FINANCIAL SERVICES REPORT

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MOFO METRICS

120: Months between Justice Clarence Thomas's on-the-bench remarks

0.69: Percentage of Supreme Court cases decided by a 4-4 tie between 1945-2014

13: Number of people killed each year by falling vending machines

2: Number of bakeries licensed to make Girl Scout cookies

17,328: Record number of Girl Scout cookie boxes sold by a single Girl Scout

175: Number of Girl Scout cookie boxes sold each year, in millions

1.9: Number of Girl Scouts, in millions

75: Percentage of women in the Senate who were Girl Scouts

Editor's Note

Why another law firm newsletter? Over ten years ago, Will Stern answered that question in the first Editor's Note of the first Financial Services Report. Some things have changed since then—we no longer print and mail paper copies, and we report on issues that were not even a twinkle in anyone's eye back then (the CFPB, Mobile Payments, and TCPA come to mind). Other things, though, have not changed. Will explained in the first issue that our goal was to help companies "stay ahead of the summons," by providing "pithy summaries and occasional humor, with an eye toward what it all means." That remains our goal.

Through it all, Will has been our fearless leader, urging us to focus on the big picture and to use as few words as possible to explain what happened, who should care, and why. Under his leadership, the Report has gained readers every year. It also won the Burton Award, which recognizes excellence in modern legal writing.

And now for something completely different, Will has handed off the Editor-in-Chief reins. We salute him. We will miss him. As he'd expect, though, read on for the latest on privacy, mortgage, and the goings-on in Washington, D.C., as well as preemption, arbitration, and TCPA decisions.

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How Well Do You Know Your Service Providers?

On December 23, 2015, the Federal Reserve Board and the FDIC announced settlements with Higher One, Inc. for alleged violations of the prohibition against deceptive acts and practices under Section 5 of the FTC Act. In conjunction with its Higher One settlement, the FDIC also announced a settlement with WEX Bank, an insured depository institution that partnered with Higher One to offer a financial aid refund program. The Agencies alleged that Higher One violated Section 5 of the FTC Act based on alleged misrepresentation and omissions in marketing of its student debit card program, known as "OneAccount." They concluded Higher One was an institution affiliated party of WEX and other regulated banks under the Federal Deposit Insurance Act, and the Board emphasized its authority to regulate and examine third-party service providers such as Higher One.

For more information, contact Jeremy Mandell at jmandell@mofo.com or read our Client Alert.

My Plan Is Better Than Your Plan

In a speech delivered on January 20, 2016, FDIC Vice Chairman Thomas M. Hoenig criticized the Federal Reserve's total loss-absorbing capacity plan, which would require the eight largest banks in the country to maintain an extra level of capital, including a required level of long-term debt. In particular, Vice Chairman Hoenig expressed concern that the measure would "increase the leverage in an already highly leveraged industry" by requiring these banks to issue billions of dollars in additional debt, creating heavy earnings demands that could exacerbate periods of financial stress. As an alternative, he suggested a plan in which the FDIC would be appointed receiver of the insured depository institution to separate the bank's assets into a "bridge bank" for the performing assets and the rest of the assets into the receivership (bad bank).

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

FTC Targets Payday Lenders

On January 20, 2016, the FTC asked a federal district court to grant its motion for summary judgement seeking $1.3 billion in equitable monetary relief due to allegedly unlawful lending practices in the Commission's case against race car driver and payday loan executive Scott Tucker, as well as several affiliated companies with ties to Native American tribes. The FTC argued defendants materially misstated the costs of the loans and seeks to hold Tucker personally liable for the company's alleged practices due to his direct involvement in and control of the alleged wrongful acts. The defendants also moved for summary judgment, arguing the lending model used by the loan service providers did not deviate from the industry norm and that borrowers understood the terms of the agreements they signed.

For more information, contact Joe Rodriguez at jrodriguez@mofo.com.

The Crusade Continues

In a report released January 29, 2016, Senator Elizabeth Warren called out the Department of Justice, the SEC, and other federal agencies, for what she views as a "shockingly weak" effort to prosecute corporate crimes across a variety of industries, including banking. The report highlights 20 recent criminal and civil cases in which the government failed to require what Sen. Warren viewed as "meaningful accountability" from either large corporations or their executives involved in alleged wrongdoing. The report further called out the DOJ for agreeing to criminal or civil settlements that rarely require any admission of wrongdoing, as well as the SEC for granting waivers that allow companies to continue to conduct business despite allegedly illegal conduct.

