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Financial Services Report

Editor's Note

Tis the season to be thankful, and we are. Take *Call of Duty: Black Ops*, for one. There is something deeply gratifying about reliving awkward moments of American history and getting a do-over. Nothing wreaks havoc quite like a crossbow with exploding bolts. Or the TSA, for another, which proved this quarter that no matter how good your organization's knack for drawing bad PR, the TSA's "airport scanner fiasco" marks a new reading on the depth gauge. And finally, there's November's election, which was like watching airbags inflate in slow motion. Procrastinators who delayed committing to memory the 2,319 pages of the Dodd-Frank Wall Street Reform and Consumer Protection Act can rejoice. The rest of us can look forward to figuring it out all over again, after the new Congress gets its own do-over, with exploding bolts.

Connoisseurs of transition will recognize the opportunity of that last sentence to segue into this issue's themes. The transformation of the financial industry continues, from comb-overs to makeovers, pompadours to buzz cuts. All of that gets reported in these pages, with a dash or two of sarcasm; it's on the house.

For our Dodd-Frank Act overview, various User Guides, and our shorter Client Alerts, visit our regulatory reform website at: **http://www.mofo.com/resources/regulatory-reform/**.

Until next time, watch your deficits, dog-ear your earmarks, and have a wonderful holiday and a Happy New Year.

William Stern, Editor-in-chief

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Beltway Report

Spare Change?

The Dodd-Frank Act amended the Electronic Fund Transfer Act to impose limitations on interchange fees that debit card issuers may receive or charge in connection with debit card transactions. The Federal Reserve Board is expected to issue proposed implementing regulations late December 2010 or early January 2011 establishing standards for determining whether a debit interchange fee is "reasonable and proportional." In crafting these standards, the Board must take two factors into consideration: one, the Board must distinguish between an issuer's "incremental cost" for authorizing, clearing or settling such a transaction and other costs that are not specific to the transaction; and two, the Board must consider the functional similarity between debit transactions and checking transactions within the Federal Reserve System that are required to clear at par.

On October 12, 2010, the TCF National Bank filed a lawsuit challenging the constitutionality of the interchange limitations. TCF alleges that the limitations "impose an unconstitutionally confiscatory regulatory structure on regulated banks in violation of the Due Process clause of the Fifth Amendment."

For more information, contact Oliver Ireland at oireland@mofo.com or Nathan Taylor at ndtaylor@mofo.com.

Capital Guidance from the Capitol

The Federal Reserve Board issued guidelines for evaluating proposals by large bank holding companies ("BHCs") to undertake capital actions in 2011, such as increasing dividend payments or repurchasing or redeeming stock. The criteria provide a common, conservative approach to ensure that BHCs hold adequate capital to maintain ready access to funding, continue operations, and continue to serve as credit intermediaries, even under adverse conditions, and are outlined in a revised temporary addendum to a Supervision and Regulation letter. The Board will evaluate requests for planned capital actions in the context of its broader process for assessing capital adequacy at the largest BHCs, and, as part of the regular supervisory process, the Board is requesting that large domestic BHCs submit comprehensive capital plans by early next year, regardless of whether a capital action is planned. The Board expects to respond to capital distribution requests beginning in the first quarter. The capital plan review is the latest step in the Board's efforts to enhance supervision of banking organizations. The Federal Reserve plans to undertake these capital plan reviews on a regular basis and will consult with primary federal bank regulators.

THE TCF NATIONAL BANK FILED A LAWSUIT CHALLENGING THE CONSTITUTIONALITY OF THE INTERCHANGE LIMITATIONS. TCF ALLEGES THAT THE LIMITATIONS "IMPOSE AN UNCONSTITUTIONALLY CONFISCATORY REGULATORY STRUCTURE ON REGULATED BANKS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT."

