FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Summer 2014

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MOFO METRICS

29	Percentage of world population that is overweight
7	Average useful life men's underwear, in years
2-5	Number of colds average adult gets per year
121	Percentage increase in college tuition since 2000
35	Percentage increase in everything else, same period
20	Percentage of arable Chinese farmland that is polluted
140	Median debt, JD grads, in thousands of dollars (2012)
88	Same figure (2004)
14	Percentage drop in sales of Barbie dolls, 2014

Attorney Advertising

MORRISON FOERSTER

Editor's Note

We start off this issue with a quiz. Do the following statements describe the allegations in an enforcement action brought by the Consumer Financial Protection Bureau or analysis of the inner workings of the Bureau itself?

- Statistical evidence reflects statistically significant disparities in treatment based on race and age resulting in "systemic disadvantages" to various protected classes unrelated to authorized factors. The entity has agreed to remediate payments to all impacted persons for fiscal years 2012 and 2013.

- Despite the passage of almost three years, the entity has not yet implemented training for employees who deal directly with the public. In addition, 59% of certain transactions and 90% of another category of transactions were not completed by the deadlines specified in the entity's procedures. The entity's response: Well, those requirements set forth in our procedures were "aspirational," but we'll try to do better.

Our fellow CFPB watchers are the lucky winners as they guessed correctly that we are describing our favorite agency. Let's just say springtime was not a bed of tulips for the Bureau with *American Banker* articles leading to congressional hearings on its employment practices and an Inspector General report appropriately titled "The CFPB Can Improve the Efficiency and Effectiveness of Its Supervisory Activities."

Now that we've jumped on the Bureau-punching-bag bandwagon, read on to learn how Richard Cordray and his downtrodden employees have beaten up on the rest of us this quarter, how much a data breach and the Volker Rule will cost you (although nothing about which will be more painful), and the latest preemption, arbitration, and TCPA decisions.

BELTWAY REPORT

FFIEC Issues the Alert on Heartbleed

On April 10, 2014, the Federal Financial Institutions Examination Council (FFIEC) issued its "OpenSSL 'Heartbleed' Vulnerability Alert." The alert warned financial institutions that systems using the OpenSSL encryption method were at risk for cyberattacks. Specifically, the alert explained that an attacker could exploit a material security vulnerability in the OpenSSL cryptographic library, dubbed "Heartbleed," to decrypt, spoof, or perform attacks on network communications. To address the vulnerability, the FFIEC urged financial institutions to immediately incorporate patched versions of OpenSSL into their systems and to ensure that the financial institutions' third-party vendors also take risk mitigation steps.

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

Third-Party Vendors Present a Growing Risk

At the Consumer Electronics Show's Government Summit, Comptroller Thomas Curry warned of three risks to bank and consumer data stemming from the use of third-party vendors and foreign subcontractors. First, the consolidation of service providers poses the risk that banks will become dependent on a single vendor, which could magnify the impact of any future deficiencies. Second, the use of third-party vendors, especially foreign-based subcontractors, to support critical functions creates data risk concerning legal and regulatory implications of the geographic location of the data. Last, third-party access to large amounts of bank and consumer data poses reputational risk and the risk of loss of confidential information. Comptroller Curry further explained that the OCC expects banks to perform due diligence, establish risk management practices, and appropriately oversee third-party relationships in accordance with the OCC's risk management guidance on third-party relationships.

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

The OCC Streamlines Rules

On May 16, 2014, the OCC announced streamlined rules that had been adopted on an interagency basis with other federal regulators. The amended rules concern consumer protection in insurance sales, procedures for monitoring compliance with the Bank Secrecy Act, depository management interlocks, disclosure and reporting of Community Reinvestment Act requirements, appraisals, the disposal of consumer information, and identity theft red flags. The OCC also eliminated provisions for which authority had been transferred to other federal agencies pursuant to the Dodd-Frank Act.

