FINANCIAL SERVICES REPORT

Quarterly News, Spring 2017

Award Winning Newsletter

IN THIS ISSUE

MOFO METRICS

1.5	Average yearly rainfall in driest city in California, in inches
71	Average yearly rainfall in wettest city in California, in inches
18	Rainfall in Los Angeles since October 2016, in inches
7	Average yearly rainfall in Los Angeles from 2011-2016, in inches
519	Snowfall at Mammoth Mountain, California since October 2016, in inches
271	Average yearly snowfall at Mammoth Mountain, California from 2012-2016, in inches

MORRISON FOERSTER

EDITOR'S NOTE

In like a lion, out like a lamb—it works for weather; does it work for new administrations? We'll have to wait and see. We'll have to wait and see about the length of CFPB Director Richard Cordray's tenure and the fate of Dodd-Frank, as it appears the Trump administration is focusing on other priorities. So the focus shifts to the D.C. Circuit, which agreed to reconsider the ruling by the federal trial court that the CFPB's structure is unconstitutional. Or not, since the circuit court specifically asked the parties to brief whether it can avoid the constitutional question altogether.

In the meantime, CFPB enforcement is at an all-time high—a five-fold increase in cases from January 1, 2017, as compared to the same period last year. Coincidence? You make the call.

You also can make the call on arbitration, privacy, TCPA, what the other federal agencies have been up to over the past few months, and the rest of the financial services news.

Until next time, enjoy the wind, snow, sleet, or sunshine!

BELTWAY

High Court Sets a Low Bar

In *Shaw v. United States*, 137 S. Ct. 462 (2016), the Supreme Court held that the Bank Fraud Act applies to acts intended to defraud a depositor and not the bank itself. The Court reasoned that because the bank had property rights in the deposits—when a customer deposits funds, the bank becomes the owner of the funds and has the rights to use such funds as the source of loans and earn profits—a defendant need not target a bank to be convicted under the Bank Fraud Act. Rather, a scheme to fraudulently obtain funds from a depositor's account is also "normally" a scheme to defraud to obtain property from a financial institution. The Court also held that the Bank Fraud Act does not require a showing that the bank suffered financial loss or that the defendant caused such loss.

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

Community Banks Call Reports, Streamlined Version

Keeping with its initiative announced in August 2016, the federal banking agencies finalized reporting requirements for new streamlined call reports from small financial institutions. The agencies received comments from over 1,000 entities. The streamlined call reports would apply to financial institutions with domestic offices that have less than $1 billion in total assets. The new streamlined call reports are designed to reduce costs for and burdens on community banks. The effective date for the new call reports is March 31, 2017, but must be approved by the OMB before they can be implemented.

For more information, contact Crystal Kaldjob at ckaldjob@mofo.com.

The Company You Keep Can Lead to $586 Million Forfeiture

The DOJ, the FTC, and several state regulators announced settlements with a money transfer business related to alleged AML violations. The FTC alleged, among other things, that the company failed to adequately and effectively detect and prevent consumer fraud, or implement a comprehensive and effective antifraud program. Under the terms of the settlement, the company will forfeit $586 million that the DOJ deemed traceable to schemes to defraud, and pay a $184 million civil money penalty assessed by FinCEN for alleged willful violations of the Bank Secrecy Act.

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

Fed Penalizes Bank for Violating Securities Revenue Limits

The Federal Reserve fined a foreign bank and its U.S. subsidiary $27 million for violating securities and underwriting revenue limits. Section 4 of the Bank Holding Company Act prohibits banks supervised by the Fed from engaging in certain securities underwriting and dealing activities, unless exempted by the Fed. In 1998, the Fed granted the bank the authority to underwrite and deal in classes of securities through its U.S. subsidiary. The bank was required to limit the revenues earned on underwriting and dealing in securities to 25% of gross revenues over any two-year period. In taking the enforcement action, the Fed alleged that the bank and its U.S. subsidiary significantly understated the amount of securities underwritten over several two-year rolling periods. The Fed also claimed that the bank did not have adequate management oversight, corporate governance, risk management, or internal controls.