For more information, contact Joe Rodriguez at jrodriguez@mofo.com.

BUREAU

Lessons From Used Car Salesmen

Although the $800,000 settlement with Herbies Auto Sales in Greeley, Colorado is small potatoes, the consent order against the "buy-here pay-here" used car dealer gives some insight into the Bureau's view of TILA's finance charge requirements. The Bureau alleged that Herbies violated TILA and engaged in deceptive practices under the CFPA by failing to include the cost of a required repair warranty policy in its disclosed APRs. The Bureau alleged the repair warranty policy was a cost of credit because the policy was required only of credit customers.

The Bureau also entered into a consent order with CarHop, one of the country's largest "buy-here, pay-here" auto dealers, and its affiliated financing company, for allegedly providing damaging and inaccurate consumer information to credit reporting companies in violation of FCRA and the CFPA. The Bureau contends that CarHop took advantage of customers with no credit or bad credit by advertising that it reports "good credit" to reporting companies and that a purchase could build credit profiles with a history of on-time payments, but the companies failed to furnish certain positive information. The companies also allegedly inaccurately reported repossession and amount owing information and failed to have reasonable policies for the furnishing of customer information.

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

I Have a Gym Membership?

The Bureau has noticed that you're paying for a gym membership every month that you forgot you had a long time ago. So are a lot of other consumers. The CFPB doesn't really care whether you go to spin class or not, but it has focused on whether the company charging you obtained your authorization in compliance with the EFTA and Regulation E. In November 2015, the Bureau issued a compliance bulletin reminding companies of the requirements for consumer authorizations for preauthorized EFTs. The bulletin discusses several areas of perceived confusion, for instance, that oral recordings obtained over the phone may authorize preauthorized EFTs under Regulation E provided that these recordings also comply with the E-Sign Act, and reminds companies of their respective obligations to provide copies of the terms of preauthorized EFT authorizations to consumers.

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

CFPB Report: Credit Card Industry Playing Its CARD Right

In December 2015, the Bureau released its second biennial Report on the consumer credit card market, as required by the CARD Act. The Report outlines the results of the CFPB's most recent study of the credit card market, which included a public request for information in March 2015 and other input from industry and consumer groups. The Bureau's outlook on the credit card market overall was quite positive. In prepared remarks, CFPB Director Richard Cordray characterized the data in the Report as evidence that the CARD Act has not reduced consumer access to credit and, instead, has "had a positive impact on consumers and industry alike across the marketplace." To learn more, check out our Client Alert.

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

Lead Aggregator in the Crosshairs

In December 2015, the CFPB sued T3Leads in the Central District of California, alleging that T3 bought consumers' loan applications from lead generators and sold the information to payday

lenders and other lead purchasers without properly vetting the sellers and buyers, exposing consumers to the risk of their sensitive personal information being purchased by illegal actors. In addition, the CFPB alleged that T3 allowed its lead generators to attract consumers with misleading statements and took unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions of the loan products for which they apply. The Bureau also alleged that T3's process of steering leads to lenders allowed consumers' applications to be sent to lenders that offer less favorable terms than may otherwise be available.

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

CFPB Speaks Softly About No-Overdraft Accounts

The CFPB believes that broader availability of "lower-risk" deposit accounts that "help consumers avoid overdrafts" will improve access to checking accounts. In a letter to the CEOs of the top 25 retail banks, Director Richard Cordray asserted that such an account would require less screening for risk and therefore would be more widely available to the estimated 10 million "unbanked" Americans. Director Cordray recognized in his remarks that "a majority of customers seem to be well served by the deposit accounts now offered at virtually all financial institutions," and the press release acknowledged that "[a]lmost nine out of 10 American households have at least one checking account, and many also maintain a savings account." Nevertheless, Director Cordray urged all financial institutions to make lower-risk accounts broadly available.