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

Great Power, Great Responsibility

On November 16, 2010, after consulting with the federal banking agencies, the Federal Reserve Board requested comment on a proposed rule to implement the Volcker Rule, which is designed to restrict banks from making certain investments and activities. The Volcker Rule generally prohibits banking entities from engaging in proprietary trading in securities, derivatives, or certain other financial instruments, and from investing in, sponsoring, or having certain relationships with a hedge fund or private equity fund. The proposed rule would allow the Board to impose conditions on any extension granted under the proposed rule if the Board determines such conditions are necessary or appropriate to protect the safety and soundness of banking entities or the financial stability of the United States, address material conflicts of interest or other unsound practices, or otherwise further the purposes of section 13 of the BHC Act and the proposed rules. The Volcker Rule also allows a banking entity to request in writing the FRB's approval for an additional extension of up to 5 years in order to permit the banking entity to meet contractual commitments in place as of May 21, 2010 to a hedge fund or private equity fund that qualifies as an "illiquid fund." The proposed rule defines certain terms, including "illiquid asset," "principally invested" in illiquid assets, "contractually committed to principally invest" in illiquid assets, and "investment strategy to principally invest" in illiquid assets.

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

Brave New World of Assessments

The Federal Deposit Insurance Corporation ("FDIC") approved two proposed rules amending the deposit insurance assessment regulations. The first would implement a provision in the Dodd-Frank Act that changes the assessment base from one based on adjusted domestic deposits (as it has been since 1935) to one based on assets, i.e., average consolidated

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total assets minus average tangible equity. Since the new base would be much larger than the current base, the FDIC is also proposing to lower assessment rates, which achieves the FDIC's goal of not significantly altering the total amount of revenue collected from the industry. The second proposal replaces a proposed rule revising the deposit insurance assessment system for large banks that was approved by the FDIC on April 13, 2010. The second proposal eliminates risk categories and debt ratings from the assessment calculation for large banks and proposes using scorecards, including financial measures predictive of long-term performance. A large financial institution would continue to be defined as an insured depository institution with at least $10 billion in assets. Both proposals will have a 45-day comment period upon publication in the Federal Register. The FDIC is proposing that both changes in the assessment system be effective as of April 1, 2011.

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

Final FDIC Guidance on Automated Overdraft Payment Programs

The FDIC issued its final guidance on the risks associated with automated overdraft payment programs. The FDIC received more than 900 written comments on the proposed guidance from financial institutions, their industry trade groups, individual consumers, consumer advocacy and public interest groups, and one member of Congress. The guidance focuses on automated overdraft programs, and encourages banks to offer less costly alternatives if, for example, a borrower overdraws his or her account on more than six occasions where a fee is charged in a rolling 12-month period. To avoid reputational and other risks, the FDIC expects institutions to establish appropriate daily limits on customer costs, and ensure that transactions are not processed in a manner designed to maximize the costs to consumers, such as by processing checks from the largest to the smallest. In order to give institutions sufficient time to review, consider, and respond to the expectations set out in the final guidance, the FDIC expects any additional efforts to mitigate risks to be in place by July 1, 2011.

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

Temporary Unlimited Deposit Insurance Coverage for Non-Interest-Bearing Transaction Accounts

The FDIC approved a final rule implementing Section 343 of the Dodd-Frank Act providing temporary unlimited deposit insurance for non-interest-bearing transaction accounts, and requiring banks to notify their customers about any changes to the insurance coverage on their accounts. The rule is effective on December 31, 2010 and expires on December 31, 2012.

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

Good Deeds Deserve Credit

The federal banking and thrift regulatory agencies announced a final Community Reinvestment Act ("CRA") rule to implement a provision of the Higher Education Opportunity Act requiring agencies to consider low-cost higher education loans to low-income borrowers as a positive factor when assessing a financial institution's record of meeting community credit needs under the CRA. The rule also incorporates a CRA statutory provision that allows the agencies to consider a financial institution's capital investment, loan participation, and other ventures with minority-owned financial institutions, women-owned institutions, and low-income credit unions as factors in assessing the institution's CRA record. This provision was published on March 11, 2010, in the *Interagency Questions and Answers Regarding Community Reinvestment*.

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

FDIC Final Rule on Safe Harbor Protection for Securitizations

The FDIC Board of Directors approved a final rule to extend through December 31, 2010, the Safe Harbor Protection for Treatment by the FDIC as Conservator or Receiver of Financial Assets Transferred by an Insured Depository Institution in Connection with a Securitization or Participation. Under this safe harbor, all securitizations or participations in process before the end of 2010 are permanently grandfathered under the existing terms of 12 C.F.R. Part 360.6. The FDIC Board had previously extended the protections twice, with the last set to expire on September 30, 2010. The final rule is substantially similar to the March 11, 2010, extension. In order to ensure that the safe harbor regulation fully conforms with the risk retention regulations required by the Dodd-Frank Act, the FDIC's new safe harbor rule provides that, upon adoption of those interagency regulations, those final regulations shall exclusively govern the risk retention requirement in the safe harbor regulation.

