in July, with little fanfare, perhaps because it concluded that "remittance histories add very little to the predictiveness of a credit scoring model" and "building a credit scoring model that includes remittance history information is unlikely to increase the credit scores of consumers who send remittance transfers." In some cases, the CFPB found a positive correlation between the use of remittance transfers and default, i.e., that people who use remittance transfers regularly may be more likely to default on credit obligations.

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

A Perfect Storm: Debt Collection, Lawyers, and Alleged Robo-signing

The CFPB has sued a Georgia-based debt collection law firm and its three principal partners, alleging multiple Fair Debt Collection Practices Act (FDCPA) violations. In the complaint, the CFPB asserts that the firm uses an automated process and non-attorney staff to generate complaints, enabling the firm to file hundreds of thousands of lawsuits. The allegations include use of robo-signed affidavits attesting to details of consumer debt that ultimately cannot be substantiated.

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

$92M, but No Money Down

In June, the CFPB and 13 state attorneys general announced a settlement with Colfax Capital Corporation, Culver Capital, LLC, and their two principals for allegedly misstating finance charges and illegally collecting debts that were void under state law. The defendants sold electronics to service members, promising zero percent financing and no money down. The CFPB alleged that the defendants, among other things, concealed finance charges by artificially inflating the price of the goods sold and assessed interest and fees that exceeded state usury caps. The Consent Order requires $92 million in consumer redress in the form of forgiveness of the existing debt without any cash payments. Likely because the defendants had filed for bankruptcy, the Consent Order requires payment of a $1civil penalty.

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

MOBILE & EMERGING PAYMENTS REPORT

CFPB Puts Its Nose Under the Mobile Banking Tent

On June 11, 2014, the CFPB released a request for information (RFI) concerning the use of "mobile financial services" among unbanked and under-banked consumers. In the RFI, the CFPB expresses its interest in learning more about how consumers use mobile devices to access financial products and services, manage finances, and achieve their financial goals. The agency plans to use responses to the RFI to develop "consumer education and empowerment strategies" related to mobile financial services. The CFPB also published a series of "consumer tips" with the RFI to provide consumers with "best practices for security" when using mobile devices for financial services.

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

Does Anyone Look at Phone Bills Anymore?

The FTC issued a Staff Report on mobile cramming, which is the placement of unauthorized third-party charges on a consumer's telephone bill. The Report identifies how cramming has become more of a problem in recent years because consumers "frequently overlook" unauthorized charges on their mobile phone bills. In the Report, FTC Staff recommend various actions that could be taken to address the problems they have associated with cramming.

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

Virtual Currencies, Actual Risks

The CFPB released a consumer advisory outlining certain risks associated with virtual currencies and announced that the CFPB will begin accepting consumer complaints regarding virtual currencies through its consumer complaint portal. The CFPB advisory provides a series of recommendations and considerations for consumers who transact with, or are interested in using, virtual currencies.

The CFPB's advisory followed release of the New York Department of Financial Services' proposed framework for regulating "retail-facing virtual currency business activity." NYDFS provided for a 45-day public comment period and said the rules are "subject to additional review and revision" based on feedback.

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

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MORTGAGE & FAIR LENDING REPORT

Just When You Thought It Was Safe to Take a Summer Vacation

On July 24, the CFPB published long-awaited proposed revisions to its Home Mortgage Disclosure Act (HMDA) rules. As detailed in our article and Client Alert, the Bureau's 573-page proposed rule would make sweeping changes to Regulation C, which implements HMDA, dramatically expanding financial institutions' HMDA reporting and compliance obligations, as well as their fair lending work more broadly. The proposed changes include required reporting of 37 new data fields, 20 of which are not required by the applicable statutes and represent additional information the CFPB would like to collect. In addition, the proposal would require "larger" HMDA reporters to report data every calendar quarter, rather than on an annual basis. Comments on the proposed rule are due by October 22, 2014.

For more information, please contact Leonard Chanin at lchanin@mofo.com or Tom Noto at tnoto@mofo.com.