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

BUREAU REPORT

SCRA Is the Basis for Next High-Profile Settlement

The DOJ and the FDIC entered into Consent Orders with Sallie Mae based on alleged violations of the Servicemembers Civil Relief Act (SCRA). The matter was referred to these agencies by the CFPB, which does not have authority to enforce the SCRA. The agencies alleged Sallie Mae violated the SCRA by charging active-duty service members more than 6% interest on their student loans. The Consent Orders require Sallie Mae and its subsidiary Navient Solutions to pay $96.6 million in restitution and penalties. Sallie Mae also agreed to contact credit bureaus to delete any negative credit history associated with the interest-rate overcharges and any related default judgments.

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

Go Ahead, Make My Day

The CFPB has once again taken the position that an attempt to collect time-barred debt violates the Fair Debt Collection Practices Act (FDCPA) prohibition on using false, deceptive, or misleading debt collection communications even if the communication does not expressly refer to litigation. The agency joined the FTC in an amicus brief in *Buchanan v. Northland Group, Inc.*, on appeal before the Sixth Circuit. The case concerns a debt collector's effort to collect a time-barred debt with a settlement offer letter, which stated the debt collector was "not obligated to renew" a settlement offer if the debtor failed to accept it. The district court found this language was not misleading because there was no threat of litigation. The CFPB and FTC disagree, arguing that actual or threatened litigation is not a necessary predicate to an FDCPA violation in the context of time-barred debt.

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

CashCall: Sweet Sixteen

The CFPB filed an amended complaint against CashCall, expanding the geographic reach of its claims to eight additional states. The suit claims UDAAP violations based on efforts to collect loans that were allegedly void as a matter of state law because the loans originated by tribal lenders allegedly exceed state usury limitations. The Bureau alleges that efforts to collect these loans are unfair, deceptive, and abusive under federal law. The original complaint identified loans originated for consumers in eight states — Arizona, Arkansas Colorado, Indiana, Massachusetts, New Hampshire, New York, and North Carolina. The amended complaint brings the total number of states to sixteen, adding loans originated for consumers in Alabama, Illinois, Kentucky, Minnesota, Montana, New Jersey, New Mexico, and Ohio.

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

Complaints Up

The CFPB's headline regarding its recent consumer response report was "CFPB Report Shows Complaints Rose 80 Percent in 2013." The increase could

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mean one of two things: either consumer protection has gotten worse since the CFPB opened its doors in 2011, or the CFPB's consumer portal and its acceptance of complaints from many additional industries have made it easier to lodge a complaint relating to consumer financial products. The CFPB fails to explain the increase, so we leave it to you to make your own determination.

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

OIG: Examine CFPB Exams

In May, the Inspector General for the Federal Reserve Board issued a report criticizing the CFPB examination process. The OIG found that CFPB exams were extraordinarily slow and that examiners were inadequately supervised and trained. The length of exams creates uncertainty for supervised institutions: the CFPB has not met its own internal guidelines for issuing examination reports, and some examinations have been outstanding for more than a year. In addition, the OIG reports that the CFPB has not finalized training, exams, or on-the-job evaluation for examiners, allows examiner commissioning based on supervisor recommendations, and does not track whether examiners have completed required on-the-job training modules.

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

Better, Cheaper Privacy Notices

The CFPB has proposed easing the annual privacy notice requirements under the Gramm-Leach-Bliley Act. Comments on the proposed change are due July 14. Financial institutions are currently required to provide an initial privacy notice to individual consumers when they establish the customer relationship, and to mail another copy of the privacy notice to their customers each year. Under the proposal, financial institutions would still be required to deliver an initial privacy notice to consumers, but would be allowed to post annual privacy notices online rather than mailing them under certain circumstances. The proposal is unlikely to be very useful for larger financial institutions, as it would require financial institutions that offer an FCRA affiliate sharing opt out or that do not qualify for the model notice safe harbor to continue sending annual notices.

For more information, read our Client Alert or contact Andrew Smith at asmith@mofo.com.