For more information, see our Client Alert at http://www.mofo.com/files/Uploads/Images/101005-FDIC-Issues-Final-Safe-Harbor-Rule.pdf or, for more information, contact Jerry Marlatt at jmarlatt@mofo.com, Ken Kohler at kkohler@mofo.com, or Obrea Poindexter at opoindexter@mofo.com.

FDIC's Re-Greening Plan

The FDIC adopted a revised restoration plan for the Deposit Insurance Fund ("DIF") and issued a Notice of Proposed Rulemaking ("NPR"). The purpose of the restoration plan is to ensure that the DIF minimum designated reserve ratio reaches 1.35% of estimated insured deposits by September 30, 2020, as required by the Dodd-Frank Act. The plan is effective immediately and supersedes the plan amended in September 2009. The plan provides that the FDIC will maintain the

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current schedule of assessment rates for all insured depository institutions and forego the three basis point uniform increase in initial assessment rates scheduled to be effective in January 2011 due to a lower than expected loss level estimated through 2014, and estimates that the DIF reserve ratio will reach 1.15% by the end of 2018, even without a three basis point increase. The FDIC has indicated that it will pursue further rulemaking in 2011 regarding the method used to reach the requisite 1.35% DIF minimum reserve ratio by September 2020, and how burdens on the smaller insured depository institutions will be offset. The FDIC will update loss and income projections for the DIF semiannually and will modify assessment rates as needed following notice-and-comment rulemaking. The NPR proposes amendments to the FDIC's regulations to: implement dividend provisions, set assessment rates, and set the DIF minimum designated reserve ratio at 2%. These regulations aim to reduce pro-cyclicality and achieve moderate, steady assessment rates through economic and credit cycles while maintaining a positive fund balance even during a banking crisis, by setting an appropriate target DIF size and a strategy for assessment rates and dividends.

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

Dodd-Frank SEC Confidentiality Provisions Eliminated

On October 5, 2010, President Obama signed into law Senate Bill 3717, removing the heightened confidentiality provisions added to the federal securities laws by Section 929I of the Dodd-Frank Act which had exempted the SEC from being compelled to disclose records or other information obtained from its regulated entities in response to Freedom of Information Act requests and subpoenas served on the SEC if the information was produced to the SEC in connection with the SEC's "surveillance, risk assessments, or other regulatory and oversight activities" outlined in the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and the Investment Company Act of 1940. In repealing Section 929I, the act did not restore Section 31(c) of the 1940 Act, but it did add language clarifying that FOIA Exemption 8 applies to the SEC.

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

THE DODD-FRANK ACT WHICH HAD EXEMPTED THE SEC FROM BEING COMPELLED TO DISCLOSE RECORDS OR OTHER INFORMATION OBTAINED FROM ITS REGULATED ENTITIES IN RESPONSE TO FREEDOM OF INFORMATION ACT REQUESTS AND SUBPOENAS SERVED ON THE SEC IF THE INFORMATION WAS PRODUCED TO THE SEC IN CONNECTION WITH THE SEC'S "SURVEILLANCE

Don't Skimp on ABS Due Diligence

The SEC proposed a new rule under the Securities Act of 1933 to require any issuer registering the offer and sale of an asset-backed security ("ABS") to perform a review of the assets underlying the ABS, amendments to Regulation AB that would require an ABS issuer to disclose the nature of that review and its findings and conclusions related to the review and the findings and conclusions of any third party engaged to review the assets underlying the ABS, and a new form to be filed by the issuer or underwriter of an ABS offering providing certain disclosure relating to third-party due diligence providers. These new provisions implement Section 945 and a portion of Section 932 of the Dodd-Frank Act. We issued a Client Alert on this: http://www.mofo.com//files//Uploads/Images/101015-Securitization.pdf

For more information, contact Jerry Marlatt at jmarlatt@mofo.com, Ken Kohler at kkohler@mofo.com, or Melissa Beck at mbeck@mofo.com.

