FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Spring 2015

IN THIS ISSUE

MOFO METRICS

44: Percentage of adults who don't practice the religion in which they were raised

20: Percentage of U.S. electricity produced by nuclear power

70: Tons of spent nuclear material, in thousands

3: Average daily smartphone usage, in hours

450: Downloads in one week of Meghan Trainor's YouTube video "All About that bass," in millions

15: Attendees at San Francisco zombie costume-wearing convention, in thousands

88: Weekly wage of ISIS mercenary, in dollars

Attorney Advertising

MORRISON FOERSTER

Editor's Note

Building on its remarkable box office success, we are glad to bring you . . . Fifty Shades of Financial Services, Spring 2015 edition. Lots of drama — DOJ is ramping up its FIRREA machine targeting subprime auto lending, the CFPB is teaming up with the Department of Defense on military lending, the Supreme Court ruling on TILA rescission made things clear as mud, and fellow CFPB watchers are eagerly awaiting the publication of the CFPB's report on arbitration. President Obama's also getting into the act, announcing new cybersecurity initiatives.

And have we identified some naughtiness? The CFPB filed actions against student debt relief services companies, a retailer catering to servicemembers, and reverse mortgage originators.

We know, cue the heavy breathing. We've also got more on Beltway, Bureau, Mortgage, and Privacy happenings, plus updates on recent preemption, arbitration, and TCPA cases.

Okay, maybe you don't have to cover this Report with the electronic equivalent of a brown-paper wrapper. But read on for reports that are as sexy as Financial Services gets!

BELTWAY REPORT

Ain't No Party Like a FIRREA Party

Recent SEC filings from a number of financial institutions indicate DOJ is looking to apply FIRREA to the world of automobile lending. According to these recent filings, DOJ is interested in subprime auto lending origination and securitization (sounds eerily familiar to anyone involved in the recent mortgage matters). FIRREA is the current statute of choice for DOJ because it provides for a less stringent burden of proof than traditional fraud and the imposition of significant civil money penalties. It remains to be seen how these investigations will play out and how broadly the DOJ will cast its net.

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

Not So Fast, Says Elizabeth Warren

Regulatory relief for banks, particularly community banks, has been a hot topic on Capitol Hill so far this year. On February 10, 2015, the Senate Banking Committee held a hearing in which senators from both parties expressed a desire to help relieve some of the post–financial crisis regulatory pressure on community banks. Senator Elizabeth Warren made it clear that she opposes any regulatory roll-back to assist community banks if it would benefit the larger financial institutions as well. Senator Warren also indicated during the hearing that raising the CFPB's supervision threshold was a nonstarter for her.

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

Fast as Fast Can Be, You'll Never Catch . . . the Fed?

The Federal Reserve recently released a paper outlining its thinking regarding next steps in developing an infrastructure to speed up electronic payments and settlements. The Fed plans to launch task forces on faster payments and payment security, which will provide a more formal way to share commentary. Starting this year and continuing into 2016, the faster-payments task force will lay out a policy framework for the new system and identify practical approaches for implementing it. Additionally, the payments-security task force will develop draft security standards and further explore the Fed's antifraud and payments risk management offerings. The Fed indicated that its longer-term goal regarding availability of the National Settlement Service is weekend or 24-hour service, adding that it would promote greater use of same-day ACH and expand its international payment services.

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

BUREAU REPORT

Cramming in UDAAP Actions

The CFPB filed a lawsuit against a telecommunications carrier in December, citing the practice of allowing third-party merchants to place unauthorized charges on consumer phone bills. More importantly, this cramming allegation included UDAAP charges, as the CFPB alleged that automatic enrollment, working with certain third-party merchants, and failing to track complaints or catch erroneous charges constituted unfair practices. The Bureau seemed especially interested in the outsourcing of payment processing to billing aggregators. This lawsuit represents the first time the Bureau has asserted its UDAAP authority to pursue an entity for this alleged conduct.