No RESPA Respite

RESPA Section 8 enforcement is back. It was in abeyance during the transition of RESPA enforcement from HUD to the CFPB over the past few years. In fact, the last announced HUD Section 8 settlement dates from almost three years ago. But the CFPB is picking up where HUD left off, and then some. The latest in the Bureau's flurry of Section 8 activity is a consent order with an online-based mortgage lender, its CEO personally, and an affiliate of the lender, alleging a "bait-and-switch" scheme. The Bureau also is pursuing creative (some would say discredited) theories about, for example, mortgage reinsurance and the parameters of a lawful affiliated business arrangement.

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

More Massive Mortgage Settlements

The CFPB, DOJ, HUD, and state attorneys general continued their aggressive mortgage enforcement this summer. In total, the country's largest lenders were ordered to pay about $20 billion (yes, billion) to resolve allegations that they (1) violated the False Claims Act by knowingly originating and underwriting mortgage loans insured by the FHA that did not meet applicable requirements, (2) submitted improper foreclosure charges to the FHA and Fannie Mae for reimbursement; and (3) engaged in origination, servicing, and foreclosure conduct in violation of UDAAP and state foreclosure laws. These actions include settlements ranging from $10 million to the multibillions. Expect more to follow.

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

Windy Cities

Local government "fair lending" litigation marches on, with mixed results. The cities of Los Angeles, Miami, and Providence, as well as Cook County, IL (home to Chicago), have jumped on the bandwagon, following other municipalities across the country in suing lenders for allegedly causing a disproportionate number of foreclosures in minority neighborhoods by engaging in discriminatory lending practices, which, they claim, have cost them money and decreased their tax revenue. Some cases have been dismissed for lack of standing, for example, but other cases have not. Meanwhile, earlier cases have, inevitably, resolved through much-touted settlements that in reality consist mostly of agreements to do what the banks already wanted to do—make more loans.

For more information, contact Tom Noto at tnoto@mofo.com.

California Court Puts the Kibosh on Controversial RESPA Case

In March, the Central District of California issued a controversial holding that a title company's relationship with delivery services like Federal Express can be subject to RESPA's anti-kickback provisions, 12 U.S.C. § 2607, rejecting Fidelity's argument that this would produce the "absurd result" of "subject[ing] companies like Kinko's and Staples to RESPA regulation for tangential services they might provide in real-estate settlements." *Henson v. Fidelity Nat'l Fin. Inc.*, No. 2:14-cv-01240-ODW(RZX), 2014 WL 1246222, at *6 (C.D. Cal. March 21, 2014). This July, though, Fidelity won the day when the court denied plaintiffs' motion to certify a class. *Henson v. Fidelity Nat'l Fin. Inc.*, No. 2:14-cv-01240-ODW(RZX), 2014 WL 2765136, at *7 (C.D. Cal. June 18, 2014). The court held that individual issues—such as whether each class member's mortgage loan was subject to the statute—would predominate over class-wide issues. As the court explained, "these inquiries are not simple on-off switches; rather, they will involve significant record review for each prospective class member's real estate settlement." It added that for the same reasons, ascertaining class membership would require "wading through the regulatory-exemptions thicket. Such an intricate, individualized inquiry belies ascertainability." *Id.* at *10. The case has now gone to mediation.

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

Please, Sir, Can We Have Some More?

In July, the CFPB issued a Policy Statement on mini-correspondent lending. While the "Policy Guidance on Supervisory and Enforcement Considerations Relevant to Mortgage Brokers Transitioning to Mini-Correspondent Lenders" deals with a lot of inside baseball mortgage issues, some broader points emerge. First, trade groups worked hard on this, and it paid off. The Statement specifically addresses questions the industry posed, which has not been the

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Bureau's common approach to informal guidance. The Statement is generally seen as pragmatic and does not outright ban the mini-correspondent model. It is also one of the few Policy Statements the Bureau has issued on a consumer financial services topic, and along with other recent issuances may signal a newfound willingness by the Bureau to engage with the financial services industry on topics of mutual interest.