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

Spotlight on Governance of Sales Practices

The OCC released its Semiannual Risk Perspective for fall 2016, highlighting the risks facing the federal banking systems and the OCC's priorities with respect to supervised entities. In its report, the OCC noted that strategic risks and operational risks remain key risks, largely because of financial innovation and because banks are adapting business models and transforming technologies to maintain competitive. The OCC highlighted governance of sales practices as a key risk.

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

OFAC Compliance Services Guidance

In response to a series of inquiries, Treasury's Office of Foreign Assets Control (ODAC) issued guidance on whether certain U.S. persons, such as attorneys and compliance personnel, may provide certain services related to sanctions laws to "covered persons"—those persons whose property is blocked, such as those on the OFAC Specially Designated Nationals and Blocked Persons lists. The guidance provides that U.S. persons may provide information and guidance regarding U.S. sanctions laws and opine on the legality of specific transactions under U.S. sanctions laws, including soliciting information from covered persons and conducting research. The guidance, however, reiterates that U.S. persons may not approve, finance, facilitate, or guarantee any transaction by a foreign person, or provide any other services where such

services would be prohibited by applicable OFAC sanctions.

For more information, contact Aki Bayz at abayz@mofo.com.

BUREAU

Overdraft U Loses CFPB Accreditation

Raise your hand if you got your first credit card because a credit card company was giving away free t-shirts on campus for completing the application. Anybody? <crickets> Anyway, the CFPB's annual Student Banking Report, issued in late 2016, expressed concern that college co-branded banking products (primarily deposit and prepaid accounts) fail to limit what it referred to as "costly fees" like overdraft and out-of-network ATM fees, and that banks and colleges profit from accounts that are not in students' best financial interests. The report reconfirms that the CFPB views college students as vulnerable consumers.

For more information, contact Jessica Kaufman at jkaufman@mofo.com.

Student Loan Servicer Suit

The CFPB, along with two states, sued the nation's largest student loan servicer in January for alleged systematic failures in processing loan payments and failing to enroll borrowers in less expensive repayment plans. The CFPB alleged that the servicer enrolled borrowers in multiple, consecutive forbearance plans instead of in cheaper, alternative repayment plans, adding $4 billion in interest charges to the borrowers' principal balances. The suit came on the eve of President Trump's inauguration—timing that the defendant claims was no accident. In a press release, the servicer stated that it had rejected an "ultimatum" to settle or be sued days before the filing and that the suit was politically motivated.

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

Back to the Well against Military Credit Services

The CFPB acted against consumer credit company Military Credit Services for a second time in December 2016, alleging MCS failed to properly disclose the terms of preauthorized transfers and interest rates on the loans it offered. In 2014, the Bureau entered into a consent order with MCS along with Freedom Stores and affiliated companies in connection with their debt collection practices. This time, the Bureau imposed a $200,000 penalty and has required MCS to hire an independent consultant with specialized experience in consumer-finance compliance to conduct an independent review of the company's issuance and servicing of credit.

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

A Very Expensive Typo

The CFPB blamed an allegedly "weak" compliance management system for deceptive advertising and collection practices that led to enforcement against a payday lender, according to the parties' December 2016 consent order. The Bureau found that the lender had deceived consumers about the price of check-cashing services, falsely threatened to repossess vehicles in connection with loans that were not secured by vehicles, and withdrew funds from consumers' accounts without written authorization. The claims were based, in part, on an ad campaign that offered to cash consumers' tax refund checks for "1.99"—the fee for the service was 1.99 percent of the amount of the check cashed, rather than $1.99. The Bureau cited "multiple supervisory examinations" that identified weaknesses in compliance management that allegedly went uncorrected, leading to the findings. The defendant was ordered to pay $255,000 in consumer redress, and a civil monetary penalty of $250,000.