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

Bureau Comes Knocking Over In-Person Collections

The CFPB settled claims of illegal debt collection by small-dollar lender and pawn broker EZCORP, Inc. in December 2015. The Bureau asserted in its consent order that EZCORP illegally visited consumers at their homes and workplaces, made "empty threats" of legal action, lied about consumers' rights, and "exposed consumers to bank fees" through unlawful electronic withdrawals. The Bureau ordered EZCORP to refund $7.5 million to 93,000 affected consumers, pay $3 million in penalties, and stop collection of remaining payday and installment loan debts owed by roughly 130,000 consumers. EZCORP self-reported many of the issues and had already discontinued many of the questioned practices, and closed all payday, installment, and auto title lending operations in the U.S. in July 2015.

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

Collection of Old, Unverified Cellphone Debt Blocked

Also in December 2015, the Bureau filed a complaint and proposed consent order against EOS CCA, a Massachusetts debt collection firm, for continuing to collect on debt in a portfolio it allegedly determined contained fraudulent, already paid, disputed, or already settled debt. The Bureau asserted that EOS also provided inaccurate information to credit reporting agencies and failed to correct reported information that it knew was inaccurate. The proposed consent order would require EOS to overhaul its debt collection practices, refund at least $743,000 to consumers, and pay a $1.85 million civil money penalty for alleged violations of the FDCPA, FCRA, and CFPA.

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

Prepaid Complaints Spike

The January 2016 snapshot of monthly complaints showed the biggest increase in complaints about prepaid cards—a 233% spike from October 2015 through December 2015—which may be due to a widely reported system glitch that locked one major prepaid company's customers out of their accounts for at least a week last October. New York was the featured geographic spotlight. Even though complaining is supposed to be every New Yorker's favorite pastime, complaints in the state were largely consistent with nationwide trends.

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

MOBILE & EMERGING PAYMENTS

Between a Rock and a Hard Place on Mobile Device Security

A subcommittee of the House Energy & Commerce Committee held hearings in December on whether mobile payment systems are sufficiently secure and protective of consumers. The industry participants at the hearings highlighted the range of security features used to secure mobile devices and transactions, including strong encryption and biometric authentication.

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

More Regulators Size Up Marketplace Lenders

Following the Treasury Department's request for information on marketplace lending in July 2015, both California and the FDIC have gotten involved. In December 2015, California's Department of Business Oversight sent a 17-page information request to 14 companies involved in marketplace lending or similar activities. The request asked for a significant amount of detail on loans, loan terms, and participation by investors.

The FDIC's February 1, 2016 issue of its Supervisory Insights contains a lengthy overview and discussion of bank participation in marketplace lending. The risk considerations highlighted by the FDIC are similar to other banking regulator guidance relating to third-party risk management practices. In particular, the FDIC focused on the risk relating to investor appetite to take on the credit risk for loans originated by the marketplace lender.

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

MORTGAGE & FAIR LENDING

Know Before You Sell

CFPB Director Cordray has penned a response to a Mortgage Bankers Association request about the Bureau's much-discussed new TRID rule. The Director responded to the MBA's concern that the implementation of the "Know Before You Owe" Rule in TRID is causing disruption in the origination of residential mortgage loans. The CFPB's response covered three unsatisfying topics: (1) the Bureau's previously stated informal policy on a "grace period" for examination in the early months of implementation; (2) reminders of the Rule's cure provisions; and (3) liability violating the Rule.

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

California Supremes Strike Again

California's highest court has shaken up the state's mortgage foreclosure landscape, adopting a minority interpretation of foreclosure law that "a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for

wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment." *Yvanova v. New Century Mortg. Corp.*, No. S218973 (Feb. 18, 2016). The court emphasized, however, "Our ruling in this case is a narrow one." *Id.* at *3. For example, it did not "hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed." *Id.* at *4. In other words, preemptive suits challenging a pending foreclosure remain a dead letter. But there is little doubt that the decision will make it easier for California foreclosure plaintiffs complaining of a completed foreclosure to at least try to state a claim.

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

HMDA Cliff Notes

Last week, the CFPB released a new compliance guide to accompany its October 15, 2015, final rule amending Regulation C, which implements the Home Mortgage Disclosure Act. The final rule makes sweeping changes to the types of institutions and transactions covered by Regulation C, and it vastly expands the universe of data about transactions that institutions must collect and report. The CFPB describes the compliance guide as a "plain language" resource designed to make the content of the rule "more accessible for industry constituents, especially smaller businesses with limited legal and compliance staff." If length is any judge, the 108-page guide certainly is easier to navigate (and carry) than the 796-page final rule.

