FINANCIAL SERVICES REPORT

Quarterly News Winter 2015

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MOFO METRICS

5,100: Number of cases, Abraham Lincoln's 25-year legal career

38: Percentage of North Koreans who are in the military, the reserves, or a paramilitary

4.25: Average salary, MLB baseball player, in millions of dollars

70: Percentage of marijuana consumed in U.S. that is grown in California

42: Hours each year the average U.S. commuter gets stuck in traffic

46: Percentage of restaurant workers who have been sexually harassed

33: Percentage of all Americans who didn't see a dentist last year

46: Percentage of divorced adults who didn't see a dentist last year

Editor's Note

We are a full service newsletter, so we offer these can't-miss Christmas gift ideas for the hard-to-please. Hoverboards are the "It" gift this season, but what about all the poor souls who *don't* own one? We've devised a remote that lets you seize control from a distance and slam the thing in reverse, toggle forward, reverse, forward again. Think, conga dancing on wheels. Nice, huh?

How about a gorilla selfie? Ours are signed by the artist.

Tired of those same old matching silk pajamas? Très démodée. We've got coordinating PJs—for owner and pet. Not just dogs and cats either. We've got gerbil (cute!), gecko, parrot, mongoose, tarantula, and python (great selfies!).

Need a gift for the brother-in-law who makes his own craft beer and waxes rhapsodically about the sparge process like he's reciting a Shakespeare sonnet? We can help you work his wort. For him, we've got gelatin capsules you drop into his mash that are guaranteed to make everything come out tasting like a deodorant puck.

Check out our entire gift catalog. You're welcome.

Speaking of gifts, consider our artisanal Newsletter as a stocking stuffer. We demand that items be identified by author, so you don't have to worry about provenance. From our farm to your table, the Winter 2015 edition has everything from Beltway to Bureau, Privacy to Preemption, Mobiles to Mortgages, plus entire sections that don't even alliterate. And it's 100% hand-crafted and gluten-free.

Until next time, on Dasher, Dancer, Prancer, Vixen, Comet, Cupid, Donner, and Blitzen. Have a wonderful holiday and a Happy New Year, from all of us to all of you.

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Finally Faster than Amazon Prime

The Federal Reserve Board recently announced that banks and other financial institutions that use its payments system will have to be able to process same-day transactions beginning next year. The move comes despite some opposition from credit unions that this requirement would impose an undue cost given the relatively small number of payment requests they process each day. Despite this opposition, the same-day payments processing requirement will go into effect on Sept. 23, 2016.

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

Who Needs Capital Reserve?

The Federal Reserve Board announced that it is delaying until 2017 changes in the way it calculates the amount of capital the nation's largest banks are required to have on hand in order to weather economic difficulties, as part of federally mandated stress tests under the Dodd-Frank Act. Banks with more than $50 billion in consolidated assets won't have to calculate a supplementary leverage ratio, which is the ratio of a bank's core costs to its total leverage exposure, for another year. Large state member banks can also wait until 2017 to implement the ratio. The Board also loosened stress test requirements for smaller banks with assets between $10 billion and $50 billion and savings and loan holding companies with more than $10 billion in assets.

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

Bigger Gets Better

The Federal Reserve Board announced it is creating a formal process through which employees can flag any potential problems relating to the agency's oversight of large financial institutions. The Board is hopeful that this process will make it easier to respond to internal concerns over its regulatory authority. The Board also will be standardizing the way Reserve branches across the nation file supervisory documents after inconsistencies among branches were discovered in a recently conducted review of the Large Institution Supervision Coordinating Committee (LISCC). The LISCC will oversee these new documentation standards and develop new training materials for the teams responsible for overseeing the nation's biggest banks.

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

So Much for That Level Playing Field

The Federal Reserve Board's lead governor for financial regulations, Daniel K. Tarullo, recently downplayed the immediate need to rein in the shadow banking sector, saying knee-jerk rules for nonbank lenders and borrowers would hamper an important source of credit. Noting that nonbank lenders can provide much-needed credit to "underserved" borrowers as well as diverse financial instruments for American households, Governor Tarullo said the threat that shadow banking poses to financial stability now is significantly less than before the 2008 economic crash. He further advised policymakers to look at the specific activity in question and balance "socially beneficial credit, capital or savings options against any associated increase in risks to the safety and stability of the financial system as a whole" in evaluating new regulations for nonbank intermediaries or lenders.