Permission to Guesstimate

Under the CFPB's remittance transfer rule, remittance transfer providers are required to disclose certain third-party fees, as well as any exchange rate that will apply to the transfer. Sometimes, though, it is impossible for financial institutions to determine these exact amounts, particularly in wire transfers, where the institution may not have a relationship with every participant in the process. The Dodd-Frank Act provides an exception allowing federally insured financial institutions to estimate third-party fees and exchange rates when they cannot determine the exact amounts. Although this provision was set to expire on July 21, 2015, the CFPB has proposed extending the exception for five years, to July 21, 2020.

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

MOBILE & EMERGING PAYMENTS REPORT

The Federal Reserve Board Goes Mobile

The Federal Reserve Board released its third annual report on "Consumers and Mobile Financial Services." According to the report, the growth in consumer adoption of mobile payments continues to be substantial, but the overall percentage of consumers who have adopted mobile payments remains relatively low at 17 percent of mobile phone users. This is in spite of the growth in use of mobile payments at the point of sale increasing threefold from 2012 to 2013. The Board cited to security concerns and consumer skepticism of the benefits of mobile payments as two of the main factors limiting wider consumer adoption of mobile payments.

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

So Does the FDIC

The FDIC released a white paper on the economic inclusion potential of mobile financial services" to assess the impact of mobile financial services on underserved consumers. The FDIC found that "approximately 17 million U.S. adults live in households without a checking or savings account. An additional 51 million U.S. adults live in households that have a bank account but rely on nonbank providers to obtain some financial services." According to the FDIC, mobile financial services, through their "anytime, anyplace and actionable nature," have the potential to expand access to the mainstream banking system. The FDIC also explains that "speed is particularly important" for underserved consumers because they are more likely to have lower-balance accounts and require financial tools to manage accounts and avoid fees.

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

MORTGAGE & FAIR LENDING REPORT

"Minor" Mortgage Changes, Major Impact

On April 30, the CFPB proposed "minor adjustments" to the mortgage rules, including tweaks to the qualified mortgage (QM) rule and changes to allow more nonprofit organizations to write QM loans. The key changes, from the industry's perspective, address what happens when a lender writes a loan as a QM but later discovers that the points and fees on the loan exceeded the 3% points and fees cap on QMs. The proposal would give lenders a 120-day "cure period" in which to issue a refund to the borrower and keep the QM status on the loan. The CFPB is "also seeking input on certain other questions relating to the impact of the bureau's rules," including how to deal with

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similar "inadvertent debt-to-income ratio overages," and "may address these issues in future rulemakings."

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

Supreme Court Takes Up TILA

The Supreme Court has granted certiorari to resolve a circuit split regarding the deadline for rescinding a loan under TILA. *Jesinoski v. Countrywide Home Loans Inc.*, No. 13-00684 (cert. granted Apr. 28, 2014). The circuits are split on whether a borrower must, within the statute's 3-year rescission window, (1) provide written notice or (2) file suit. The Third, Fourth and Eleventh Circuits have held that the statute allows rescission by written notice. In *Jesinoski*, the Eighth Circuit, following its recent decision in *Keiran v. Home Capital, Inc.*, 720 F.3d 721, 726-29 (8th Cir. 2013), and decisions by the First, Sixth, Eighth and Tenth Circuits, held that a borrower must file a timely lawsuit in order to rescind. If there are no further extensions, the plaintiff's brief is due this July, and the bank's response is due in September.

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

It's a Miracle

Finally, something on which the nation's politicians can agree: The CFPB is going too far with its indirect auto-lending campaign. On April 7, 2014, Republicans and Democrats on the House Financial Services Committee took turns grilling the CFPB's general counsel over the Bureau's policy of holding banks that fund car loans responsible for auto dealers' alleged discrimination. As we've reported, at least one lender has already paid nearly $100 million to settle indirect auto-lending claims by the CFPB, and the CFPB made clear in its March 2013 Bulletin that it will continue to hold lenders responsible for dealers' alleged charging of higher interest rates to protected classes of buyers.