For more information, read our blog post or contact Ryan Richardson, rrichardson@mofo.com.

HMDA + HMDA

This February, the CFPB continued its HMDA implementation efforts, publishing with the Federal Financial Institutions Examination Council new "File Specifications" for data to be collected pursuant to the HMDA and its implementing regulation, Regulation C, in 2017 and 2018. These File Specifications follow the CFPB's October 15, 2015, final rule amending Regulation C, published in the Federal Register on November 10. As the Rule contemplated, the new File Specifications make changes to the format and method in which HMDA data must be submitted. More importantly, the 2018 File Specifications show the number of individual data fields that will ultimately be necessary to implement the Rule's new collection requirements—110. Yes, that's right, 110.

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

TILA-ISCIOUS

The Ninth Circuit has confirmed that a TILA amendment, which requires creditors to notify a borrower of the sale or transfer of their loan, does not apply retroactively. *Talie v. Wells Fargo Bank*, 808 F.3d 410 (9th Cir. 2016). The court unanimously affirmed the district court's order dismissing the putative class action alleging that the defendant banks violated TILA Section 1641(g) by not notifying plaintiffs that their mortgages had been transferred in 2006. The court noted that retroactive application of statutes is "disfavored," and in this case, there was "no clear indication, in §-1641(g)'s text or in its legislative history, that Congress intended for it to apply to loans that had been transferred before its enactment." *Id.* at 411, 412. As a practical matter, it's not clear how much impact the ruling will have, since the TILA amendment, and corresponding lender compliance programs, have been in place since 2009.

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

OPERATIONS

More Planning for the Future

In December 2015, the OCC issued proposed guidelines establishing standards for recovery planning by certain banks and other entities with average total consolidated assets of $50 billion or more ("covered banks"). The proposed guidelines would require each covered bank to maintain a recovery plan addressing bank-specific and market-wide stress scenarios and the responses to such scenarios to ensure restored financial and operational strength and viability. Each recovery plan would need to identify, among other things, (1) triggers specific to the bank's particular vulnerabilities; (2) a wide range of credible options a bank could undertake to continue to restore financial and operational strength and viability; and (3) escalation procedures for each trigger. Distinct from living wills and stress testing, recovery plans would not be limited to planning for financial shocks; recovery plans would also need to address how a bank would, for example, recover from a cyberattack, an adverse legal ruling, or a sudden change in leadership. The OCC would enforce these guidelines under the special enforcement procedures for safety and soundness standards.

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

Proposed CCyB Policy Statement

In December 2015, the Federal Reserve Board, in consultation with the FDIC and the OCC, requested public comment on a proposed policy statement that details the framework that the Federal Reserve Board will follow in establishing the U.S. Basel III countercyclical capital buffer (CCyB) for large, internationally active banking organizations that are subject to the advanced approaches capital rules. The CCyB is intended to be a macroprudential tool that the Federal Reserve Board may use to strengthen the financial system by raising capital requirements when there is an elevated risk of above-normal losses. The CCyB functions as an extension of the Capital Conservation Buffer and, from a regulatory standpoint, is already provided for in the Federal Reserve Board's regulatory capital rules. While the capital rules detail the mechanics of applying the CCyB, the Federal Reserve Board's proposed policy statement, which is described in greater detail in our Alert, focuses on when the CCyB will be invoked.

For more information, contact Jared Kaplan at jkaplan@mofo.com.

Stormy Scenarios

In January 2016, the banking agencies issued press releases specifying the scenarios for the 2016 Comprehensive Capital Analysis and Review ("CCAR") and the stress test exercises required under the Dodd-Frank Act. In 2016, the Federal Reserve Board's CCAR exercises will include 33 bank holding companies with $50 billion or more in total consolidated assets. The OCC's stress test exercise covers banks with more than $10 billion in assets. The "severely adverse" scenario is a severe global recession in which the U.S. unemployment rate hits 10 percent, corporate financial stress is heightened, and negative yields are met for short-term U.S. Treasuries. The "adverse" scenario is a moderate recession and mild deflation in the United States, and weakening global economic activity. (The "baseline" scenario represents average projections from a survey of economic forecasters.) A subset of the CCAR participants will be required to factor in a global market shock as part of their scenarios, and a broadly overlapping subset of participants will be required to incorporate a counterparty default scenario.