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

Choking out Chokepoint

The FDIC recently reassured banks that they can provide accounts and other services to payday lenders as it continues to face criticism and litigation for its perceived role in a federal crackdown on payday loans known as Operation Chokepoint. The FDIC reissued a financial

institution letter that it first released in 2005 that laid out the risks of banks offering their own small-dollar, high-cost loans to customers with short-term cash flow problems. The FDIC noted that its prior guidance, which highlighted the problems with such loans, does not apply to the provision of services like deposit accounts and extensions of credit to clients that offer such services.

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

BUREAU

CashCall Update: Go West, Young Bureau

In September, the CFPB's action against online lender CashCall, Inc. and related companies was moved from federal court in Massachusetts to California. *CFPB v. CashCall, Inc.*, No. 13-13167-GAO, 2015 U.S. Dist. LEXIS 131856 (D. Mass. Sept. 23, 2015). CashCall and other defendants funded, purchased, serviced and collected online payday loans made by a tribal-affiliated lender that is not named in the lawsuit. The CFPB alleges UDAAP violations based on the defendants' efforts to collect loans that were purportedly void under state law because the lender charged excessive interest and/or failed to obtain a required license. The Complaint identified sixteen states—including Massachusetts, but not California—with laws related to the defendants' alleged conduct. The federal judge in Massachusetts transferred the case to California, where the defendants perform most of their business and where their owner, who is also named in the suit, resides. The transfer mooted a personal jurisdiction defense raised by the owner.

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

Spotlight on Student Loan Servicing

The CFPB, the U.S. Department of Education (DOE), and the Treasury released a Joint Statement of Principles on Student Loan Servicing, which is accompanied by a CFPB report. In the CFPB's press release, the CFPB expressed "concern" about what it calls "widespread servicing failures reported by both federal and private student loan borrowers." It vowed to "stamp[] out illegal actions" and "clean up" the $1.2 trillion student-loan servicing market. In the documents, these agencies create an interagency framework for future student loan servicing regulation. The recommendations include creating consistent, industry-wide standards for the entire market; holding servicers "accountable" through coordination among federal and state agencies regarding enforcement of consumer financial laws, higher education laws and regulations, as well as DOE federal servicing contracts; providing borrowers "access to clear, timely information" about repayment options and alternative payment plans; and improving publicly available data about the performance of student loans, the utilization of specific repayment options and the outcomes of borrowers enrolled in those plans by, among other things, publicizing servicer-level data on loan performance.

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

Servicemember Settlement

The CFPB sued Security National Automotive Acceptance Company, an Ohio-based auto finance company that specializes in lending to active-duty and former military members to buy used motor vehicles. It claimed that the finance company leveraged servicemember military status in collecting debts, allegedly exaggerating the potential that servicemembers could face adverse career consequences or actions under the Uniform Code of Military Justice for nonpayment. The case settled in October, with the finance company ordered to pay $2.28 million in consumer redress and a $1 million penalty.

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

A Rose by Any Other Middle Name Is Probably the Wrong Person

The CFPB settled claims against two of the country's largest employment background screening report providers for failing to take steps to ensure that they did not send inaccurate criminal record information or non-reportable information about job applicants to prospective employers. The consent order focuses on the providers' allegedly inadequate policies and procedures for ensuring maximum possible accuracy of reports and excluding non-reportable information, and provides for $10.5 million in monetary relief to consumers, a $2.5 million civil penalty and various compliance requirements. The providers are consumer reporting agencies that annually generate and sell more than 10 million consumer reports about job applicants to potential employers.

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

Bureau Sues Alleged Student Loan Scammer

In October, the Bureau sued Global Financial Support, Inc., along with its owner. The Complaint alleged a deceptive scheme in which the company sent letters to students and their families claiming to match them with targeted financial aid assistance programs for a fee of $58 to $79. The company allegedly promised it would conduct extensive searches to target or match consumers with individualized financial aid opportunities. Consumers allegedly received either nothing at all, or a generic booklet that provided no individualized advice. The company also allegedly falsely represented an affiliation with the government by using official-seeming logos and seals, as well as with academic institutions by using the student's university name.