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

Home Is Where Your Headquarters Are (Sometimes)

"One might think that 150 years after Congress established national banks in 1863, the question of their citizenship for purposes of diversity jurisdiction would be well established. . . . Not so." *Rouse v. Wachovia Mortg., FSB*, 747 F.3d 707, 708 (9th Cir. Mar. 27, 2014). "The relevant statute is ambiguous, the courts are split on the question, and the Supreme Court has not squarely decided the issue." *Id.* After a walk through 150 years of case law, the Ninth Circuit held that "a national bank is a citizen only of the state in which its main office is located." For purposes of diversity jurisdiction. *Id.* at 709 (emphasis added). Thus, Wells Fargo Bank is a citizen of South Dakota and not California. The decision deepens the circuit split on this question—the Ninth Circuit followed the First, Sixth, Seventh, and Eighth Circuits, while the Second and Fourth Circuits have held that national banks may be citizens of more than one state.

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

TILA and RESPA, Sitting in a Tree

This past December, the CFPB completed the long process of integrating TILA and RESPA mortgage disclosure forms, aimed at putting an end to 30 years of borrower and lender frustration at dealing with two sets of overlapping, contradictory forms. Like any union, the integrated forms are imperfect, and the CFPB has now issued a number of materials aimed at clarifying and improving the process, including a Guide to Completing TILA-RESPA Integrated Disclosure Forms and a new "e-closing pilot" program.

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

Fifth Circuit Adopts HUD's Disparate Impact Rule

The Fifth Circuit has become the first circuit court to adopt HUD's aggressive new disparate impact rule, including its plaintiff-friendly burden-shifting formula. *Inclusive Cmtys. Project, Inc. v. Tex. Dep't of Housing & Cmty. Affairs*, No. 12-11211, 2014 U.S. App. LEXIS 5424 (5th Cir. Mar. 24, 2014). The plaintiffs contend the Texas agency disproportionately approved certain low-income housing tax credits for developments in predominantly minority neighborhoods, and denied the credits in predominantly white neighborhoods. This, plaintiffs claimed, "creat[ed] a concentration of the [low income] units in minority areas, a lack of units in other areas, and maintain[ed] and perpetuat[ed] segregated housing patterns." *Id.* at *8. The district court held for plaintiffs, and the Fifth Circuit affirmed. It recognized that the Supreme Court has recently granted cert. in two separate cases to determine whether disparate impact claims are cognizable under the FHA, but because those cases were dismissed, the Fifth Circuit was "bound" to follow existing precedent. HUD, not surprisingly, is now relying on the decision in an industry challenge to the disparate impact rule. *American Ins. Ass'n et al. v. U.S. Dep't of Housing and Urban Dev.*, Case No. 1:13-cv-00966-RJL (D.D.C. filed June 26, 2013).

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

Plus Ça Change . . .

The CFPB's annual Fair Lending Report is out. It hits the familiar themes—mortgage and auto finance are "key" priorities, the Bureau's "data driven" approach, and its use of enforcement proceedings as a "tool[] for addressing" fair lending risk. The CFPB continues to emphasize its expectation that lenders, including indirect auto lenders, proactively analyze their data to identify fair lending risk as part of their compliance management systems. And, the Report picks up the Home Mortgage Disclosure Act (HMDA) arguments that the Bureau has recently begun emphasizing—placing HMDA on equal footing with the Equal Credit Opportunity Act (ECOA) as a "fair lending" law, and listing inaccurate data as a fair lending risk. The report warns that the Bureau "will continue to use" HMDA to identify fair lending violations. The Bureau drove these themes home in its "Supervisory Highlights" published this May, and also provided more detail about how lenders should document exceptions

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that they make to approve loans outside their established credit standards.

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

OPERATIONS REPORT

Conforming Capital Changes

The OCC issued an interim final rule amending various OCC regulations to make those regulations consistent with the OCC's recently adopted regulatory capital framework. Specifically, the interim final rule corrects cross-references to the new capital rules and deletes obsolete references. The interim final rule also makes more substantive changes to subordinated debt rules by clarifying which requirements apply to subordinated debt that is not included in tier 2 capital and by making structural changes to the subordinated debt rules applicable to federal savings associations, in order to parallel the rules applicable to national banks. The technical and conforming amendments took effect March 31, 2014.