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

PREEMPTION

Preemption Cubed

A federal district court in Connecticut held that a state consumer protection claim against a national bank premised on an alleged omission was preempted by the NBA, TILA, and RESPA. *Smith v. Wells Fargo Bank, N.A.*, No. 3:15-cv-89 (SRU), 2016 U.S. Dist. LEXIS 10653 (D. Conn. Jan. 29, 2016). Plaintiff alleged the national bank violated the Connecticut consumer protection statute by failing to itemize in the loan documents certain interest charges paid in connection with the refinancing of her mortgage loan. The court held that the National Bank Act and OCC regulations preempted plaintiff's attempt to require a national bank to separately disclose these charges. The court further held that this claim was preempted by TILA and RESPA because the purported disclosure requirement was inconsistent with the disclosures required by these statutes.

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

More in the Never-Ending Saga

Yet another court has weighed in on whether state law claims on the order of posting transactions and calculation of overdraft fees are preempted by the NBA and OCC regulations. *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, MDL No. 2613, 2015 U.S. Dist. LEXIS 165736 (D.S.C. Dec. 10, 2015). The court followed the analysis of the Ninth Circuit in finding state law claims challenging a national bank's order of posting policies and policies regarding whether to honor transactions into overdraft were preempted as they significantly interfered with the bank's federally authorized incidental powers. In contrast, claims "not premised on unfairness or bad faith theories but on genuine disputes about the terms of the contract and the parties' compliance therewith" were not preempted because they only incidentally affect the bank's deposit-taking powers. *Id.* at *33.

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

FCRA Consensus – One District at a Time

A federal court in the Northern District of Alabama followed what it referred to as the "growing consensus" in the District in following the total preemption approach. *Bush v. J.P. Morgan Chase Bank, N.A.*, No. 2:15-cv-00769-JEO, 2016 U.S. Dist. LEXIS 9352, at *22 (N.D. Ala. Jan. 27, 2016). The court explained that tort claims based on a furnisher's alleged reporting of inaccurate information to credit agencies fall within the scope of section 1681t(b)(1)(F), which is an absolute bar to state causes of action. The other preemption provision in FCRA, which preempts claims where the information was furnished with malice, applies to users of information, the court reasoned, not furnishers of information. As a result, the court dismissed state tort claims to the extent they were based on the alleged furnishing of inaccurate information.

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

PRIVACY

Privacy Matters

We lead this issue's Privacy Report with a new report from Morrison & Foerster's Privacy & Data Security group, which summarizes the results of an online survey of more than 900 consumers. The survey results confirm that privacy issues present real business risks and can negatively impact a company's bottom line in a number of ways. The key findings of the report include that privacy concerns influence consumer purchasing decisions; high-earning, well-educated consumers are more likely to stop buying from a business because of a data breach; identity theft is the biggest privacy concern among consumers; and the government fares worse than the private sector when it comes to consumer trust.

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

Safe Harbor, Safe Again?

In October 2015, the European Court of Justice ("ECJ") effectively invalidated the U.S.-E.U. Safe Harbor framework, which had enabled companies to transfer data from Europe if the U.S. companies receiving the information committed to protecting it in accordance with a set of agreed-upon privacy principles enforceable under U.S. law. Tens of thousands of companies in the E.U. rely on this agreement to share information regarding employees, customers, and business partners with U.S. companies. The ECJ ruling was ostensibly based on concerns relating to access to European data by U.S. law enforcement and national security authorities, as well as the fact that European citizens did not have effective judicial redress against the U.S. government. The ECJ's decision immediately threw cross-border data transfers into disarray and sent regulators and policymakers on both continents scrambling for a replacement. Recently, E.U. and U.S. authorities announced that they had reached an agreement on a revised Safe Harbor. The details of this new "E.U.-U.S. Privacy Shield" agreement are not yet public, but reports suggest that it addresses the access and redress concerns underlying the ECJ decision that started this scramble.

For more information, read our Client Alert or contact Miriam Wugmeister at mwugmeister@mofo.com.