For more information, contact Obrea Poindexter at opoindexter@mofo.com. You can also read our client alert.

No Relief for Debt Relief

The Bureau's focus on debt relief has continued, with two new enforcement actions against student debt relief services companies and their owners in December 2014, asking a federal court to enter a proposed consent order that would ban one company and associated individuals from offering debt relief services, and litigating against the other. In the former action, the Bureau alleged the defendants engaged in deceptive and abusive acts or practices and violated the Telemarketing Sales Rule (TSR), including by improperly charging upfront fees, charging customers who could not qualify for many relief options, and misrepresenting that debt consolidation would result in lower payments or quick relief. In the second action, the Bureau alleged a debt relief firm and its owner engaged in deceptive acts or practices and violations of the TSR, including by charging upfront fees, misrepresenting an affiliation with the Department of Education through the use of an official-looking logo, and misrepresenting the fees charged for services.

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

Enforcement Targets Retailer Catering to Servicemembers

It's not just student borrowers who are on the Bureau's radar—servicemembers are continuing to get their share of attention, too. In December, the Bureau and state attorneys general sought entry of a consent order of claims against Freedom Stores, Inc., a furniture and electronics retailer that caters to U.S. military members with stores located near military bases nationwide, its affiliated financing entity, and its owners. The Bureau alleged the defendants engaged in illegal

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debt collection practices against servicemembers, including filing illegal lawsuits, debiting consumers' accounts without authorization, and contacting servicemembers' commanding officers. The proposed consent order would require the defendants and their owners to pay $2.5 million in consumer redress and impose a $100,000 civil monetary penalty.

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

CFPB Joins the Army (in Calling for More Limits on Military Lending)

The Bureau released a report and a comment letter in December highlighting its view that the scope of the Department of Defense rules implementing the Military Lending Act (MLA) should be expanded. The MLA establishes protections, including maximum "military" APR on "consumer credit" transactions, to ensure that covered borrowers are not subjected to "predatory" lending practices. The report, the CFPB said in a press release, identified "gaps" in the MLA that "have allowed companies to offer high-cost loans to military families." The report, however, is based largely on anecdotal evidence from servicemembers rather than statistical analysis. It provides examples of MLA circumvention based on lenders modifying loan amounts and duration, but doesn't offer support for the proposition that credit card products are being used to circumvent the MLA's limitations. Nonetheless, in its comment letter, the Bureau expressed support for the Department of Defense's recent proposal to expand the MLA by applying it to new types of creditors and credit products, including open-end credit, with special rules for credit cards.

For further information, contact Leonard Chanin at lchanin@mofo.com. You can also read our client alert.

Keep the "Confidential" in "Confidential Supervisory Information"

In January, the CFPB issued a Compliance Bulletin reminding supervised financial institutions of the regulatory requirement to keep Confidential Supervisory Information (CSI) confidential. In the Bulletin, the CFPB offers examples of what constitutes CSI, including: (1) CFPB examination reports and supervisory letters; (2) information related to an institution's supervisory rating, information, and communications; (3) communications between the supervised institution and the CFPB related to the CFPB's supervisory activities; and (4) information created by the CFPB in the exercise of its supervisory authority.

For more information, contact Don Lampe at dlampe@mofo.com. You can also read our client alert.

CFPB to Study How to Promote Savings; Needs Better Names for Special Projects

The CFPB views consumer financial empowerment as part of its Dodd-Frank mandate, and in December, the Bureau launched a research initiative called Project Catalyst to analyze the effectiveness of practices designed to promote saving habits, particularly among low- and moderate-income prepaid card users. As part of Project Catalyst, American Express has agreed to share insights from its own efforts to evaluate the effectiveness of a product feature that allows prepaid card users to set money aside in a savings "wallet" that is separate from funds used for regular transactions. Project Catalyst joins the CFPB's more jazzily named consumer initiatives, Ready? Set. Save! and Your Money, Your Goals.