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

CFPB Imposes Negative Opinion of Negative Option Billing, Again

Two credit reporting agencies were ordered to pay $17.6 million in restitution to consumers, as well as civil monetary penalties totaling $5.5 million, in connection with the marketing and sale of their credit score and credit reporting offerings to consumers. The Bureau claimed that the agencies misrepresented that the credit scores they marketed and provided to consumers were the same scores lenders typically use to make credit decisions, when in fact, according to the Bureau, lenders use different scores and scoring models. In addition, the agencies advertised certain products as costing "$1," even though ultimately the consumer would be enrolled, through negative option billing, in products with monthly fees of around $16 or more per month.

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

Bureau Opts to Sue Over Overdraft Opt-In

The CFPB filed a complaint against TCF National Bank in January claiming that TCF's marketing of overdraft services for one-time debit and ATM transactions was deceptive under the Consumer Financial Protection Act. The complaint focuses on the net impression created by

TCF's overdraft marketing, alleging, among other things, that TCF structured its new account agreements and disclosures to place the opt-in Regulation E requires for one-time debit and ATM overdraft services near disclosures for mandatory items; did not orally disclose to customers that overdraft services were optional and could result in fees; and failed to monitor production incentives for enrollment in overdraft services. TCF has moved to dismiss the complaint, arguing principally that the CFPB seeks to impose requirements for oral disclosures and sequencing that go beyond what Regulation E requires.

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

CashCall "True Lender" Ruling Proceeds to Appeal

Over the CFPB's objection, a federal district court judge certified the appeal of summary judgment rulings in the CFPB's suit against online lender CashCall. The suit has been going on since 2013, when the Bureau alleged that CashCall violated the Consumer Financial Protection Act by seeking to collect on loans that were void in whole or in part because they violated either state usury caps or licensing requirements. At summary judgment, the judge ruled—based on CashCall's arrangement with the tribe-affiliated company—that CashCall rather than the tribal entity was the "true lender" of the loans at issue. As a result, the usury caps of the states in which the loans were made applied, rather than the tribal caps. The case is stayed while the decision is appealed.

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

Tribes Must Comply with CFPB CIDs

In another tribal sovereignty development in the Ninth Circuit, in January the court compelled three tribal lenders to comply with CFPB civil investigative demands concerning small-dollar lending products. The court held that because Congress did not expressly exclude tribes from the Bureau's enforcement authority, the entities fell within the agency's jurisdiction.

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

Just So You Know, No Attorney Has Read This

The CFPB alleged that two debt collection law firms had violated the FDCPA and the FCRA when attorneys electronically signed debt collection letters—some of which threatened collection actions—without having reviewed the consumer's file, among other things. The law firms agreed in January to provide refunds to consumers who made payments in response to the letters. The firms also agreed to stop sending collection letters from individual attorneys or with the phrase "Attorney at Law," and to clearly and prominently disclose in letters and calls to consumers that no attorney has reviewed the consumer's account where no attorney has done so.

For more information, contact Jessica Kaufman at jkaufman@mofo.com.

Tribes Part Three

In a decade-old case against the Miami Tribe of Oklahoma and the Santee Sioux Nation of Nebraska, the California Department of Business Oversight alleged that tribe-affiliated payday lenders were not licensed, were charging fees in excess of 800 percent of APR and were making loans in excess of the $300 cap set by California law. The California Supreme Court issued an opinion in December holding the lending entities were not entitled to sovereign immunity because they were not "arms of the tribe." Although the lending entities and the tribes had a "nominally close" relationship, there was "scant evidence that either tribe actually controls, oversees, or significantly benefits from the underlying business operations of the online lenders."

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

Compliance Bulletin on Production Incentives

Previously, the CFPB has focused enforcement efforts on "production incentives," like payments based on sales or referrals of new products to current customers ("cross-selling"), sales of products to new customers, sales at higher prices where pricing discretion exists, quotas for customer calls completed, and collections benchmarks. The CFPB has now published a compliance bulletin focusing on the risks and the importance of robust compliance management with respect to these practices.