A (Cyber) Bill Becomes Law

As we reported in the Winter 2015 Issue, the Senate had passed the Cybersecurity Information Sharing Act of 2015. Later in December, President Obama signed a substantially similar bill, the Cybersecurity Act of 2015, into law as part of the omnibus spending and tax bill (H.R. 2029). Although the new law addresses a variety of cybersecurity topics, its main focus is authorization of three types of activities to combat cyber threats: (1) sharing cyber threat information with other companies and the federal government; (2) monitoring their information systems for cyber threats; and (3) conducting defensive measures to protect their information systems from cyber threats. The law includes a number of additional protections designed to remove obstacles that may cause companies to avoid these voluntary activities, including, for example, protections from liability for sharing cyber threat information and monitoring information systems, as well as Freedom of Information Act, antitrust, and other protections.

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

Regulators Continue to Offer Advice on Cyber Security

The FDIC's Winter 2015 issue of ***Supervisory Insights*** includes an article on "A Framework for Cybersecurity," which describes the evolving cyber threat landscape and the government's efforts to enhance the security and resilience of critical infrastructure sectors, including the financial sector. The Framework describes the four components of an information security program that the FDIC believes are critical for a bank's cyber risk control structure. These areas are: Corporate Governance, Threat Intelligence, Security Awareness Training, and Patch-Management Programs. The last of these, which may seem out of place at first glance, is focused on software updates designed to fix known vulnerabilities or security weaknesses in applications and operating systems, as the article suggests that a lack of robust patch management programs has been a significant contributing factor in the uptick in security incidents in recent years.

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

More Cyber Security Compliance Obligations

California's Attorney General (AG) released a new report on data breaches reported to the AG from 2012 through 2015. Most of the report summarizes the types of breaches (such as malware and hacking attacks and the theft of electronic devices). It also lays out "recommendations" for what the AG believes is a reasonable information security program for purposes of the California safeguards law. For example, the report states that "[t]he 20 controls in the Center for Internet Security's Critical Security Controls define a minimum level of information security that all organizations that collect or maintain personal information should meet." Moreover, the report indicates that "[t]he failure to implement all the Controls that apply to an organization's environment constitutes a lack of reasonable security." In other words, California has laid down a clear (and dramatic) marker for what it believes "reasonable" means for purposes of the California safeguards law.

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

Is Big Data in Big Trouble?

The FTC released a report in January titled "Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues." The report doesn't call for legislation, nor does it appear to be a harbinger of imminent enforcement actions. The FTC raised concerns that the same type of analytics that can help target opportunities in underserved communities may be inadvertently used to exclude certain populations, due to incomplete or inaccurate data or hidden biases in the collection, analysis, and interpretation of the data. The report offers guidance on how big data can be used in a way that maximizes benefits to society, while minimizing legal and ethical risks, flagging in particular potential liability under existing laws such as the FCRA and section 5 of the FTC Act.

For more information, read our Client Alert or contact Julie O'Neill at joneill@mofo.com.

Well, Some Data Brokers Definitely Are

Falling under the FTC's broad view of what constitutes a "data broker," the FTC announced a settlement with a group of defendants, including LeapLab Company, based on the FTC's allegations that the defendants sold loan application data to entities the FTC referred to as "scammers," meaning "non-lenders that did not use the information to assist consumers in obtaining a payday loan or other extension of credit." These companies allegedly had no business need for the information, and some of the companies apparently used the information to withdraw funds from consumers' financial accounts without authorization. The FTC alleged that these practices were "unfair," in violation of section 5 of the FTC Act.

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

What Else Is New in the FTC's Privacy and Data Security World?

The FTC released its 2015 Privacy and Data Security Update in January. The report highlights the FTC's privacy efforts, which have included law enforcement actions, reports, public workshops, educational efforts, and international cooperation. It discusses key enforcement actions in privacy and data security, and under the Fair Credit Reporting Act, the Children's Online Privacy Protection Act, and the U.S.-EU Safe Harbor Framework. The update also notes revisions to the FTC's Telemarketing Sales Rule, as well as advocacy and policy work. This work includes the FTC's foray into the "Internet of Things" with a report detailing the FTC's views on how the principles of security, data minimization, notice, and choice apply in this new space.