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

U-Debt

On September 30, 2015, the CFPB ordered an indirect auto lending company and its auto lending subsidiary to pay $48.3 million in fines for alleged FDCPA, TILA, and UDAAP violations. The CFPB alleged that the companies manipulated borrowers by using phony caller ID information and lying about imminent repossession or criminal charges in order to induce loan payments. The CFPB also alleged that the companies contacted third parties associated with the borrowers and made similar misrepresentations about the borrower's account. In its press release announcing the action, Director Cordray vowed to "continue to clean up the debt-collection market."

For more information, read our blog post or contact Ashley Hutto-Schultz at ahuttoschultz@mofo.com.

New Process Confirms Enforcement Decisions Not Appealable

Three years after publishing its supervisory matters appeals process in CFPB Bulletin 2012-07, the CFPB has issued a revised process. Many of the changes are ministerial, such as permitting an odd number of appeal committee members and extending the time to issue a written decision on appeals from 45 to 60 days. A more substantive change, however, is that the revised appeals process does not permit a supervised entity to appeal "adverse [supervisory] findings . . . related to a recommended or pending investigation or public enforcement action until the investigation or enforcement action has been resolved." The prior appeal process stated only that the supervisory appeal process could not be used to appeal "enforcement actions" generally. The revised appeals process also clarifies that the standard used on appeal is "consistency with the policies, practices, and mission of the CFPB and the overall reasonableness of the examiners' determinations, and support offered for, the supervisory findings."

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

MOBILE & EMERGING PAYMENTS

EMV Deadline Has Come and Gone…And Now State AGs Want More

On October 1, 2015, the EMV deadline hit, but don't expect your card-swiping days to be over. Although a majority of credit cards now include chips, many merchants, especially small merchants, have not upgraded to EMV-compatible payment terminals. Under the Visa and MasterCard Rules, if a party to a transaction does not support EMV, that party will be liable for the cost of any fraud. This could prove costly for non-compliant merchants.

The EMV deadline marks a milestone in the slow migration in the United States to this more secure card technology. But mere days after the EMV deadline hit, state Attorneys General began pressing card networks and card issuers to do more. Most of the new EMV cards issued by banks are chip-and-signature cards rather than the more secure chip-and-PIN cards. Attorneys General in eight states and the District of Columbia are now pushing credit card issuers and processors to go further in card security by requiring cardholders to enter a PIN at the point-of-sale as secondary verification.

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

Model Virtual Currency Framework

The Conference of State Bank Supervisors (CSBS) released its Model Regulatory Framework for State Regulation of Certain Virtual Currency Activities. The model framework, which is meant to be a guide to state regulators, applies to activities involving the third-party control of virtual currency, including control for the purposes of transmitting, exchanging, holding, or otherwise controlling virtual currency. For digital currency firms, the model framework is a step towards greater regulatory obligations, as well as more regulatory certainty and legitimacy. Critics complain that the definitions of virtual currency and covered actions are too vague and that the framework goes too far in treating digital currencies the same as fiat currencies.

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

Marketplace Lenders Prepare for Crowdfunding and Crowding

The SEC released its final rulemaking to implement the crowdfunding exemption created by the JOBS Act. These rules will allow ordinary people to invest in small companies subject to certain investment limits, which may open another avenue for certain marketplace lenders that have struggled to work around costly securities registration requirements. New entrants that are small enough to meet the investment limits will now be able to compete with the (relatively) more established marketplace lenders that have been going through the process of registering notes with the SEC.

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

Cross-Device Data Collectors Beware

Consider yourself warned. At a workshop held to discuss cross-device tracking, the Federal Trade Commission's (FTC) Chairwoman Edith Ramirez urged companies that track users' activities across multiple devices to disclose the practice and provide users with an option to opt-out. Although she acknowledged that cross-device tracking can create benefits to consumers with tools such as app synchronization and fraud prevention, Chairwoman Ramirez warned that the FTC will bring enforcement actions for "unfair" data collection activities. She noted that companies let users opt out of receiving targeted advertising based on collected data but do not provide an opt-out for the recognition of a user across his or her devices. This suggests that the FTC expects companies to provide both types of opt-outs – one for cross-device tracking generally and another for the receipt of interest-based advertising.