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

Mistakes Are an Unfair Practice

During a switch in payment processors, a host of glitches allegedly resulted in denying prepaid-card customers access to funds, and delayed the processing of direct deposits. In February, the program manager and its payment processor entered into a settlement with the CFPB arising from the Bureau's allegations that they had failed to test and adequately prepare for the transition, and that these and other failures amounted to unfair practices under the CFPA. The defendants agreed to pay $10 million in restitution to "tens of thousands" of customers and a $3 million civil monetary penalty.

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

MOBILE & EMERGING PAYMENTS

DLT Is Receiving Much TLC

Distributed ledger technology (DLT) and its most common applications, Blockchain and Bitcoin, have a lot of people talking. On December 5, 2016, the Fed released a research paper exploring the potential applications of DLT in financial services. The paper identified various use cases in the payment, clearing, and settlement context (e.g., cross-border payments and post-trade clearing, and settlement of securities transactions), but acknowledged that business, technical, legal, and risk management challenges remain. Federal Reserve Board Governor Powell offered his views in a speech on DLT, including healthy skepticism on central bank issued digital currency. Meanwhile, on Capitol Hill, Representatives Jared Polis and David Schweikert launched the Blockchain Caucus on February 9, 2017. The Caucus will seek to advance sound public policy relating to blockchain and distributed ledger technology through education, public engagement, and research efforts.

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

Not So Fast, Say the States

The OCC's proposal to offer limited-purpose bank charters to FinTech companies has drawn criticism from state regulators and some consumer groups. New York Department of Financial Services Superintendent Maria Vullo is leading the opposition against the OCC's proposal. Vullo has argued that the charter solves a nonexistent problem, as state laws already regulate FinTech companies involved in financial services activities. In addition, she voiced concerns that the national charter will stifle innovation by allowing larger FinTech companies to dominate the market. The Conference of State Bank Supervisors, in its own comment letter to the OCC, backs up Vullo and also argues that the OCC would, in effect, be picking winners and losers in the marketplace in deciding who is worthy of a charter. State regulators are also getting some help from Capitol Hill, including from Senators Sherrod Brown (D-OH) and Jeff Merkley (D-OR), who have echoed the state regulators' worries and emphasized their own concerns that the charter will degrade consumer protections.

For more information, contact Sean Ruff at sruff@mofo.com.

MORTGAGE & FAIR LENDING

More on Marketing Arrangements

On January 31, 2017, the CFPB announced consent orders with a mortgage lender and its affiliates, as well as with real estate brokerage firms, based on alleged violations of Section 8(a) of RESPA stemming from a host of agreements and arrangements the mortgage lender allegedly had entered into with settlement-side parties such as real estate brokers. The orders appear to render unlawful common arrangements between mortgage lenders and real estate brokers, including marketing service agreements (MSAs), lead agreements, desk rentals, preferred lender arrangements, advertising and co-marketing agreements, and the application of seller credits. It is interesting that the orders do not address or consider the *PHH* decision by the D.C. District Court.

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

Yet Another Reminder

On January 23, 2017, the CFPB announced consent orders with mortgage servicers based on alleged failures to comply with loss mitigation requirements, to consider requests for payment deferments as requests for foreclosure relief options, to disclose the impact of deferring payment due dates, or to notify borrowers of missing documentation, and based on their demanding duplicative and unnecessary documentation to evaluate foreclosure relief options. The CFPB also alleged charging for credit insurance that should have been canceled, prematurely canceling credit insurance, and furnishing inaccurate information to credit reporting agencies, as well as failing to investigate customer disputes of information furnished to credit reporting agencies. This is the latest in a series of consent orders reflecting the CFPB's laser focus on compliance with loss mitigation procedures and requirements, as well as credit reporting issues.

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

OPERATIONS

Delay, Delay, Delay

On December 9, 2016, the FRB issued "Procedures for a Banking Entity to Request an Extended Transition Period for Illiquid Funds" (SR 16-18). SR 16-18 and the related policy statement provide guidance to banking entities on the procedures for requesting an extension of the Volcker Rule's conformance period for "illiquid funds." The FRB

generally expects to grant extensions to illiquid funds so long as the applicable criteria, set forth in SR 16-18, are met. SR 16-18 and the policy statement provide a streamlined application process for requesting an extension of the conformance period for illiquid funds. Notwithstanding the guidance in SR 16-18 and the policy statement, questions remain regarding the definition of an "illiquid fund." Requests for extensions were required to be submitted by January 20, 2017.