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

Extension of Volcker Rule Conformance Period

On April 7, 2014, the Federal Reserve Board announced that banking entities will have two additional one-year extensions to conform their ownership interests in and sponsorship of certain collateralized loan obligations (CLOs) subject to the Volcker Rule implementing regulations. These extensions move the "conformance period" for CLOs to July 21, 2017. Only CLOs in place as of December 31, 2013, that do not qualify for the exclusion for loan securitizations in the Volcker Rule implementing regulations would be eligible for the extension. Banking entities granted extensions would not have to include ownership interests in CLOs for purposes of determining investments and deductions under the Volcker Rule implementing regulations until the end of the relevant conformance period.

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

Estimating the Cost of the Volcker Rule Implementing Regulations

The OCC released an economic impact analysis of the Volcker Rule implementing regulations, and determined that the regulations would cost banks between $412 million and $4.3 billion. The wide range of estimated costs is based primarily on the potential decrease in the market value of banks' investments in impermissible covered funds, which the OCC estimates will be "between zero and $3.6 billion." Other costs related to the implementing regulations include costs associated with compliance and reporting requirements (between $402 million and $541 million), costs associated with estimated capital deductions related to covered funds (between $147 million and $165 million), and additional costs to the OCC related to supervision (approximately $10 million).

For more information, contact Henry Fields at hfields@mofo.com.

OCC Volcker Rule Bulletins

On March 25, 2014, the OCC issued two bulletins concerning the Volcker Rule implementing regulations. The first bulletin highlights key provisions of the Volcker Rule implementing regulations and states that entities that are subject to the OCC's jurisdiction and the Volcker Rule implementing regulations must fully conform their activities and investments to the requirements of the implementing regulations by July 21, 2015. The second bulletin describes the interim final rule that serves as a patch to the Volcker Rule implementing regulations and permits banking entities to retain interests in certain collateralized debt obligations backed primarily by trust preferred securities.

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

The Evolving Regulatory Capital Rules

On April 8, 2014, the OCC, the Federal Reserve Board, and the FDIC issued a final rule changing the regulatory capital rules for large, interconnected U.S. banking organizations. The final rule establishes enhanced supplementary leverage ratio standards for covered bank holding companies (covered BHCs) and subsidiary insured depository institutions (subsidiary IDIs). Under the final rule, a subsidiary IDI of a covered BHC must maintain a supplementary leverage ratio of at least 6% to be well capitalized for purposes of the agencies' prompt corrective action framework. Covered BHCs would also be subject to a supplementary leverage ratio buffer of 2% above the minimum supplementary leverage ratio requirement (3%). Based on the final rule, a covered BHC that maintains such a buffer is not subject to limitations on distributions and discretionary bonus payments.

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

Still More Proposed Changes to Regulatory Capital Calculations

On April 8, 2014, the OCC, the Federal Reserve Board, and the FDIC issued notices of proposed rulemakings regarding the regulatory capital rules that were adopted by the agencies in July 2013. Among other things, the proposed rules would revise the calculation of the denominator of the supplementary leverage ratio—i.e., total leverage exposure—by changing the treatment of on- and off-balance sheet exposures. The proposal would more closely align U.S. regulatory capital rules with international leverage ratio standards. The proposed rule also would revise the definition of "eligible guarantee" to address the agencies, inadvertent limitation of the recognition of guarantees of wholesale exposures under the advanced approaches risk-based capital rule and would make changes to the public disclosure requirements for the supplementary leverage ratio. The proposals would apply to all institutions that are subject to the approaches risk-based capital rules, as defined in the 2013 revised capital rules. The deadline for comments on the proposal is June 13, 2014.

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

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PREEMPTION REPORT

Complete Preemption Rejection

A federal court in San Francisco decided that the NBA does not completely preempt state labor laws. *Garrett v. Bank of Am. N.A.*, No. 13-cv-05263-JST, 2014 U.S. Dist. LEXIS 57523 (N.D. Cal. Apr. 24, 2014). Plaintiff, a former bank teller, filed suit in state court alleging a national bank violated state law requiring employers to provides seats for their workers. The national bank removed the case to federal court, in part, based on a complete preemption theory. The court disagreed, finding the national bank had not "demonstrated that the NBA so directly controls the precise question of worker seating as to provide the exclusive cause of action through which such an action can be brought against a national bank." *Id.* at *9.