Golden Guidance on Golden Parachutes

The FDIC issued Financial Institution Letter 66-2010 ("FIL-66-2010") providing guidance on regulatory expectations with respect to applications to make permissible golden parachute payments. Golden parachute payments, i.e., certain types of termination payments to an institution-affiliated party ("IAP") as defined by 12 C.F.R. Part 359 ("Part 359"), are subject to restrictions for "troubled" institutions (institutions with a composite rating of "4" or "5" or meeting other criteria) and their holding companies, even if such holding company is healthy. Part 359 provides certain exceptions to the restrictions on golden parachute payments. FIL-66-2010 clarifies the golden parachute application process for troubled institutions, specifies the type of information necessary to satisfy the certification requirements, and highlights factors considered by supervisory staff when determining whether to approve a golden parachute payment. Under the filing procedures set forth in FIL-66-2010, a troubled institution must demonstrate that: (1) the IAP has not committed any fraudulent act or omission, or breach of trust or fiduciary duty or insider abuse, that has had a material adverse effect on the institution or covered company; (2) the IAP is not "substantially responsible" for the insolvency or troubled condition of the institution or covered company; and (3) the IAP has not committed a violation of any applicable federal or state banking law that has had or is likely to have a material effect on the institution or covered company.

Operations Report

Walking the Talk

The financial crisis has caused unprecedented attention to the incentive compensation practices of financial institutions. In addition to media coverage and public scrutiny of compensation arrangements, this attention has given rise to new federal oversight of financial institutions' compensation arrangements. In fact, enforcement action may possibly be taken by a financial institution's federal supervisor if its incentive compensation arrangements are thought to have created a risk to the safety and financial soundness of the organization. In addition, the Dodd-Frank Act requires disclosures of incentive compensation arrangements that may increase a company's risk exposure.

Talking the Walk

The Basel Committee on Banking Supervision (the "Basel Committee") issued revised final Principles and Guidance (the "Guidance") concerning sound corporate governance of banks. See http://www.mofo.com/resources/regulatory-reform/#basel. The Guidance updates 2006 Basel Committee guidance on bank corporate governance and reflects modifications that the Basel Committee believes are appropriate in view of the bank and insurance company corporate governance failures that came to light during the recent financial crisis. The Basel Committee stated that the Guidance is not intended to add a new regulatory layer on top of existing national statutes, but instead is meant to assist banks in enhancing their corporate governance framework and to assist bank supervisors in assessing the quality of their corporate governance framework, should be implemented in a manner that reflects the size, complexity, structure, economic significance to, and risk profile of the bank, and applied in a manner consistent with applicable national law.

The Guidance articulates fourteen corporate governance principles, including: the Board's overall responsibility for the bank and oversight over senior management; Board members' qualifications, training, and understanding of their role in the bank's corporate governance; Board's definition of appropriate governance practices for its work; parent holding company's Board's

THE GUIDANCE UPDATES 2006 BASEL COMMITTEE GUIDANCE ON BANK CORPORATE GOVERNANCE AND REFLECTS MODIFICATIONS THAT THE BASEL COMMITTEE BELIEVES ARE APPROPRIATE IN VIEW OF THE BANK AND INSURANCE COMPANY CORPORATE GOVERNANCE FAILURES.

responsibility for ensuring there is corporate governance throughout the corporate organization; senior management ensuring that the bank operates in a manner consistent with the bank's business strategy, risk tolerance/appetite, and Board policies; effective internal controls system and risk management function (including a chief risk officer) with sufficient authority, stature, independence, resources, and access to the Board; and monitoring of risks on an ongoing firm-wide and individual entity basis, and updates thereof as a bank engages in new or expanded activities and as the external risk landscape changes.

For more information, please check our Client Alert at http://www.mofo.com/files/Uploads/Images/101025-BCBS.pdf.

Plastic (a/k/a Card Report)

Save-The-Plastic Act

The Federal Reserve Board issued a final rule implementing the ECO-Gift Card Act, which modified the effective date of certain disclosure requirements applicable to gift cards under the Credit Card Accountability Responsibility and Disclosure Act of 2009. For gift cards produced prior to April 1, 2010, the legislation and the final rule delay the August 22, 2010 effective date of these disclosures until January 31, 2011, provided that several specified conditions are met.

Reportedly, the rule will save from destruction more than 100 million plastic cards. This is a "win-win" for the environment, retailers, and the prepaid card industry.