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

Final TLAC-AC-AC-AC Rules

In December, the FRB issued final rules regarding total loss absorbing capacity (TLAC) requirements for global systemically important banks (GSIBs) in the United States. Like the proposed rule issued by the FRB in October 2015, this Final Rule sets a minimum level of long-term debt (LTD) for domestic GSIBs and the U.S. operations of foreign GSIBs. The LTD could be used to recapitalize the critical operations of the GSIBs upon failure. The Final Rule sets a minimum level of total loss-absorbing capacity, which can be met with both regulatory capital and LTD. According to the FRB, the requirements of the Final Rule will improve the prospects for the orderly resolution of a failed GSIB and will strengthen the resiliency of all GSIBs.

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

The OCC's Progress Report

The OCC released a third-party review of its efforts to enhance the supervision of large and mid-size financial institutions. The review assessed the OCC's implementation of recommendations from a similar review in 2013. The improvements noted in the report include strengthening the role and resources of the lead experts to expand the horizontal and system-wide view of the federal banking system; enhancing staffing and human resource strategies; developing a risk appetite statement and establishing an Enterprise Risk Management function headed by a Chief Risk Officer; making improvements to the process for issuing and tracking matters requiring attention; and strengthening the enterprise-wide quality assurance program. The OCC committed to continuing to work on partially completed recommendations from the 2013 review.

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

A Tailored Fit?

On January 30, 2017, the FRB adopted a final rule that revises the capital plan rule and stress test rules under Dodd-Frank (Final CCAR Rule). The Final CCAR Rule establishes a new class of bank holding companies (BHCs)—*i.e.*, "large" and "noncomplex" firms with at least $50 billion in total consolidated assets—that are subject to less stringent requirements than other BHCs subject to the annual Comprehensive Capital Analysis and Review (CCAR). The Final CCAR Rule also tightens certain requirements for all BHCs subject to CCAR testing.

For more information, read our Client Alert or contact Jared Kaplan at jkaplan@mofo.com.

PREEMPTION

Preempt That!

A federal court in West Virginia held that state law claims challenging a national bank's method and timing of assessing late fees was preempted by the NBA and OCC regulations. *Powell v. Huntington Nat'l Bank*, No. 2:13-cv-32179, 2016 U.S. Dist. LEXIS 179202 (S.D. W.V. Dec. 28, 2016). Plaintiff alleged the national bank assessed late fees in violation of the West Virginia Consumer Credit and Protection Act. The court found that state law obligations regarding the order of posting and scheduling of payments would significantly interfere with the national bank's servicing of mortgages in violation of the NBA and OCC regulations authorizing national banks to make real estate loans without regard to state law limitations concerning terms of credit and servicing of those mortgages.

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

HOLA Preemption Wins the Day

In *Mackell v. Wells Fargo Home Mortgage*, No. 16-cv-04202-BLF, 2017 U.S. Dist. LEXIS 11842 (N.D. Cal. Jan. 26, 2017), a federal court in California considered which charter governed the preemption analysis in a case in which plaintiff asserted claims for alleged failure of an appraiser hired by the lender to disclose "red tags" which prevent any future sale or transfer of the property. The loan was originated by a federal thrift, but was owned by a national bank when the suit was filed. The court joined what it called a "growing number of courts" that have held that the charter at the time of the challenged acts governs the preemption analysis. Because the plaintiff challenged actions taken at origination, the court held that HOLA preemption applied. Under OTS regulations, plaintiff's claims were preempted as relating to terms of credit and disclosures of mortgages.