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

One Person's Trash . . .

What happens when an auto dealership accidentally sends a customer's credit report to an unrelated third party (who happens to be in prison)? An unexpected call from prison, followed by a lawsuit. *Owens v. Dixie Motor Co.*, No. 5:12-CV-389, 2014 U.S. Dist. LEXIS 59006 (E.D.N.C. Mar. 31, 2014). Plaintiff alleged state law claims based on failure to protect against unauthorized access to her credit report and failure to comply with representations in the dealership's privacy policy that it would safeguard customers' private information. The court found claims based on the unauthorized access theory were preempted by the Fair Credit Reporting Act, which includes provisions governing proper disposal of consumer reports and expressly preempts state-law claims regarding any conduct regulated by the Act. The court further found claims based on the alleged misrepresentations were not preempted because FCRA does not regulate any such representations.

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

The HBOR Saga Continues

This quarter, two courts adopted what has been the minority position on which charter governs the preemption analysis for loans originated by an institution with a different charter than the current holder of the note and deed of trust. *See Bowman v. Wells Fargo Home Mortg.*, No. 13-cv-05850, 2014 U.S. Dist. LEXIS 65806 (N.D. Cal. May 13, 2014); *Rijhwani v. Wells Fargo Home Mortg., Inc.*, No. C 13-05881, 2014 U.S. Dist. LEXIS 27516 (N.D. Cal. Mar, 3, 2014). In both cases, the courts concluded they would look to the charter of the entity that took the actions at issue in the suit. As the current holder of the note and deed of trust was a national bank, and the challenged foreclosure activity occurred after the transfer of the note and deed of trust to the current holder, both courts found NBA preemption rather than HOLA preemption governed the analysis.

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

PRIVACY REPORT

The State of State Breach Notification Laws

In April 2014, Kentucky enacted a data breach notification law, leaving only Alabama, New Mexico, and South Dakota as states without one. The Kentucky law provides that notice must be provided to consumers in the event of a breach "in the most expedient time possible and without unreasonable delay." In addition, Iowa recently amended its state data breach notification law to require entities to notify the state Attorney General of breaches affecting more than 500 individuals in Iowa. The law was also amended to cover breaches affecting personal information in paper documents, in addition to computerized data already covered. The amended Iowa law will go into effect on July 1, 2014.

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

This Is Not the Drone You're Looking for

More than twelve states have enacted laws regulating the use or licensing of drones. Most of these laws are focused on limiting government and law enforcement activities. However, several new state "drone" laws, including laws in Idaho, Texas, and Oregon, are intended to address privacy concerns beyond those raised in government and law enforcement contexts. For example, these laws impose limitations on the use of drones to photograph or electronically record individuals and their property.

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

More Power to the FTC

A district court in New Jersey upheld the FTC's authority to bring an enforcement action under the unfairness prong of the FTC Act against a company for failure to maintain adequate data security systems. *FTC v. Wyndham Worldwide Corp., No. 13-cv-01887, 2014 U.S. Dist. LEXIS 47622 (D.N.J. Apr. 7, 2014). In 2012, the FTC brought an enforcement action against Wyndham alleging that it failed to provide reasonable and appropriate security for the personal information collected and maintained by its hotels. The FTC's action followed an alleged breach in which computer hackers gained access to more than 619,000 payment card numbers. Wyndham moved to dismiss the complaint, arguing that the FTC did not have authority to assert an unfairness claim in the data security context, must formally promulgate regulations before bringing an unfairness claim, and did not sufficiently plead its allegations. The court resolved all three of these issues in favor of the FTC and denied the motion to dismiss.*

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

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What Do You Have to Say About Mobile Security?

The FTC is seeking public comments to supplement last year's FTC forum examining the state of mobile security. The forum, held in June 2013, addressed a wide array of security issues in the mobile arena, including current and potential future threats to user privacy and security. The FTC is now seeking public comments on the following topics: secure platform design, secure distribution channels, secure development practices, and security lifecycle and updates.