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

Rx for Medical Debt

Forty-three million Americans have overdue medical debt on their credit reports, and 52 percent of all debt on credit reports is from medical expenses, according to a CFPB report issued in December. The report and an accompanying consumer advisory took these and other findings to suggest that the medical debt system is "not working for consumers," and focused on unique aspects of medical debt that may, in the Bureau's view, be part of the problem. Among the particular complexities surrounding medical debt noted in the report are the complex billing system for medical expenses, inconsistent collection and credit reporting practices, and the frequent "parking" of medical debts on credit reports as a collection strategy. Medical debt was also a key topic at the Bureau's Winter 2015 Consumer Advisory Board Meeting.

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

MOBILE & EMERGING PAYMENTS REPORT

Virtual Currency Regulated, Bit by Bit

After releasing a proposal to regulate virtual currencies via a "BitLicense" regulatory regime in 2014, the New York DFS issued a revised proposed rule that narrows the scope of the proposed regime. New York–chartered financial institutions, gift card and loyalty rewards programs, certain software developers and merchants, and personal investors in virtual currencies would largely fall outside the revised proposal. The revised proposal would permit the grant of a "conditional license" to an entity

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that does not satisfy all licensing requirements, such as a startup or small business, allowing the entity to engage in virtual currency activity for a period of two years, unless the superintendent removes the licensee's conditional status or renews the conditional license. Comments are due to the NYDFS by March 27, 2015.

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

Same Bit Time, Different Bit Channel

In December, the Conference of State Bank Supervisors issued a Policy Statement on State Virtual Currency Regulation and a Draft Model Regulatory Framework and request for public comment. Due to concerns in the areas of consumer protection, marketplace stability, and law enforcement, the CSBS recommends that activities involving third-party control of virtual currency be subject to state licensure and supervision. Third-party control of virtual currency includes transmitting, exchanging, holding, or otherwise controlling virtual currency. The model framework outlines only the broad components of an activities-based model licensing regime. Under either a virtual currency license or existing state banking and money transmission laws, a state regime based on the model would regulate companies that transfer, manage, and hold virtual currencies on behalf of consumers, but would not require state-level suspicious activity reporting.

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

Vet Your Apps Redux

The National Institute of Standards and Technology published guidance on mobile app security. The guidance aims to assist organizations in understanding the process for vetting the security of apps and planning for implementation of an app vetting process. The NIST guidance also addresses developing app security requirements, understanding the types of app vulnerabilities and the testing methods used to detect them, and determining whether an app is acceptable for deployment on the organization's mobile devices.

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

MORTGAGE & FAIR LENDING REPORT

Hammer Time

On February 10, 2015, the CFPB added another company to its litany of alleged RESPA Section 8 offenders. In its Consent Order against NewDay Financial, LLC, the Bureau claimed that the company violated Section 8's prohibition against kickbacks by paying "licensing fees" and "lead generating fees" in exchange for referrals from a nonprofit organization that serves veterans. It ordered NewDay to pay a $2 million civil money penalty and to submit a compliance plan, and will be increasing its oversight of NewDay's marketing relationships. Reading between the lines, the Bureau has made one point crystal clear—Section 8 is essentially a strict liability statute. As reflected in our previous client alerts (RESPA Respite Is Over, CFPB as HUD, No RESPA Respite Cont'd), Section 8 continues to be one of the CFPB's hot-button issues.

For more information, contact Joe Rodriguez at, JRodriguez@mofo.com. You can also read our most recent client alert.

If at First You Don't Succeed . . .

Finally! In January, the Supreme Court heard oral argument in the landmark fair lending case *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* As we reported in our Winter Report, the Court is poised to decide whether disparate impact claims are cognizable under the Fair Housing Act, after parties in two earlier appeals that posed the same question dismissed their actions under questionable circumstances. It is always hard to read the tea leaves in oral argument, but court watchers in attendance reported that the questioning was brisk, with the traditionally more liberal justices asking questions suggesting possible support for the disparate impact theory, and Justice Scalia asking pointed questions of both sides.