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

First in Time for FCRA Preemption

A federal court in Georgia held that state law claims based on the furnishing of allegedly inaccurate information to credit reporting agencies were preempted by FCRA. *Seckinger v. Bank of Am., N.A.*, No. CV415-306, 2017 U.S. Dist. LEXIS 9893 (S.D. Ga. Jan. 6, 2017). The court reasoned that the FCRA provision excluding from preemption claims alleging malicious or willful intent was superseded by the later, broader FCRA provision. The court therefore dismissed claims for invasion of privacy, defamation, and tortious debt collection practices.

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

PRIVACY

Evolving Standards of Security

The National Institute of Standards and Technology (NIST) recently released a draft update to its well-known cybersecurity framework to refine and clarify the framework, incorporating feedback on the original 2014 effort. Key changes include a new section on cybersecurity measurement to help companies assess risk management; expanded discussion of supply chain risk management; more clarity and detail on identity and access management; and efforts to help explain the use of the framework's "tiers" to implement the cybersecurity framework. NIST is seeking public comments and intends to publish a final updated version "around the fall of 2017."

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

New York State of Data Security

The New York Department of Financial Services (NYDFS) made a splash when it first announced proposed cybersecurity standards for covered financial institutions in fall 2016, and has now done so again by issuing standards in final form two weeks before they are set to take effect on March 1, 2017. The final rules are similar to the *second* proposed rule that NYDFS issued in December 2016—less proscriptive and narrower, but still potentially challenging. Working on a compressed timeframe (the first annual certification of compliance is due February 15, 2018, and phased compliance periods for specific requirements kick in six months from the effective date), covered entities will now have to grapple with, among other things, a number of ambiguities in the final rule, a 72-hour breach-reporting requirement, and an annual certification of compliance with the regulations.

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

Meet the New Boss

Changes in enforcement priorities and approaches may be coming at the Federal Trade Commission (FTC). Just before Donald Trump assumed the presidency, Chair Edith Ramirez announced her resignation. The former Chair made a mark on privacy and data security policy and enforcement during her tenure, including by leading the FTC's efforts to explore the implications of an array of developing areas of law and technology. New acting Chair Maureen Ohlhausen is not likely to undo these efforts, but her approach may be different. For instance, in the recent *Vizio* case, she issued a concurring statement articulating her skepticism about the FTC's recent approach to using the "unfairness" prong of Section 5 of the FTC Act and the "need for the FTC to examine more rigorously what constitutes 'substantial injury'" for purposes of bringing unfairness claims.

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

To the Mat

Although there will be new FTC commissioners, the FTC's long-running dispute with LabMD doesn't seem to be going anywhere. The case involves a clinical testing laboratory that allegedly had unreasonable security practices. The company fought the FTC's allegations, won before an administrative law judge, and then saw that ruling overturned by the FTC Commission. Now the case is on appeal in the Eleventh Circuit. The FTC, which filed its brief in mid-February, continues to argue that consumers were harmed by LabMD's allegedly inadequate data security practices when a file containing sensitive personal information was inadvertently made available on a file-sharing site, because a public disclosure is a concrete harm even absent "tangible effects or emotional injury."

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

Searching for Answers

Last year, the Second Circuit ruled that a warrant under the Stored Communications Act (SCA) could not compel production of email content stored on servers outside the United States. A magistrate judge in the Eastern District of Pennsylvania has "respectfully disagree[d]" with that ruling in a dispute involving two search warrants for foreign-stored user data under the SCA. *In re Search Warrant No. 16-960-M-01 to Google*, No. 2:16-MJ-01061-TJR, 2017 WL 471564, at *9 (E.D. Pa. Feb 3, 2017). The court reasoned that the relevant conduct was "the actual invasion of the account holders' privacy – the searches – [that] will occur in the United States." *Id.* at *11. Transferring the data to the U.S. would not constitute an illegal seizure under the Fourth Amendment, the court explained, because "there is no meaningful interference with the account holder's possessory interest in the user data." *Id.* at *9.

For more information, read our Client Alert or contact John Carlin at jcarlin@mofo.com.