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

Keeping Track: More Card Act "Clarifications"

On November 2, 2010, the Federal Reserve Board published a proposed rule purporting to clarify certain recent amendments to Regulation Z, particularly those implementing the Credit Card Accountability Responsibility and Disclosure Act of 2009. However, the so-called proposed clarifications could significantly impact current industry practices and, in some instances, would require issuers to again revise compliance policies and procedures, application and account-opening disclosures, and change in terms notices and other consumer communications. In particular, the proposed clarifications would reverse important protections under Regulation B to ensure that non-working women have access to credit by revising the ability to pay requirements in a way that would limit an issuer's ability to extend credit to a non-

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working spouse. The comment period closes on January 3, 2011, and final clarifications are expected in April 2011, with a mandatory compliance date in October 2011.

For more details on this, please review our Client Alert available at: http://www.mofo.com/files/Uploads/Images/101116-CARD-Act.pdf.

For more information, contact Richard Fischer at lfischer@mofo.com, Oliver Ireland at oireland@mofo.com, or Obrea Poindexter at opoindexter@mofo.com.

THE INTERIM FINAL RULE ALSO IMPLEMENTS THE PROVISIONS OF THE DODD-FRANK ACT THAT REQUIRE CREDITORS AND THEIR AGENTS TO PAY CUSTOMARY AND REASONABLE FEES TO FEE APPRAISERS. AMONG OTHER THINGS, THE RULE PROHIBITS COERCION AND OTHER SIMILAR ACTIONS DESIGNED TO CAUSE APPRAISERS TO BASE THE APPRAISED VALUE OF PROPERTIES ON FACTORS OTHER THAN THEIR INDEPENDENT JUDGMENT.

Mortgage Report

This is our quarterly update. For a more comprehensive report on the implications of the Dodd-Frank Act on the mortgage industry, see our 100-page User Guide on how Dodd-Frank affects "Residential Mortgages." See http://www.mofo.com/files/Uploads/Images/ResidentialMortgage.pdf and our 32-page Mortgage Servicing User Guide. See http://www.mofo.com/files/Uploads/Images/100830User_Guide_Mortgage_Servicing.pdf or contact Joseph Gabai at jgabai@mofo.com.

Board Rules on Residential Mortgage Loans

On August 16, 2010, the Federal Reserve Board issued two proposed rules and three final rules governing federal Truth-in-Lending Act ("TILA") requirements for residential mortgage loans. For additional details on the proposed rule to enhance protections and disclosures for home mortgage transactions and the final rule governing loan originator compensation practices, please review our Client Alerts available at: http://www.mofo.com/files/Uploads/Images/100917-Home-Mortgage.pdf and http://www.mofo.com//files//Uploads/Images/100831FinalRule.pdf.

For more information, contact Joseph Gabai at jgabai@mofo.com or Andrew M. Smith at andrewsmith@mofo.com.

I'm OK, You're OK

On October 18, 2010, the Federal Reserve Board ("Board") issued an interim final rule to implement the appraisal independence provisions of the Dodd-Frank Act. The interim final rule also implements the provisions of the Dodd-Frank Act that require creditors and their agents to pay customary and reasonable fees to fee appraisers. Among other things, the rule prohibits coercion and other similar actions designed to cause appraisers to base the appraised value of properties on factors other than their independent judgment; prohibits appraisers and appraisal management companies hired by lenders from having financial or other interests in the properties or the credit transactions; and prohibits creditors from extending credit based on appraisals if they know beforehand of violations involving appraiser coercion or conflicts of interest, unless the creditors determine that the values of the properties are not materially misstated. For additional details, please review our Client Alert available at: http://www.mofo.com/files/Uploads/Images/101101-Interim-Final-Rule-on-Real-Estate-Appraisals.pdf.

For more information, contact Joseph Gabai at jgabai@mofo.com.

Another Offspring of Dodd-Frank

The Board proposed a rule to revise the escrow account requirements for higher-priced, first-lien "jumbo" mortgage loans which implements a provision of the Dodd-Frank Act that would increase the annual percentage rate (APR) threshold used to determine whether a mortgage lender is required to establish an escrow account for property taxes and insurance for first-lien jumbo mortgage loans. Jumbo loans are loans exceeding the conforming loan-size limit for purchase by Freddie Mac, as specified by the legislation. In July 2008, the Board issued final rules requiring creditors to establish escrow accounts for first-lien loans if a loan's APR is 1.5 percentage points or more above the applicable prime offer rate. Under the Dodd-Frank Act, which amended the Truth in Lending Act ("TILA"), the escrow requirement will apply to jumbo loans only if the loan's APR is 2.5 percentage points or more above the applicable prime offer rate. The APR threshold for non-jumbo loans remains unchanged.