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

High Court Resolves TILA Circuit Split

The Supreme Court resolved a thorny TILA question on January 13, 2015. In *Jesinoski v. Countrywide Home Loans, Inc., et al.*, 135 S. Ct. 790 (2015), the Court ruled that borrowers need only *notify* their lender in writing of their intention to rescind their mortgages within TILA's three-year statutory rescission period, and not actually *bring suit* to rescind. In a unanimous opinion authored by Justice Scalia, the Court overturned a September 2013 Eighth Circuit ruling that TILA required the petitioners to sue for rescission, and rejected similar holdings by the First, Sixth, Ninth, and Tenth Circuits. The end result is uniformly relaxed procedural requirements for borrowers to exercise their right to rescind, potentially making it easier to abandon properties that are underwater or otherwise no longer advantageous to borrowers.

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

Reverse Report

On February 9, the CFPB released a report highlighting consumer

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complaints regarding reverse mortgages. The report covers 1,200 reverse mortgage complaints received between December 1, 2011, and December 31, 2014, or about 1 percent of all mortgage complaints received. According to the Bureau, many complaints show a mismatch between consumer expectations and the way the product functions. In response to the report, the Bureau also issued a consumer advisory for consumers who currently have a reverse mortgage that highlights ways to protect surviving heirs from potential financial hardship.

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

More Mortgage (Rules)

The CFPB continued to "tweak" mortgage rules in 2015. In February 2015, it published its final TILA/RESPA integrated disclosure mortgage rules (the "know before you owe" rules), modifying them to make minor changes about rate locks and construction loan disclosures. First, creditors will now be required to provide a revised Loan Estimate within three business days after a consumer locks in a floating interest rate (as opposed to the date the rate was locked as required by the original rule). The Bureau said it made the change in response to stakeholder feedback that the original proposed rule would have resulted in creditors no longer being able, as a practical matter, to lock rates later in the day or after business hours. Second, the Bureau is requiring a minor addition to the Loan Estimate form for new home construction, which reflects the fact that construction loans often take longer to settle than other loans. The final mortgage disclosure rule goes into effect August 1, 2015.

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

Not Reversing Course

In February, the CFPB took action against three companies for alleged false and deceptive advertising of reverse mortgages. All three defendants are accused of sending deceptive marketing materials that falsely implied affiliations with a government entity and/or governmental approval of the loan product in violation of the 2011 Mortgage Acts and Practices Advertising Rule. The Bureau settled with two of the three companies, including civil monetary penalties of $225,000 and $85,000.

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

OPERATIONS REPORT

Extension of Volcker Rule Conformance Period for Legacy Funds

In December, the Federal Reserve Board issued an order extending the Volcker Rule conformance period until July 21, 2016, for banking entities to conform their investment in and relationships with covered funds and with foreign funds that may be subject to the Volcker Rule and that were in place prior to December 31, 2013 ("legacy funds"). The order also announces the Federal Reserve Board's intention to grant the final one-year extension of the conformance period for legacy funds until July 21, 2017. No extension was granted for the conformance period for proprietary trading, which will end on July 21, 2015. The Board's rationale for the extension for legacy funds was, in part, that the extensions allow for the divestiture of fund investments in an orderly manner consistent with protecting the safety and soundness of banking entities, reduce potential disruptive effects that significant divestitures of covered funds could have on markets, and allow banking entities additional time to conform their relationships with covered funds.

For more information, contact Julian Hammar at jhammar@mofo.com . You can also read our client alert.

Agencies Propose Clarifications for Advanced Approaches Banking Organizations

In December 2014, the OCC, Federal Reserve Board, and FDIC proposed revisions to clarify, correct, and update certain provisions of the regulatory capital rules applicable to banking organizations subject to the agencies' advanced approaches risk-based capital framework. The proposed revisions are intended to clarify certain qualification criteria and calculation requirements for risk-weighted assets and that all advanced approaches banking organizations are subject to the supplementary leverage ratio and the disclosure requirements for that ratio.