Your TV Is Watching You

The FTC recently announced a settlement with a television maker alleging violations of Section 5 of the FTC Act based on: (1) its collection of detailed viewing information from consumers' televisions without their knowledge and consent; and (2) licensing of this data to third parties for, among other things, tracking responses to and delivering advertising to consumers on other devices. The settlement offers insight for all players in the Internet of Things space on the FTC's expectations for appropriate disclosures and consent relating to the collection and use of information from Internet-connected devices. The settlement requires the television maker to pay $1.5 million. The FTC did not explicitly tie this payment to consumer redress, such as refunds, suggesting the FTC is pushing the envelope of its ability to obtain monetary penalties in Section 5 cases.

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

Vendor Vigilance

The FDIC Inspector General issued a report on February 15, 2017 highlighting what it viewed as cybersecurity flaws in many financial institutions' contracts with third-party service providers. The Inspector General's objective was to assess how clearly FDIC-supervised institutions' contracts with third-party service providers address those providers' responsibilities related to business continuity planning, and responding to and reporting on cybersecurity incidents. The Inspector General reviewed 48 contracts between financial institutions and service providers associated with 19 financial institutions. According to the report, many third-party service providers are unprepared to recover from a cybersecurity-related disruption, or to contain and report a security breach.

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

ARBITRATION

Called Too Late

The Sixth Circuit held that an arbitration agreement did not apply to a phone call made to a consumer after the expiration of the consumer contract, and therefore the consumer could bring her TCPA case in federal court. *Kasie Stevens-Bratton v. TruGreen, Inc.*, No. 16-5161, 2017 U.S. App. LEXIS 632 (6th Cir. Jan. 11, 2017). The court reasoned that the contract did not specify that the arbitration clause would survive past the expiration of the contract. The court rejected the defendant's argument that the arbitration agreement should apply because the consumer had provided her telephone number and agreed that the company could contact her regarding "future services."

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

Authorized User Not Authorized for Arbitration

Is an authorized user of a credit card bound by the arbitration clause in the credit card agreement for the account? Unclear according to a San Diego federal court. The court denied a motion to compel arbitration, finding factual issues exist as to whether the authorized user was bound by the contract and the arbitration provision. *Doherty v. Barclays Bank Delaware*, No. 16-cv-01131 AJB-NLS, 2017 U.S. Dist. LEXIS 20825 (C.D. Cal. Feb. 14, 2017). These issues included whether there was mutual assent between the authorized user and the issuer, and whether the authorized user knew he was an authorized user for the account.

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

TCPA

Strictly Speaking, the TCPA's OK

On January 27, 2017, a judge in the Northern District of California rejected First Amendment challenges to the TCPA. The court found that the TCPA was content-based because of its exemptions for emergency calls and debt collection calls, and therefore applied strict scrutiny in its analysis. The court ultimately determined that the TCPA passes constitutional muster because there is a compelling governmental interest in protecting the privacy of residential telephone subscribers, and the TCPA is narrowly tailored because neither the emergency calls exemption, nor the debt collection calls exemption allows for "unlimited proliferation of any type of call" and "the TCPA does not restrict individuals from receiving any content they want to receive." *Brickman v. Facebook, Inc.*, No. 16-cv-00751-TEH, 2017 WL 386238, at * 7-8 (N.D. Cal. Jan. 27, 2017).

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

Not So Bare After All

According to the Ninth Circuit, receipt of a text message alone is sufficient to confer Article III standing to pursue a claim for violation of the TCPA. *Van Patten v. Vertical Fitness Grp.*, No. 14-55980, 2017 U.S. App. LEXIS 1591 (9th Cir. Jan. 30, 2017). The Ninth Circuit determined, based on the TCPA's legislative history, that "unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients." *Id.* at *12. Thus, under *Spokeo*, the court held that the plaintiff "need not allege any additional harm beyond the one Congress has identified" in order to plead a concrete injury-in-fact. *Id.* The court ultimately affirmed summary judgment against the plaintiff because he had given prior express consent to be contacted, and cancellation of his gym membership did not equate to revocation, which "must be clearly made and express a desire not to be called or texted." *Id.* at *23-24.