Ahead of the workshop, the Digital Advertising Alliance (DAA) released guidance to help companies apply the DAA's self-regulatory principals to cross-device data collection. The DAA guidance helps data collectors and advertisers apply the principles of transparency and consumer choice to cross-device data collection for interest-based advertising purposes.

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

MORTGAGE & FAIR LENDING

HOLY HMDA!

On October 15, 2015, the CFPB (finally!) released a final rule amending Regulation C, which implements the Home Mortgage Disclosure Act (HMDA). Like the August 2014 proposed rule, the final rule includes changes to Regulation C in four broad areas: (1) the types of institutions required to collect and report HMDA data; (2) the types of transactions and applications subject to HMDA's collection and reporting requirements; (3) the data that must be collected and reported; and (4) the method and frequency of reporting data and making data available to the public.

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

One-Two Punch

On September 28, the CFPB announced two new enforcement actions—one for alleged discriminatory auto loan pricing and the other for alleged deceptive credit card add-on product marketing practices. First, a joint CFPB and DOJ indirect auto-lending enforcement action continues the CFPB's campaign to regulate indirectly auto dealer markups. This time, a regional bank agreed to limit dealer discretion to mark up interest rates and "has the option . . . to move to non-discretionary" comp. In the second action, the CFPB asserts that the same bank, through its service providers, committed deceptive acts or practices in the marketing and sale of a credit card add-on product. The bank agreed to pay approximately $3 million to nearly 25,000 customers, as well as a $500,000 CMP. As the CFPB noted, this is its eleventh public credit card add-on enforcement action.

For more information, see our blog post or contact Angela Kleine at akleine@mofo.com.

Mammoths, Megalodons, MSAs

This fall, marketing service agreements (MSAs) took another step down the road to extinction. The CFPB issued a RESPA Compliance Bulletin expressing concern that MSAs often give rise to "disguised compensation for referrals." The Bulletin did not, however, provide clear lines for determining whether particular arrangements are lawful under Section 8 of RESPA. Nor did it provide a list or description of agreement terms or conduct of the parties that would be found lawful under RESPA. Rather, the CFPB stated, "determining whether an MSA violates RESPA requires a review of the facts and circumstances surrounding the creation of each agreement and its implementation."

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

The Thin Red Line

On September 24, 2015, the CFPB and DOJ announced a joint action against a regional bank for alleged discriminatory redlining practices from 2009 through 2013 in certain neighborhoods in New York and adjoining states. Over the past few months, officials from both the CFPB and DOJ have spoken publicly about redlining concerns, noting that they have seen a resurgence in the practice. This case is largely premised on the CFPB's peer-based redlining analysis, focusing on applications rather than originations, and identifying statistically significant disparities. This case appears to be a perfect storm of poor statistical results, branching and broker relationship decisions gone awry, inartful CRA assessment

designations, and an inadequate compliance management system.

For more information, read our Client Alert or contact Joe Rodriguez at jrodriguez@mofo.com.

OPERATIONS

Fed Proposes TLAC Requirements

On October 30, 2015, the Federal Reserve Board issued a proposal that would, among other things, require globally systemically important banks (G-SIBs) to issue long-term debt for the purposes of capitalizing a bridge institution that would succeed the G-SIB in the event of its failure and to maintain outstanding minimum levels of eligible external total loss absorbing capacity (TLAC). The long-term debt requirements would result in G-SIB capital requirements reaching as high as 23.5 percent. The TLAC proposal also introduces the concept of a "clean holding company" by imposing a number of significant restrictions on the other liabilities that a covered bank holding company may have outstanding. Covered bank holding companies would be required to comply with the TLAC proposal and the clean holding company requirements as of January 1, 2019; certain other aspects of the proposal would phase in over time. The comment period on the proposal will close on February 1, 2016.

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

PREEMPTION

Saved By the Supreme Court?

As we reported in our last Report, the Second Circuit threw the industry a curve ball by holding purchasers of debt from national banks are not entitled to rely on the exportation of rates that governed when the national bank originated the debt. *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015). The defendant has now filed a petition for certiorari asking the Supreme Court to review the decision. *Midland Funding, LLC v. Madden*, No. 15-610 (U.S. Nov. 10, 2015). In the petition, the defendant points out that the Second Circuit's ruling is in conflict with rulings in other circuits and would have enormous ramifications for the secondary market if left in place. Defendant indicated that ten industry groups will be filing amicus briefs supporting its position.