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

Capital Surcharge Proposal

On December 9, 2014, the Federal Reserve Board proposed a rule to strengthen the capital positions of the largest, most systemically important U.S. bank holding companies (each a global systemically important banking organization, or GSIB). Currently, eight U.S. firms would be identified as GSIBs under the proposal. GSIBs would be subject to a risk-based capital surcharge, based on their systemic risk profile. The proposal builds on the Basel Committee framework for GSIB capital surcharges and identifies two methods for calculating capital surcharges. GSIBs would calculate capital surcharges under the two methods and use the higher of the two. Based on initial estimations, GSIB capital surcharges would

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range from 1.0 to 4.5 percent of the GSIB's total risk-weighted assets. The capital surcharge proposal would be phased in beginning on January 1, 2016, becoming fully effective on January 1, 2019.

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

More on Capital and Liquidity Coverage Ratios

On December 16, 2014, the OCC and the Federal Reserve Board issued an interim final rule (IFR) amending the definition of "qualifying master netting agreement" under the agencies' regulatory capital and liquidity coverage ratio rules, as well as under the OCC's lending limits rule applicable to national banks and federal savings associations (IFR). The IFR also makes conforming amendments to key definitions under the capital rules of "collateral agreement," "eligible margin loan," and "repo-style transaction." The amendments are designed to ensure that the U.S. regulatory treatment of certain financial contracts will not be affected by implementation of special resolutions regimes in foreign jurisdictions or by the International Swaps and Derivatives Association's Resolution Stay Protocol, which was published in November 2014. The IFR took effect as of January 1, 2015.

For more information, contact Julian Hammar at jhammar@mofo.com. You can also read our client alert.

Basel Seeks to Address Credit Rating Gap

On December 22, 2014, the Basel Committee issued two consultative papers designed to raise the minimum capital level for all banks to maintain and to strengthen the manner in which capital levels are measured, in part by removing references to credit ratings and limiting national authorities' ability to interpret the rules. The Basel Committee proposal regarding the "capital floor" is intended to ensure that banks that rely on internal models for determining capital levels are protected against mistakes in their internal capital calculations. The Basel Committee proposals also address a bank's reliance on outside credit ratings in determining how much capital is required to be held against certain bank assets. Comments on the proposals are due to the Basel Committee by March 27, 2015.

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

New Law Limits Dodd-Frank's Swaps Pushout Rule

On December 16, 2014, President Obama limited the scope of swaps and security-based swaps subject to Dodd-Frank's pushout requirement for insured depository institutions and uninsured branches and agencies of foreign banks that are swap dealers and security-based swap dealers ("covered depository institutions") when he signed into law the Consolidated and Further Continuing Appropriations Act 2015. This Act amends Section 716 of the Dodd-Frank Act, commonly known as the Lincoln Amendment or the Swaps Pushout Rule. The Swaps Pushout Rule effectively requires covered depository institutions to push out certain swaps activities to a separately capitalized affiliate or cease the activities altogether, unless an exemption applies. Under the December 2014 amendment, covered depository institutions will only be required to push out certain swaps based on an asset-backed security or a group or index primarily comprised of asset-backed securities.

For more information, contact Julian Hammar at jhammar@mofo.com. You can also read our client alert.

PREEMPTION REPORT

HBOR and HOLA Don't Mix

Federal courts in California continue to find claims brought under the California Homeowner's Bill of Rights (HBOR), as well as related common law and UDAP claims preempted by HOLA and OTS regulations. *Stewart v. Wells Fargo Bank, N.A.*, No. CV 14-02180, 2014 U.S. Dist. LEXIS 166692 (C.D. Cal. Dec. 1, 2014); *Aldana v. Bank of America, N.A.*, No. CV 14-7489, 2014 U.S. Dist. LEXIS 166460 (C.D. Cal. Nov. 26, 2014). The courts found the charter at the time of origination governed the preemption analysis. They held allegations of violations of the HBOR, including dual tracking, failure to appoint a single point of contact, and failure to contact the borrower prior to initiating foreclosure, were preempted under OTS regulations as state-law challenges to mortgage servicing practices. They dismissed common law and UDAP claims based on the same allegations as preempted as well.