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

You Say Po-Tay-To, the Fed Says Po-Tah-To

In August, the Eighth Circuit held that a loan guarantor is not an "applicant" for purposes of marital-status discrimination under the ECOA, flatly rejecting the definition the Fed promulgated in Regulation B and recent Sixth Circuit authority. *Hawkins v. Cmty. Bank of Raymore*, No. 13-3065, 2014 WL 3826820, at *2 (8th Cir. Aug. 5, 2014). The Sixth Circuit recently held that the ECOA is ambiguous on this point and so deferred to the Federal Reserve Board. *RL BB Acquisition, LLC v. Bridgemill Commons Dev. Grp., LLC*, 754 F.3d 380, 385 (6th Cir. 2014). The Eighth Circuit disagreed: "Because the text of the ECOA is unambiguous regarding whether a guarantor constitutes an applicant, we will not defer to the Federal Reserve's interpretation of applicant, and we conclude that a guarantor is not protected from marital-status discrimination by the ECOA." *Hawkins*, 2014 WL 3826820, at *3. *See also Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436, 441 (7th Cir. 2007).

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

OPERATIONS REPORT

Stress Test Push Back

In June, the Federal Reserve Board, the OCC and the FDIC issued proposed rules delaying the start date of the capital plan and stress test cycles by three months. The proposed rules also clarify that institutions covered by the annual stress test rules will not have to calculate their regulatory capital ratios using the Basel III advanced approaches rule until the stress testing cycle that begins on January 1, 2016. Each agency's proposal also makes other adjustments to the capital plan and stress test processes. For example, the Board's proposal purports to clarify the application of the capital plan rule to a large bank holding company that is a subsidiary of a U.S. intermediate holding company of a foreign banking organization.

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

Volcker Rule Exam Procedures

On June 12, 2014, the OCC issued interim procedures for examiners to assess banks' progress in developing a framework to comply with the Volcker Rule. The interim procedures would generally apply to examinations of national banks, federal savings associations, and federal branches and agencies of foreign banks. The interim procedures shed light on the OCC's focus and priorities with regard to the implementation of the Volcker Rule. The interim procedures are divided into four categories: general procedures, proprietary trading, covered funds, and conclusions. For a more detailed discussion of the key objectives for each of these categories, see our Client Alert. Currently, banks are expected to conform their activities and investments to the Volcker Rule by July 2015.

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

Operational Risk Calculation Guidance

On June 30, 2014, the Basel Coordination Committee (BCC) issued guidance titled "Supervisory Guidance for Data, Modeling, and Model Risk Management Under the Operational Risk Advanced Measurement Approaches." The BCC provides exam guidance relating to the implementation of the advanced approaches risk-based capital rule. The BCC generally consists of Federal Reserve staff responsible for overseeing the Federal Reserve's process for implementing the advanced approaches rule. The June guidance informs a regulated banking organization's operational risk calculation. Specifically, a regulated banking organization must estimate its operational risk exposure by collecting and using four data elements: internal operational loss event data, external operational loss event data, scenario analysis, and business environment and internal control factors.

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

FAQs for FBOs

On June 26, 2014, the Federal Reserve Board published responses to FAQs relating to the enhanced prudential standards under Section 165 of the Dodd-Frank Act and implementing Regulation YY, as they relate to foreign banking organizations (FBOs). Specifically, the FAQs address the implementation plan, U.S. structure, regulatory reporting, capital adequacy, capital stress testing, risk management, liquidity, and other topics relating to Regulation YY applicable to FBOs. The Board advises that the FAQs will be a "living" document to which the Board may add questions and responses as they arise.

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

PREEMPTION REPORT

No RESPA Piggybacking

A federal court in San Diego found a California Unfair Competition Law (UCL) claim based on an alleged RESPA violation was preempted by HOLA and OTS regulations. *Hayes v. Wells Fargo Bank, N.A.*, No. 13-cv-1707 (BLM), 2014 U.S. Dist. LEXIS 91149 (S.D. Cal. July 3, 2014). Plaintiff alleged both

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a RESPA and a UCL violation based on the defendant's alleged failure to conduct an initial escrow analysis and inaccurate escrow calculations that purportedly caused plaintiff's default. The court first sided with those courts that have applied the charter of the original lender to the preemption analysis. The court then found that plaintiff's UCL claim, as applied, was expressly preempted by the OTS regulations as a state law purporting to regulate escrow accounts. The court rejected plaintiff's argument that the UCL is a law of general applicability that is not preempted, explaining a state court ruling holding otherwise was in conflict with Ninth Circuit law.