For more information, contact Tiffany Cheung at tcheung@mofo.com.

It's Just Information!

A California federal court concluded that a prerecorded call regarding health insurance renewal was purely informational and did not contain telemarketing or advertisements in violation of the TCPA. *Smith v. Blue Shield of Cal. Life & Health Ins. Co.*, No. SACV 16-00108-CJC(KESx), 2017 U.S. Dist. LEXIS 5620 (C.D. Cal. Jan. 13, 2017). The court explained that if it were to hold otherwise, "it would transform practically all communication from any entity that is financially motivated and exchanges goods or services for money into telemarketing or advertising, which would contravene the delineated definitions of telemarketing and advertising" in FCC regulations. *Id.* at *30-31. The insurance company's "single call tracking [its] mandatory communications regarding insurance enrollment and renewal [should not] expose [it] to millions of dollars of liability under the TCPA." *Id.* at *32. Accordingly, the court dismissed the plaintiff's complaint.

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

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.

The firm members who specialize in financial services are:

Los Angeles

Henry Fields	(213) 892-5275 hfields@mofo.com
Joseph Gabai	(213) 892-5284 jgabai@mofo.com
Robert Stern	(213) 892-5484 rstern@mofo.com
Nancy Thomas	(213) 892-5561 nthomas@mofo.com

New York

James Bergin	(212) 468-8033 jbergin@mofo.com
David Fioccola	(212) 336-4069 dfioccola@mofo.com
Mark Ladner	(212) 468-8035 mladner@mofo.com
Barbara Mendelson	(212) 468-8118 bmendelson@mofo.com
Michael Miller	(212) 468-8009 mbmiller@mofo.com
Joan Warrington	(212) 506-7307 jwarrington@mofo.com

San Francisco

Michael Agoglia	(415) 268-6057 magoglia@mofo.com
Roland Brandel	(415) 268-7093 rbrandel@mofo.com
Angela Kleine	(415) 268-6214 akleine@mofo.com
Adam Lewis	(415) 268-7232 alewis@mofo.com
Jim McCabe	(415) 268-7011 jmccabe@mofo.com
James McGuire	(415) 268-7013 jmcguire@mofo.com
William Stern	(415) 268-7637 wstern@mofo.com

Washington, D.C./Northern Virginia

L. Richard Fischer	(202) 887-1566 lfischer@mofo.com
Oliver Ireland	(202) 778-1614 olreland@mofo.com
Don Lampe	(202) 887-1524 dlampe@mofo.com
Obrea Poindexter	(202) 887-8741 opoindexter@mofo.com

ABOUT MORRISON & FOERSTER

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on The American Lawyer's A-List for 13 straight years and the Financial Times named the firm number six on its list of the 40 most innovative firms in the United States. Chambers USA has honored the firm with the only 2014 Corporate/M&A Client Service Award, as well as naming it both the 2013 Intellectual Property and Bankruptcy Firm of the Year. Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger.

NEWSLETTER STAFF

Editor-in-Chief: Nancy Thomas

Operations Report
Jeremy Mandell, Managing Editor

Beltway Report
Crystal Kaldjob

Bureau Report
Jessica Kaufman

Mobile & Emerging Payments Report
Obrea Poindexter and Trevor Salter

Mortgage & Fair Lending Report
Angela Kleine and Sarah Davis

Preemption Report
Nancy Thomas

Privacy Report
Nate Taylor and Adam Fleisher

Arbitration Report
Natalie Fleming-Nolen

TCPA Report
David Fioccola

Can't wait for the next issue? The Financial Services Group sends out client alerts by e-mail, reporting on developments of significance. If you would like to be added to our circulation list, contact Taylor Birnbaum at tbirnbaum@mofo.com.

If you wish to change an address, add a subscriber, or comment on this newsletter, please write to:

Taylor Birnbaum
Morrison & Forester LLP
250 West 55th St.
New York, NY 10019
tbirnbaum@mofo.com