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

Finally, a Do-Not-Track Standard

After more than three years, the World Wide Web Consortium's Tracking Protection Working Group has agreed on a model for a standardized signal consumers can use to tell servers that they do not want their data collected across different websites. The specification will be tested for implementation, and the group will be accepting comments on the draft standard until June 18. The group will now turn its attention to compliance issues and how servers and browsers will comply with and respond to do-not-track requests. The group is aiming to complete work on the technical and compliance issues by the end of 2014 and to finalize the standards by mid-2015.

For more information, contact Reed Freeman at rfreeman@mofo.com.

Big Data Gets the Presidential Treatment

As part of President Obama's announced review of big data and privacy, the President's Council of Advisors on Science and Technology (PCAST) was tasked with putting together a report examining the current and potential future capabilities of key technologies that collect, analyze, and use big data, in addition to technologies that preserve privacy. On May 1, 2014, PCAST released its report, which identifies the source of big data and the privacy challenges it poses. The report includes several recommendations, including that: policy attention should focus on the actual uses of big data and less on its collection and analysis; agencies should strengthen U.S. research in privacy-related technologies; and the U.S. should take the lead both in the international arena and at home by adopting policies that stimulate the use of presently available technologies that protect privacy.

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

How Much Is That Data Breach in the Window?

In May 2014, IBM and Ponemon released their ninth annual *Cost of Data Breach Study: Global Study.* According to the report, the average cost of a data breach increased 15% to $3.5 million. The majority of the breaches studied in the report occurred during 2013. The study looked at 314 companies in 16 industry sectors from 10 different countries. For the first time, the report analyzed the likelihood of a company having one or more data breaches in the next 24 months. According to the report, companies in India and Brazil are most likely to have a data breach involving at least 10,000 records, and companies in Germany and Australia are least likely to have a breach.

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

FTC Wades Into "Big Data"

On May 27, 2014, the Federal Trade Commission released a 110 page report based on an 18-month study of data brokers. The report, titled "Data Brokers: A Call for Transparency and Accountability," encourages legislative action to require data brokers to be more transparent about what data they collect and to give consumers more control over the data. The FTC found that data brokers often collect consumer data without the consumer's knowledge, and that some data brokers retain consumer indefinitely, creating security risks. The legislative recommendations include a mandatory centralized portal, consumer access to data collected, additional opt-out tools, and heightened protections for collection and sharing of sensitive data.

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

ARBITRATION REPORT

Supreme Court Lets Arbitrators Decide Local Litigation Issue

The Supreme Court held that an arbitrator, not a court, should decide whether a pre-arbitration condition to arbitration in an international treaty was satisfied. *BG Grp. PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014). The majority likened the obligation to litigate any issues locally before going to arbitration to a procedural precondition to arbitration like claims of waiver. The dissent disagreed, arguing that the treaty constituted an offer to arbitrate conditioned on the obligation to litigate locally. Accordingly, the question at hand was one of arbitrability — whether the parties agreed to arbitrate — which is decided by courts, not arbitrators.

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

Points for Creativity, but Whistleblower Protections Are for Whistleblowers

In *Santoro v. Accenture Federal Services, LLC*, No. 12-2561, 2014 U.S. App. LEXIS 8410 (4th Cir. May 5, 2014), the Fourth Circuit rejected the argument that whistleblower provisions in the Dodd-Frank Act invalidated a pre-dispute arbitration provision in an employment agreement regardless of whether the dispute involved a whistleblower. The Dodd-Frank Act prohibits employers from requiring whistleblowers to arbitrate their claims. A creative employee argued that this prohibition invalidates any pre-dispute arbitration clause that does not contain an explicit carve-out for whistleblowers. The Fourth Circuit disagreed, reconciling the FAA's broad encouragement of arbitration and the provision in the Dodd-Frank Act by reading the latter to impact only those disputes brought by whistleblowers.