The Dodd-Frank Act incorporates into TILA the Board's regulatory requirement for escrow accounts and revises the APR threshold, but the act also includes other provisions, including new disclosure

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requirements. The Board's rule only implements the act's change to the APR threshold, while other provisions of the act concerning escrow accounts will be implemented in a separate rulemaking. The proposed change would not affect the APR threshold used to determine whether a jumbo loan is subject to the other consumer protections that the Board adopted for higher-priced loans in 2008.

For more information, contact Joseph Gabai at jgabai@mofo.com.

Who's Got My Mortgage?

The Board issued final rules to implement a statutory amendment to TILA requiring that consumers receive notice when their mortgage loan has been sold or transferred. The disclosure requirement became effective in May 2009 upon enactment of the Helping Families Save Their Homes Act, which requires the purchaser or assignee that acquires a mortgage loan to provide the required disclosures in writing within 30 days. To provide compliance guidance and greater certainty on the new requirements, the Board published interim rules in November 2009 that were effective immediately, and to allow time to make any necessary operational changes, covered parties are permitted to continue to follow the November 2009 interim rules until the mandatory compliance date for the final rules, which is January 1, 2011.

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

2009 HMDA Data Available

The Federal Financial Institutions Examination Council ("FFIEC") announced the availability of data on mortgage lending transactions at 8,124 U.S. financial institutions covered by the Home Mortgage Disclosure Act ("HMDA"). The data include nearly 15 million applications (of which nearly 9 million resulted in loan originations), and 4.3 million loan purchases, for a total of 19.3 million actions, and information on 210,000 requests for preapprovals that did not result in a loan. The HMDA data reflect a growing reliance on loans backed by FHA insurance during the recent mortgage market difficulties. For home purchase lending, the FHA's share of first-lien loans increased from 7 percent in 2007 to 26 percent in 2008 and to 37 percent in 2009. First-lien lending for home purchases backed by Veterans Administration (VA) guarantees also increased markedly, although VA-backed lending is much smaller in scope than FHA-backed lending. The VA market share of first-lien home purchase loans increased from 2.7 percent in 2007 to 4.9 percent in 2008 and to 6.7 percent in 2009. The overall incidence of higher-priced lending reported in the 2009 HMDA data for all racial and ethnic groups was lower than reported in 2008.

For more information, contact Joseph Gabai at jgabai@mofo.com.

THE BOARD ISSUED FINAL RULES TO IMPLEMENT A STATUTORY AMENDMENT TO TILA REQUIRING THAT CONSUMERS RECEIVE NOTICE WHEN THEIR MORTGAGE LOAN HAS BEEN SOLD OR TRANSFERRED. THE DISCLOSURE REQUIREMENT BECAME EFFECTIVE IN MAY 2009 UPON ENACTMENT OF THE HELPING FAMILIES SAVE THEIR HOMES ACT.

Privacy Report

Dodd-Frank Customer Access Provision

Among the many powers the Dodd-Frank Act confers on the new Consumer Financial Protection Bureau ("CFPB") is oversight over privacy. One important privacy provision, however, has been lost in the shuffle. Specifically, the Act directs the CFPB to prescribe rules that require a "covered person" to make available to a consumer, upon request, information in the person's control or possession concerning the consumer financial product or service that the consumer obtained from such covered person. This would include information relating to transactions and the account, including costs, charges, and usage data. Moreover, the disclosure would have to be provided in an electronic form usable by consumers. The Act does include some relevant exceptions to this "access" requirement, including any information collected by the covered person for the purpose of preventing fraud or money laundering and any information that the covered person cannot retrieve in the ordinary course of its business with respect to that information. Nonetheless, this "access" provision represents a significant departure from the historical U.S. approach to privacy for financial institutions.