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

HPA Preemption Confusion

Can plaintiffs pursue state law claims for failure to disclose lender-purchased mortgage insurance at the closing as required by the Homeowners Protection Act (HPA)? Depends on which court you ask. A federal court in Rhode Island held that the HPA preempts common law fraud and misrepresentation claims. *Gregor v. Aurora Bank FSB*, No. 13-21834, 2014 U.S. Dist. LEXIS 83182 (D.R.I. June 18, 2014). Noting that other district courts had held otherwise, the court reasoned that Congress used the same preemption language in the HPA as it used in ERISA, so Congress must have intended HPA preemption to be construed broadly as is the case with ERISA preemption. The court further explained that state law claims are preempted even if they are duplicative of HPA claims because state law would function as an "alternate enforcement mechanism," frustrating Congress's intent to create uniform mortgage insurance disclosure requirements. *Id.* at *20.

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

The Golden Rule Applies to Out-of-State Banks

In *Pereira v. Regions Bank*, 752 F.3d 1354 (11th Cir. 2014), the plaintiff brought suit against an Alabama bank alleging a violation of a Florida state law prohibiting assessment of check-cashing fees by a Florida branch of the bank. The Eleventh Circuit had already held the state law was preempted as to national banks. *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194 (11th Cir. 2011). Federal law provides that state laws apply to in-state branches of out-of-state banks to the same extent as those laws apply to national banks. 12 U.S.C. § 1831a(j)(1). Therefore, the Eleventh Circuit held the state law was preempted as to the Alabama bank as well.

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

Same Language, Same Result

A federal court in Massachusetts found a state law claim seeking to impose mortgage disclosure requirements on a national bank was preempted by the NBA and OCC regulations. *Downey v. Wells Fargo Bank, N.A.*, No. 12-11340-DJC, 2014 U.S. Dist. LEXIS 94406 (D. Mass. July 11, 2014). The court found that plaintiff's state law claim was preempted by OCC regulations that allow national banks to make mortgage loans without regard to state law limitations on disclosures and advertising. The court reasoned that other courts had found the same state law preempted by OTS regulations, and the OTS and OCC regulations are "nearly identical." *Id.* at *16. The similarity between state law and TILA disclosure requirements did not save the state law from preemption as the shorter statute of limitations under TILA reflected important policy considerations.

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

No Deal on Debt Collection Statutes

Two federal courts rejected arguments that HOLA and OTS regulations preempt state debt collection statutes. *Henderson v. Wells Fargo Bank, N.A.*, No. 3:12-CV-3935-L, 2014 U.S. Dist. LEXIS 103657 (N.D. Tex. July 30, 2014); *Tinsley v. OneWest Bank, FSB*, No. 3:13-23241, 2014 U.S. Dist. LEXIS 100914 (S.D.W.V. July 24, 2014). Both courts found plaintiffs' claims were based on alleged unfair and deceptive debt collection practices, which are not topics listed in the OTS preemption regulations. Instead, the courts explained, those types of claims are general commercial laws that have only an incidental effect on lending, so they are not preempted.

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

Back to the (State Court) Drawing Board

Loyal readers will recall that a Hawaii district court found state law claims brought by the Hawaii Attorney General challenging add-on credit card products were completely preempted by the NBA and DIDMCA. Financial Services Report Spring 2014. The Ninth Circuit considered the AG's interlocutory appeal and reversed the district court's ruling. *Hawaii v. HSBC Bank Nev., N.A.*, No. 13-15611, 2014 U.S. App. LEXIS 14966 (9th Cir. Aug. 1, 2014). The court found plaintiffs' claims did not attempt to regulate the interest that national banks could charge and instead were best understood as claims alleging deceptive and unfair practices, which are not completely preempted by the NBA. The Court noted that its conclusion was consistent with the Fifth Circuit's ruling on similar claims brought by the Mississippi AG. The court declined to consider DIDMCA preemption because the state-chartered defendant settled while the appeal was pending.