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

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Pesky Contract Provisions at Odds with Arbitration Rules Split Courts

If FINRA Rules allow customers to arbitrate disputes, but the parties' contract includes a forum selection clause indicating disputes must be brought in federal court, what is a court to do? The answer depends on which court is making the decision. The Ninth Circuit ruled recently that a contract including this kind of forum selection clause trumped the FINRA Rule and required the parties to pursue their claims in court. *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733 (9th Cir. 2014). As the court acknowledged, the Fourth Circuit and two courts in the Southern District of New York have ruled otherwise.

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

Which Agreement Is Which?

In *Dasher v. RBC Bank (USA)*, 745 F.3d 1111 (11th Cir. 2014), the Eleventh Circuit dealt a fatal blow to RBC Bank's long-standing attempts to compel arbitration of a dispute regarding overdraft fees. The decision required the court to decide which agreement governed the question of arbitrability — the agreement in force at the time of the events in question (which included an arbitration agreement) or the current agreement (which did not). The court held that the latter agreement applied and defeated arbitration because: the current agreement provided that it entirely superseded the earlier agreement, the current agreement governed activities "for all time," and the current agreement was the operative contract at the time of the decision.

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Expensive Arbitration Antitrust Victory

Plaintiffs in a long-running antitrust class action lost their bid to prove an antitrust conspiracy among ten large issuers to include a class action waiver in credit card arbitration agreements. *Ross v. Am. Express Co.*, Nos. 04 Civ. 5723 (WHP), 05 Civ. 7116 (WHP), 2014 U.S. Dist. LEXIS 50550 (S.D.N.Y. Apr. 10, 2014). Of the ten issuers originally named as defendants, only three had not settled at the time of trial. After a trial, the court ultimately found plaintiffs had not met their burden to prove the credit card issuers conspired to include the class waivers in their agreements. The court noted, though, that the case presents "a cautionary lesson" to lawyers who convene meetings of "competitors" to discuss legal issues, given the costs required to defend the suit. *Id.* at *28.

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TCPA REPORT

The Reaches of Consent

The Eleventh Circuit issued a decision regarding the scope of consent and revocation of consent **in** *Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242 (11th Cir. 2014). Plaintiff alleged that State Farm violated the TCPA by placing 327 debt-collection calls to his cellphone. State Farm sought to contact plaintiff's cohabitant and unmarried partner, who had provided plaintiff's number on her credit card application. The Eleventh Circuit reversed the district court's grant of summary judgment in State Farm's favor, rejecting State Farm's argument that a debtor can give express consent under the TCPA to call a cohabitant's number. The court also held that any express consent given could be revoked orally, and that such revocation need not be in writing*.

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What's Mine Is Not Necessarily Yours

According to a recent New Hampshire district court decision, providing a spouse's telephone number to a company—without more—does not give the entity consent to contact the spouse. In *Lamont v. Furniture N., LLC*, No. 14-CV-036-LM, 2014 WL 1453750 (D.N.H. Apr. 15, 2014), Mrs. Lamont provided both her and her husband's cellphone numbers when making purchases at Bob's Discount Furniture. After Bob's allegedly placed a number of autodialed calls to both numbers, plaintiffs sued under the TCPA. The court dismissed plaintiffs' claims as to Mrs. Lamont, finding that, by providing Bob's with her phone number, she expressly consented to receive the challenged calls. *Id.* at *3. But the court refused to dismiss Mr. Lamont's TCPA claims, holding that it lacked adequate information to determine whether he expressly consented. *Id.* at *4. The court's holding suggests that marriage alone will not establish the ability to provide consent to call a spouse's cell phone number.

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As Long as I Can Send Informational Texts

The FCC recently lowered the bar to express consent under certain circumstances, creating an exemption for informational text messages sent without charge to the user. On March 27, the FCC granted CAA's petition to exempt free calls and texts about package deliveries from the TCPA's list of prohibited communications made without express consent. In response to GroupMe's application, the FCC also specified that social networks can send free administrative texts even if an intermediary reports consent. These decisions offer clarification for these specific situations, although a number of other petitions regarding TCPA issues remain pending.

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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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