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

Sounds Familiar

The question in *Madden* of which charter (if any) governs after a transfer of debt, for purposes of preemption analysis, has been considered in a different context by federal courts in California over the past few years. As faithful readers will recall, we have reported on numerous cases brought by mortgage borrowers challenging foreclosure and loan modification practices in which the loan was originated by a federal thrift, but is held by a national bank at the time of suit. The district courts have continued to split on the issue. Two new decisions add to the confusion, with one court siding with what it refers to as "the majority of district courts" applying the charter at origination and another court holding HOLA preemption never applies to a loan held by a national bank, even if the loan was originated by a federal thrift. *Avnieli v. Residential Credit Solutions, Inc.*, No. 2:15-cv-02877-ODW (PJW), 2015 U.S. Dist. LEXIS 138683 (C.D. Cal. Oct. 9, 2015); *Campos v. Wells Fargo Bank, N.A.*, No. EDCV 15-1200 JVS (DTBx), 2015 U.S. Dist. LEXIS 116599, at *13 (C.D. Cal. Aug. 31, 2015).

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

Distinction Without a Difference

Are common law fraud and state consumer protection claims preempted as applied to a national bank? It depends, according to a federal court in New York. Plaintiff based these claims on

allegations that a national bank "offered a loan that appeared to be a standard adjustable-rate mortgage with a reliable benchmark [LIBOR], but privately knew" that this benchmark was suppressed. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 (NRB), 2015 U.S. Dist. LEXIS 149629, at *87 (S.D.N.Y. Nov. 3, 2015). The court rejected the national bank's argument that fraud by omission claims are preempted as imposing disclosure obligations on national banks. It found these claims were not preempted because plaintiff did not seek to impose a special "bank-specific rule that would require novel disclosures," and instead relied on the common law obligation of disclosure that applies whenever a party has special knowledge.

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

Please Remain Standing

The Ninth Circuit reversed a district court's dismissal on grounds that state law requiring employers to provide seats to their workers was preempted as applied to a national bank. *Green v. Bank of America, N.A.*, No. 13-56023, 2015 U.S. App. LEXIS 17800 (9th Cir. Oct. 13, 2015). The court explained that the National Bank Act preempts state law when it interferes with banking-related functions, but does not insulate national banks from general costs of doing business like those imposed by state seating laws.

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

FCRA in California

It's a split decision for furnishers sued in the Ninth Circuit. A federal court in Los Angeles followed what it referred to as the "majority of district courts in the Ninth Circuit, as well as the Second and Seventh Circuits" in following the "total preemption approach." *Haddock v. Countrywide Bank, N.A.*, No. 14-cv-6452 PSG (FFMx), 2015 U.S. Dist. LEXIS 146291, at *62 (C.D. Cal. Oct. 27, 2015). As a result, the court found a common law misrepresentation claim was preempted by FCRA. But the court rejected the furnisher's argument that the exemption in the FCRA for California state law claims did not include a private right of action, finding the Ninth Circuit decided otherwise in *Gorman v. Wolpoff & Abramson LLP*, 584 F.3d 1147 (9th Cir. 2009). *Id.* at *36.

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

PRIVACY

The Senate Passes a Cyber Bill!

On October 27, 2015, the Senate passed the "Cybersecurity Information Sharing Act of 2015." The legislation is intended to help both the private sector and the federal government protect against cyber threats by removing potential or perceived obstacles that may keep private sector entities from taking a number of steps to combat growing cyber threats. These steps include cyber threat information sharing (within the private sector and between private sector companies and the federal government), information system monitoring for cyber threats, and conducting defensive measures on information systems to protect against cyber threats. The legislation provides some liability and FOIA protections to assuage concerns about the risk to private entities from the sharing of cyber threat data. The bill does not *require* any information sharing, but it does impose conditions, such as scrubbing certain personal information, that must be met in order to benefit from the liability protection.