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

HOLA Sinks Elder Abuse Claims as Well

A federal court in California dismissed state law claims alleging a "retired elderly woman" was duped into refinancing her mortgage loan by a federal thrift. *Stiles v. Wells Fargo Bank*, No. C-14-04169, 2014 U.S. Dist. LEXIS 173096 (N.D. Cal. Dec. 15, 2014). Plaintiff's negligence, fraud, and elder law claims were based on alleged failure to disclose various loan terms and lax underwriting standards, which caused her to enter into a mortgage loan she could not afford. The court found these claims were preempted because they were based on alleged

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faulty disclosures and origination practices, two areas specified in the OTS preemption regulations.

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

Absolute Discretion Isn't as Broad as It Sounds

Two employment-related preemption cases to report on this quarter. In the first one, the national bank defendant argued the NBA provision giving national banks "near-absolute discretion" in "management of the employment relationship" preempted state claims alleging improper reporting of the former employee's termination, unlawful discrimination, and failure to pay wages. *Aghmane v. Bank of America, N.A.*, No. C-13-03698, 2014 U.S. Dist. LEXIS 168934, at *27-28 (N.D. Cal. Dec. 5, 2014). The court dismissed the claims in part, finding the discrimination claims fell within the scope of employment management, but post-termination reporting and alleged failure to pay wages did not.

In the second case, the national bank pointed to OCC regulations allowing national banks to adopt compensation plans, in arguing for dismissal of state claims based on alleged failure to pay overtime. *Federman v. Bank of America, N.A.*, No. 14-0441, 2014 U.S. Dist. LEXIS 175565 (D.N.J. Dec. 16, 2014). The court denied the national bank's motion, finding state labor laws are laws of general applicability that are not preempted because they do not target banks or the business of banking.

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

Door Slammed Shut

When is a mortgage originator like the Fuller Brush man? When plaintiff alleges the originator is subject to the Pennsylvania Door-to-Door Sales Law and therefore must provide written and oral notice of the right to cancel under the Law. A federal court shot down this claim, finding TILA preempts the Law. *In re Deitch*, 522 B.R. 99 (Bankr. E.D. Penn. 2014). The court explained that the timing of return of funds after rescission under the Pennsylvania law was different than the timing required by Regulation Z. Based on this conflict, the court held the law preempted because it "expressly mandates a disclosure and/or action which clearly contradicts the same disclosure and/or action required by federal law." *Id.* at 111.

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

PRIVACY REPORT

White House Hosts Cybersecurity Summit

On February 13, 2015, the White House hosted a Summit on Cybersecurity and Consumer Protection. The Summit brought together federal government officials, CEOs from a wide range of industries, computer security experts, law enforcement officials, and consumer advocates. Topics included strengthening public-private partnerships and cybersecurity information sharing, improving cybersecurity practices and technologies, and enhancing the security of payment technologies. At the Summit, President Obama identified four basic principles for combating cyberthreats, including public/private cooperation, the need for innovation to meet increasingly sophisticated threats, and protection of personal information in the sharing of cyberthreat information.

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

Information-Sharing Executive Order Issued

On the same day as the Summit, President Obama issued an Executive Order to promote cyberthreat information sharing, both within the private sector and between government and the private sector. The Executive Order encourages more companies and industries to establish Information Sharing and Analysis Organizations (ISAOs) to share information with each other. Some industries have already set up such information exchanges (e.g., the Financial Services—Information Sharing and Analysis Center), but the ISAOs would encourage broader sharing across a region or in response to a specific threat. The Executive Order also calls for a common set of voluntary standards to address, among other things, contractual agreements, business processes, operating procedures, and privacy protections, such as data minimization.