For more information, contact Jim McCabe at jmccabe@mofo.com or James McGuire at jmcguire@mofo.com.

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PRIVACY REPORT

FFIEC Offers a Seat at the Table for Community Banks

In May, the Federal Financial Institutions Examination Council (FFIEC) conducted a webinar for community banks to raise awareness of cybersecurity issues and to highlight actions being taken by the FFIEC. The FFIEC announced that community banks should expect vulnerability and risk mitigation assessments on cybersecurity. These assessments will be designed to allow the FFIEC agencies to "make informed decisions about the state of cybersecurity across community institutions" and to "address gaps and prioritize necessary actions to strengthen supervisory programs." The FFIEC also launched a web page that aggregates cybersecurity information and links to webinars and other cybersecurity-related information.

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

Treasury Secretary Serves Up Cybersecurity on a Plate to Financial Institutions

At the 2014 delivering Alpha conference, Treasury Secretary Jacob J. Lew urged financial institutions to take stronger steps in protecting against cyberthreats. Lew advised financial institutions to use the cybersecurity framework issued by the National Institute of Standards and Technology (NIST) to reduce cyberthreats and to ensure that their third-party vendors use this framework as well. To further facilitate cyberthreat sharing across the financial services industry, Lew announced that the Treasury created an information sharing and analysis unit, the Financial Sector Cyber Intelligence Group.

For more information, contact Andrew Serwin at aserwin@mofo.com.

The SEC Wants Its Piece of the Cybersecurity Pie

In a speech given on June 16, 2014, SEC Commissioner Luis Aguilar strongly encouraged boards of directors to more actively assess cyber threats. Like the Treasury Secretary, Aguilar encouraged boards to look to the NIST cybersecurity framework as a foundation for their efforts.

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

Orange You Glad You Didn't Have a Breach in Florida

On June 20, 2014, Florida Governor Scott signed into law a package of bills (S.B. 1524 and 1526) repealing the state's security breach law and putting in its place arguably the broadest and most encompassing breach law in the country. The new law is groundbreaking in its scope, including its requirement that companies impacted by a data breach provide to the AG upon request, among other things, an incident report or computer forensics report and a copy of the company's policies in place "regarding breaches."

For more information, read our Client Alert or contact Nathan Taylor at ndtaylor@mofo.com.

Second Bite at the Apple for Wyndham

Loyal readers will recall our report on Wyndham's failed attempt to dismiss claims brought by the FTC in a data breach case under the unfairness prong of the FTC Act. However, the district court granted Wyndham's motion for an interlocutory appeal to the Third Circuit, and the Third Circuit granted Wyndham's petition. The two issues certified for appeal are: (1) whether the FTC can bring an unfairness claim involving data security under Section 5 of the FTC Act; and (2) whether the FTC must formally promulgate regulations before bringing an unfairness claim. *Fed. Trade Comm'n v. Wyndham Worldwide Corp.*, No. 13-1887(ES), Memorandum & Order (D.N.J. June 23, 2014), ECF No. 203; *Fed. Trade Comm'n v. Wyndham Worldwide Corp.*, No. 14-809, Petition for Review Granted (3d Cir. July 29, 2014), Doc. ID 003111692293.

For more information, contact Cindy Abramson at cabramson@mofo.com.

No Monetary Damages, No Claims, No Service

On July 14, 2014, an Illinois federal court dismissed a case against the crafts store Michaels related to a high-profile data breach reported by the company earlier this year. *Moyer v. Michaels Stores, Inc.*, No. 14-C-561, 2014 WL 3511500 (N.D. Ill. July 14, 2014). The court found plaintiffs had standing to pursue their claims, explaining that increased risk of identity theft from the breach constituted injury for purposes of Article III. Plaintiffs had not, though, identified any concrete monetary damages caused by the data breach, an essential element of their claims.