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

GLBA Sample Clause Safe Harbor to End Soon

At the end of 2009, the federal banking agencies and the Commodity Futures Trading Commission, Federal Trade Commission, National Credit Union Administration, and Securities and Exchange Commission (collectively, the "Agencies") published a final rule amending their privacy rules under Title V of the

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Gramm-Leach-Bliley Act (“GLBA”). In doing so, the Agencies issued a model privacy form that financial institutions may use to describe their privacy policies and to provide consumers with the opportunity to opt out of the sharing of information with nonaffiliated third parties, as required by the GLBA. The final rule provides that use of the model privacy form (consistent with the detailed instructions included with the form) constitutes compliance with the notice content requirements of the privacy rule for privacy policies and opt-out notices. The Agencies clarified, however, that “[w]hile the model form provides a legal safe harbor, institutions may continue to use other types of notices that vary from the model form so long as these notices comply with the privacy rule.” In addition, agency staff has encouraged financial institutions to use the model form and have advised that examiners will be looking for use of the form in examinations beginning in 2011. Although the existing privacy rules of the Agencies provide sample clauses that financial institutions may use to comply with the notice content requirements of the rules, the safe harbor for these sample clauses is eliminated effective January 1, 2011. The Agencies explained that, after December 31, 2010, “institutions may continue to use notices containing these clauses, so long as these notices comply with the privacy rule,” but there will be no safe harbor for using the sample clauses after that date.

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

FTC Releases Draft Privacy Report Outlining Best Practices, Possible New Requirements Under Section 5 of the FTC Act

On December 1, the Federal Trade Commission, by a vote of 5-0, released its long-awaited staff report on privacy, Protecting Consumer Privacy in an Era of Rapid Change. Based largely on themes and concepts developed through a series of privacy roundtables held by the Commission over the past year, the report sets out an expansive proposed framework for how companies should protect consumers’ privacy. Although the Commission set out to develop a framework for applying its existing authority under Section 5 of the FTC Act to modern privacy practices, the report falls far short of that ambition. Rather, while breathtaking in its scope and detail, it leaves more questions than answers. Most importantly, the Commission’s report is long on recommendations but short on which of those recommendations amount to requirements under Section 5. Comments are due by January 31, 2011, and the Commission expects to release a final report, which may be more concrete, later in 2011. For our detailed Client Alert, see http://www.MoFo.com/files/Uploads/Images/101203-Do-not-track-list.pdf.

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

The White House Creates Internet Privacy Committee

On October 24, 2010, as part of the Obama Administration’s commitment to promoting use of the Internet while protecting individual privacy, the White House’s National Science and Technology Council announced the launching of a new Subcommittee on Privacy and Internet Policy. The Subcommittee will develop principles and strategic directions with the goal of fostering consensus in legislative, regulatory, and international Internet policy realms. The Subcommittee will focus on core principles including facilitating transparency, promoting cooperation, empowering individuals to make informed and intelligent choices, strengthening multi-stakeholder governance models, and building trust in online environments.

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

FDIC Issued Data Security Guidance on Copiers and Other Devices

On September 15, 2010, the Federal Deposit Insurance Corporation (“FDIC”) issued a Financial Institution Letter (FIL-56-2010) providing guidance regarding how financial institutions should mitigate the risks associated with the storage of sensitive information on photocopiers, fax machines and printers (“FDIC Guidance”). The FDIC Guidance explains that copy and fax machines, and printers frequently contain either hard drives or flash memory that stores digital images of the documents that the machines handle and that financial institutions use these devices regularly for loan and other business documents that contain sensitive customer information. In this regard, the FDIC Guidance indicates that financial institutions should establish written policies and procedures to identify devices that store digital images of business documents and ensure their hard drives and flash memories are erased, encrypted, or destroyed prior to being returned to a leasing company, sold to a third party, or otherwise disposed of.

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

Heartland Litigation Appears to (Finally) End

A September 21, 2010 ruling of the Maine Supreme Judicial Court appears to have ended the class action litigation involving the Maine-based supermarket chain Hannaford Bros. Co. Hannaford experienced a breach involving information regarding a reported 4.2 million credit and debit card accounts that had been intercepted while the information was being transmitted to the company’s central computer systems, resulting in more than 20 class actions that were consolidated and transferred to a district court in Maine. In 2009, the district court dismissed most of the class action claims based on a variety of theories, including that there was no breach of implied warranty, no breach of

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a confidential relationship, or no failure to advise customers of a data breach. Significantly, the court said that, in order to withstand a motion to dismiss, plaintiffs must demonstrate that they faced actual damages. But, the district court stayed its dismissal order in order to ask the Maine Supreme Judicial Court to address whether, under Maine law, "time and effort spent mitigating or averting harm… is alone sufficient to recover damages." The Maine court concluded that, under Maine law, negligence claims do not provide a basis to "compensate individuals for the typical annoyances or inconveniences that are part of everyday life," such as expending time and effort to mitigate against risks related to the Hannaford breach.