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

Another Cyber Group Sets Up Shop

On February 10, 2015, the White House announced a new organizational effort to provide cybersecurity analysis and facilitate information sharing on cybersecurity threats. The new Cyber Threat Intelligence Integration Center (CTIIC) will operate under the Office of the Director of National Intelligence (DNI). The president issued a presidential memorandum calling on the DNI to establish the CTIIC by the end of fiscal year 2016. It remains to be seen how the purpose of the new Center will differ from that of the existing National Cybersecurity and Communications Integration Center, which operates within DHS.

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

State Regulator Joins the Party

In December 2014, the Superintendent of Financial Services at the New York State

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Department of Financial Services (NYDFS) issued an industry guidance letter to all NYDFS-regulated banks outlining new targeted cybersecurity preparedness assessments. The assessments will be incorporated into all examinations going forward as part of pre-examination First Day Letters. These Letters will include various topics, including cybersecurity corporate governance, protections against intrusions, management of third-party service providers, and resources devoted to information security and overall risk management. The NYDFS also will schedule IT/cybersecurity examinations following the comprehensive risk assessment of each institution.

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

The Ten-Year Privacy Forecast: Cloudy

In December 2014, the Pew Research Center released a lengthy report on the future of privacy. The report includes the responses of hundreds of experts and Internet builders to questions about the future of privacy in the coming decade. More than 2,500 respondents answered the question: Will policy makers and technology innovators create a secure, popularly accepted, and trusted privacy-rights infrastructure by 2025 that allows for business innovation and monetization while also offering individuals choices for protecting their personal information in easy-to-use formats? Not surprisingly, the responses were divided. Fifty-five percent of respondents expressed their belief that an accepted privacy-rights regime and infrastructure would not be created in the coming decade, and 45 percent indicated that such an infrastructure would be created.

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

Progress on Big Data Recommendations?

On February 5, 2015, the White House released an interim report on the progress made on the six recommendations from the Big Data report it issued last year. The White House identified the following developments: (1) plans to release draft legislation on a Consumer Privacy Bill of Rights; (2) proposed data breach notification legislation; (3) an interagency process led by the Office of Management and Budget to apply the Privacy Act of 1974 to non-U.S. persons where practicable; (4) plans to issue a report exploring the implications of Big Data for discrimination and civil rights; (5) proposed student privacy legislation; and (6) efforts to update the Electronic Communications Privacy Act.

For more information, contact Chris Lyon at clyon@mofo.com.

Report on Big Data and Differential Pricing

On the same day as it issued Administration's interim report, the White House Council of Economic Advisers (CEA) issued a report entitled "Big Data and Differential Pricing." The CEA noted that while many companies use Big Data for targeted marketing, "examples of personalized pricing remain fairly limited." The CEA also found that many substantive concerns "can be addressed by enforcing existing antidiscrimination, privacy, and consumer protection laws." The CEA added that "providing consumers with increased transparency into how companies use and trade their data would promote more competition and better informed consumer choice."

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

Jumping the Gun

The Eleventh Circuit affirmed a lower court's dismissal of an action brought by LabMD alleging that the FTC did not have the authority to charge the company with violating the FTC Act by failing to prevent unauthorized access to patient information. *LabMD Inc. v F.T.C.*, No. 14-12144, 2015 WL 233072 (11th Cir. Jan. 20, 2015). LabMD asserted that the issues in the FTC's administrative complaint against the company are governed by the Health Insurance Portability and Accountability Act (HIPAA) and that the FTC should be coordinating with the Health and Human Services Department in HIPAA cases. The Eleventh Circuit held that because the administrative action is still pending (and not a final agency action), the court does not have authority to review the matter.