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

Data Breaches Are Taking a Bite out of the Big Apple

New York AG Eric Schneiderman issued a report highlighting the growing costs of data breaches to New York, with more than 900 breaches reportedly costing businesses over $1.37 billion in 2013. The New York AG released a report, entitled "Information Exposed: Historical Examination of Data Breaches in New York State" that includes data breach statistics and related information. The figures were attributed in large part to recent high-profile breaches, which impacted millions of New York residents. Schneiderman urged businesses to create and implement better data security plans and vowed to continue to work for greater collaboration between industry and security experts.

For more information, contact Marian Waldmann Agarwal at mwaldmann@mofo.com.

ARBITRATION REPORT

The Fox Can't Guard the Hen House

Agreeing with the Sixth Circuit, the Third Circuit held in *Opalinski v. Robert Half International, Inc.*, No. 12-4444, 2014 U.S. App. LEXIS 14538 (3d Cir. July 30, 2014), that the

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trial court should decide whether an arbitration provision permitted class arbitration absent clear agreement by the parties that the arbitrator should decide that question. Noting that the Supreme Court has recently recognized the fundamental difference between individual and class arbitration, the Third Circuit found that whether class arbitration is permitted is a question of arbitrability that must be decided by a trial court. The Third Circuit relied on the long-standing precedent that "who" is bound by the arbitration provision is a question for the court to decide.

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

No Second Bite at the Apple

In *In re checking Account Overdraft Litigation*, 754 F.3d 1290 (11th Cir. 2014), the Eleventh Circuit reversed the district court and found that defendant had waived an argument that the parties had delegated the determination of the enforceability of a class waiver in an arbitration agreement to the arbitrator. Defendant had asked the district court to compel arbitration. The court initially found the class waiver was unconscionable and therefore unenforceable. Following the Supreme Court's ruling in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), though, the district court reconsidered its ruling and found that a delegation clause requiring the arbitrator to decide enforceability issues vested the arbitrator with authority to decide whether the class waiver was enforceable. The Eleventh Circuit reversed, finding that the defendant "waived its delegation clause argument when it waited to raise the issue until after it had asked the district court to decide arbitrability—and lost." 754 F.3d at 1298.

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

Delegation Clauses Are All the Rage

A California state appellate court held that delegation clauses are enforceable under California law and require courts to allow arbitrators to decide all questions of enforceability. *Tiri v. Lucky Chances*, 226 Cal. App. 4th 231, 2014 Cal. App. LEXIS 423 (Cal. Ct. App. May 15, 2014). The court rejected plaintiff's argument that the delegation clause was substantively unconscionable because it was not unduly harsh and applied equally to both parties.

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TCPA REPORT

"Yo Quiero Taco Bell" Text Messages?

On July 2, 2014, the Ninth Circuit, in an unpublished decision, affirmed dismissal of TCPA claims against Taco Bell Corp., finding that the company was not vicariously liable for spam text messages sent on behalf of Chicago-area local Taco Bell owners. *Thomas v. Taco Bell Corp.*, No. 12-56458, 2014 U.S. App. LEXIS 12547, at *4-6 (9th Cir. July 2, 2014). The court agreed that neither the local Chicago association, nor the companies it hired to send the text messages, were agents of Taco Bell Corp. And because Taco Bell Corp. did not ratify the text messages, it could not be held liable under a ratification theory either.

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What Does "Capacity" Mean Anyway?

A federal court in Florida rejected a broad interpretation of the term "autodialer" under the TCPA, concluding that the "term 'capacity' refers to 'present, not potential, capacity' to produce and dial numbers." *De Los Santos v. Millward Brown, Inc.*, No. 13-80670-CV-MARRA, 2014 U.S. Dist. LEXIS 88711, at *19-21 (S.D. Fla. June 29, 2014) (citation omitted). The defendant had moved to dismiss a TCPA claim, arguing that the TCPA is unconstitutionally overbroad because it includes many smartphones or computers. The court disagreed, finding that "as of yet, no court, nor this one, will interpret the TCPA so broadly." *Id.* at *21.

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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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