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

What's a Picture Worth? In Illinois, It Could Be a Lot

Litigation continues over the meaning of a biometric identifier under the Illinois Biometric Information Privacy Act. At the end of last year, Shutterfly lost its bid to have a class action alleging unlawful use of facial recognition technology dismissed. *Norberg v. Shutterfly, Inc.*, No. 15 CV 05351, 2015 U.S. Dist. LEXIS 175433 (N.D. Ill. Dec. 29, 2015) (order denying motion to dismiss). The court found that facial geometry scans derived from photographs are not necessarily exempt from the reach of the state's biometric law, even though photographs themselves are exempt. The court rejected Shutterfly's argument that the court lacked personal jurisdiction, finding Shutterfly's online services were conduct directed toward Illinois residents. Another court in the district reached a different result in a similar case filed against Facebook, dismissing the case for lack of personal jurisdiction. *Gullen v. Facebook.com, Inc.*, No. 15 C 7681, 2016 WL 245910 (N.D. Ill. Jan, 21, 2016). Shutterfly has asked the court to reconsider based on this ruling.

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

ARBITRATION

More Love for Arbitration From the Supreme Court

In December 2015, the Supreme Court upheld a class arbitration waiver in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). The arbitration agreement at issue banned class arbitration unless the "law of your state" forbids class arbitration waivers. When the case started, it was undisputed that California state law banned class arbitration waivers. After the Supreme Court found this law was preempted by the FAA, the defendant sought to compel bilateral arbitration. Plaintiffs argued that the arbitration provision was unenforceable because the law of California continued to ban class arbitration waivers. The Supreme Court disagreed, finding the "law of your state" referred to *valid* law, and the law was no longer valid as it was preempted by the FAA. The majority defended their reading of the clause in the face of a forceful dissent that accused the Court of "expanding" the FAA, "degrading" the rights of consumers and "insulating" economic entities from liability.

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

"Gaming the System" Means You Lose

In *Hayes v. Delbert Services Corp.*, Nos. 15-1170, 15-1217, 2016 U.S. App. LEXIS 1747 (4th Cir. Feb. 2, 2016), the Fourth Circuit refused to enforce an arbitration agreement that provided for waiver of all rights under federal law. The arbitration clause was in a loan agreement with the Western Sky. It provided for arbitration under the "laws and jurisdiction of the Cheyenne River Sioux Tribe" and further stated that "no United States state or federal law applies to this Agreement." The court rejected the loan servicer's motion to compel arbitration, finding the loan servicer was not a tribal entity and therefore could not require consumers to waive protections of federal laws. The court held that waiver of federal law went too far, accusing the loan servicer of trying "to game the entire system." *Id.* at *23. The loan servicer has filed a petition for rehearing, arguing there is no basis for treating tribal law differently from other foreign laws and citing Supreme Court precedent rejecting an attempt to invalidate an arbitration clause because it is governed by foreign law.

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

TCPA

MBA Joins a Long List of Others Calling Foul on FCC

The Mortgage Bankers Association (MBA), along with the American Financial Services Association and the Consumer Mortgage Coalition (collectively, the "Associations"), have added their voices to the industry groups challenging the FCC's July 2015 Declaratory Order as an unprecedented and unwarranted expansion of TCPA liability. The Associations recently submitted an amicus brief supporting ACA International's challenge to the FCC's Order in the D.C. Circuit. They argue that the FCC's interpretation of "autodialer" and prior express consent contravenes the statute and imposes potential liability for *any* call to a cell phone. The Order, amici argue, is also contrary to federal law requiring or encouraging calls to cell phones, particularly in the mortgage servicing arena.

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The FCC Leaves Its Mark

We are starting to see the impact of the FCC's Declaratory Order on court decisions. *See Cartrette v. Time Warner Cable, Inc.*, No. 5:14-CV-143-FL, 2016 U.S. Dist. LEXIS 4867 (E.D.N.C. Jan. 14, 2016). A federal court in North Carolina rejected defendant's arguments that plaintiff could not revoke consent to receive calls and that plaintiff could not prove it used an "autodialer." The court relied on the FCC's Order, following the FCC's conclusion that consumers could withdraw consent and that "autodialers" could include systems with the *capacity* to generate random numbers.

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