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Feds Stalled on Data Security Legislation

Congress continues to be stalled in its attempts to pass broad-based data security legislation. Although other issues, such as financial reform, have dominated the news, a number of lawmakers expressed hope that Congress would pass a broad-based data security bill this year. For example, in December 2009, the House approved a data security bill (H.R. 2221), and various Senate committees are currently considering various data security bills, including, for example, S. 1490 and S. 3579. These bills would require that the FTC adopt rules requiring that businesses that handle personal information relating to consumers implement risk-based information security programs to protect such information. Moreover, the bills frequently include a nationwide standard for security breach notification, possibly preempting the various state laws. While there has been broad support in Congress for enacting data security legislation, jurisdictional issues and competing bills continue to complicate efforts toward final passage.

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California Governor Vetoes Breach Amendment (Again!)

On September 29, 2010, California Governor Schwarzenegger once again vetoed a bill that would have amended the state's security breach notification law (S.B. 1166). S.B. 1166 would have, among other things, provided requirements for the content of notices that businesses must send to consumers when there is a security breach. Moreover, the amendment would have required that businesses notify the California Attorney General of breaches involving more than 500 state residents. S.B. 1166 was substantially similar to two previous bills that have been approved by the California legislature and then ultimately vetoed by the Governor.

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Arbitration Report

Supreme Court Poised to Decide Future of Class Action Waivers

The U.S. Supreme Court heard oral argument on November 9 in *AT&T Mobility LLC v. Concepcion*, U.S. No. 09-893. The Court will decide whether the Federal Arbitration Act preempts states from conditioning the enforcement of an arbitration agreement on the availability of certain procedures, such as the availability of class arbitration. Many states have held that class action waivers are unenforceable, so the Court's decision could have a significant impact on the future of those waivers. Stay tuned.

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Preemption Report

Keeping the Riff Raff Out

Two federal courts rejected attempts to remove cases to federal court based on the complete preemption doctrine. In *Joseph v. Commerce Bank N.A.*, 2010 U.S. District LEXIS 97664 (W.D. Mo. Sept. 17, 2010), the court held state-law claims challenging a national bank's payment posting practices were not completed preempted by the National Bank Act and did not implicate federal issues such that the court had subject matter jurisdiction over a case alleging only state law claims. In *Garduno v. National Bank of Arizona*, 2010 U.S. Dist. LEXIS 100188 (D. Ariz. Sept. 7. 2010), the court rejected the bank's contention that TILA and RESPA completely preempted plaintiff's claims, explaining nothing in those statutes indicated that Congress intended these statutes to supplant state law claims.

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Repo Requirements Rejected

Two more federal courts held disclosure prerequisites to auto repossession mandated by state law are preempted by the National Bank Act and OCC regulations. *Epps v. JPMorgan Chase Bank, N.A.*, 2010 U.S. Dist. LEXIS 122782 (D. Md. Nov. 19, 2010); *Perez v. Midland Funding, LLC*, 2010 U.S. Dist. LEXIS 111212 (N.D. Cal. Oct. 19, 2010). Relying heavily on *Aguayo v. U.S. Bank*, 658 F. Supp. 2d 1226 (S.D. Cal. 2009) [discussed in our Winter 2009 Report], these courts found that these state laws directly regulate national banks' lending activities and are expressly preempted by OCC regulations. They explained that post-repossession notices are credit-related documents and that the savings clause in the OCC regulations excluding debt collection rights does not apply because these laws more

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than incidentally affect defendants' lending practices.

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No End Run Around FCRA

The Fourth Circuit held Plaintiff's state debt collection statute and UDAP claims were preempted by FCRA to the extent that they were based on a furnisher's reporting of inaccurate information to credit reporting agencies. *Ross v. FDIC*, 2010 WL 4261819 (4th Cir. Oct. 29, 2010). Plaintiff pled the defendant furnisher acted with malice, potentially bringing the claims within the preemption exemption in 15 U.S.C. § 1681h(e). The court declined to decide whether the federal or state law definition of malice applied, but found that under either standard, supplying information the furnisher knows is false satisfies the malice requirement. Absent proof of knowledge by the furnisher Washington Mutual, the court affirmed judgment in favor of the FDIC as Receiver.

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