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

ARBITRATION REPORT

We Can Hardly Wait

In February 2015, the CFPB announced that it will hold a field hearing in Newark, New Jersey, on March 10, 2015, to discuss the topic of arbitration. The Dodd-Frank Act requires the CFPB to conduct a study on arbitration agreements and provide a report of its findings to Congress. It is widely anticipated that the CFPB will use the field hearing to announce the release of its report to Congress. After releasing the report, the CFPB may fashion rules related to arbitration, which must be "consistent" with the study findings.

For more information, contact James McGuire at jmcguire@mofo.com. You can also see our client alert.

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More in the Overdraft Litigation Arbitration Saga

The Eleventh Circuit held in February that neither the bank defendant nor the named class plaintiffs had standing to litigate the issue of whether the defendant had waived its arbitration rights until after the class is certified. *In re Checking Account Overdraft Litig.*, No. 13-12082, 2015 U.S. App. LEXIS 2075 (11th Cir. Feb. 20, 2015). In the MDL of cases challenging overdraft practices, defendant Wells Fargo opposed class certification, in part, on grounds that plaintiff could not prove numerosity because of arbitration clauses in absent class members' agreements. Wells Fargo simultaneously filed a motion to compel arbitration of absent class members' claims. The district court denied that motion, and Wells Fargo appealed. The Eleventh Circuit held that, prior to a certification decision, the district court lacked jurisdiction to decide the issue of arbitration against absent class members.

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

They Can't Try Try Again

The Ninth Circuit denied a motion for rehearing *en banc* to reconsider a decision reversing a district court order compelling arbitration on grounds that there was insufficient evidence that a consumer had agreed to an arbitration provision. *Knutson v. Sirius XM Radio, Inc.*, 771 F.3d 559 (9th Cir. 2014). Thus, the holding that a customer was not on notice that he had entered into an arbitration agreement included in a "Welcome Package" sent more than a month after the purchase of a vehicle will stand.

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

Ask and You May Receive a Waiver of Arbitration Rights

A California court refused to compel arbitration, finding the company waived its right to arbitration after it served discovery requests seeking information regarding the putative class in an employment class action. *Bower v. Inter-Con Sec. Servs., Inc.*, 232 Cal. App. 4th 1035 (2014). The court acknowledged that the law favors arbitration and that waiver of arbitration rights will not be inferred lightly. However, the court held that the defendant waived its rights because service of broad discovery requests was inconsistent with its right to arbitrate, and the costs incurred to respond to those requests prejudiced the plaintiff, who opposed arbitration and who would not have incurred those costs in an individual arbitration.

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TCPA REPORT

You Win Some, You Lose Some

Two different rulings on motions to strike class claims in TCPA class actions on grounds that the complaint impermissibly alleged a "fail-safe" class definition. In one case, the defendant alleged a proposed class definition of all persons who received a non-emergency call to their cell phones from a third-party telemarketer acting on the defendant's behalf was improper because the definition required proof that the third-party was acting on the defendant's behalf for each class member's claim. The court rejected the argument as premature, finding plaintiff could pursue discovery on the relationship between the third-party and defendant and refine the class definition accordingly. *Smith v. State Farm Mutual Automobile Insurance Company, et al.*, No. 13-cv-2018 (N.D. Ill. Jan. 13, 2015) (Dkt. No. 190).

In contrast, a Pennsylvania district court recently agreed with defendants that proposed FDCPA and TCPA class definitions were "fail-safe" and thus should be stricken. *Zarichny v. Complete Payment Recovery Servs., Inc.*, No. CIV.A. 14-3197, 2015 WL 249853 (E.D. Pa. Jan. 21, 2015). The court found classes defined as consumers who received telephone calls from defendants without written notice as required by the FDCPA and consumers who received calls from defendants using an automatic dialer without members' prior express consent were improper as class membership depended on proof of defendants' ultimate liability. The court rejected plaintiff's argument that additional discovery could cure this defect, finding proof of liability required a fact-intensive, individualized inquiry that rendered the class unascertainable.

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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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