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

New York DFS Wants In On the Action

A new cybersecurity framework floated by the New York Department of Financial Services (NY DFS) lays out cybersecurity regulations that DFS is contemplating proposing. The contemplated regulations would require significant

administrative controls, including the implementation of a number of specific written policies and procedures and annual reporting to NY DFS assessing a financial institution's cyber readiness and vendor oversight, including specific contractual requirements, such as multifactor authentication and encryption. In addition, by specifying technical controls, such as multifactor authentication and specific logging requirements, the contemplated regulations deviate from a more traditional risk-based approach in which a financial institution adopts security controls designed to address particular risks.

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

So Does The SEC

The SEC's Office of Compliance Inspections and Examinations (OCIE) conducted a first round of cybersecurity examinations in early 2015, and is now in the midst of another round. Following its early exams, the OCIE issued a Risk Alert in mid-September summarizing its expectations. The OCIE's expectations do not address new information security concepts, but they indicate an appetite for a deeper inquiry into the specific nature of controls. The examination areas include risk assessment, access controls, vendor management, training, and incident response. They also drill down into specific practices. For example, examiners may assess "how firms monitor the volume of content transferred outside of the firm" and how they monitor for unauthorized data transfers, as well as "how firms control access to various systems and data via management of user credentials, authentication, and authorization methods." This assessment may include a review of controls associated with remote access and other aspects of access management.

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

NIST Gets Into the Weeds

The National Institute of Standards and Technology (NIST) recently released a number of materials relating to cybersecurity. These include a request for comment on draft guidance for access control based on granular attributes (title, division, certifications and training), as opposed to a person's role. NIST also released a final report providing an overview of de-identifying personal information, including models for de-identification, approaches for re-identifying data, and challenges in de-identifying data and using it appropriately. Finally, NIST released guidance on application whitelisting, a technique that permits only authorized application and application components to operate on a system network. By controlling what applications are permitted to execute on a host, whitelisting can help prevent the execution of malware or unlicensed or unauthorized software. The guidance is intended to help companies understand whitelisting basics and integrate whitelisting in the security development lifecycle.

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

Be Aware, Be Very Cyber-Aware

October was National Cybersecurity Awareness Month, which was intended to "recognize the importance of remaining vigilant against any and all cyber threats." The President issued a statement affirming that the Administration is working to address cybersecurity not only as a public safety issue, but also as an issue of national security. The President's statement reminds "every American" that we need to play our part in digital defense, such as by using strong passwords, keeping our software up to date, and "practicing responsible online behavior."

For more information, contact Adam Fleisher at afleisher@mofo.com.

Watch Out for Cyber Attacks and Extortion

The FFIEC issued a Joint Statement to "notify financial institutions of the increasing frequency and severity of cyber attacks involving extortion." The FFIEC warns that cyber criminals and activists use a variety of tactics, including so-called ransomware, to perpetrate attacks involving extortion or other business disruption. Financial institutions face considerable risks relating to these types of cyber attacks, and as such should ensure that their risk management processes and business continuity planning address the risks. The statement suggests a number of general steps that financial institutions should take, including conducting ongoing security risk assessments, securely configuring systems, performing security monitoring, and implementing and regularly testing controls around critical systems.

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

Get Noticed: California Passes New Privacy and Breach Notification Laws

In mid-October, California governor Jerry Brown signed into law four privacy bills: three strengthen the state's data breach notification statute and impose restrictions on operators of automated license plate recognition systems (ALPRs), and one requires law enforcement to obtain a warrant for the collection of digital records and location. A.B. 964 adds to the state's breach notification law a definition for the term "encrypted," while S.B. 570 specifies the form and content of the notices that must be sent to consumers in the event of a breach. S.B. 34 pulls information collected from ALPRs, when used in combination with an individual's name, within the scope of personal information that falls under the California breach law. It also requires ALPR operators to have reasonable security procedures and practices, as well as a privacy policy. The fourth bill, S.B. 178, bars a state law enforcement agency or other investigative entity from compelling a business to turn over any metadata or digital communications—including emails, texts, or documents stored in the cloud—without a warrant.

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

LabMD Prevails

An administrative law judge ruled against the FTC on the merits in the long-running, closely watched data security dispute with LabMD. Way back in 2007, a LabMD file containing consumer personal information was allegedly available on a peer-to-peer file sharing application. The FTC alleged that the failure to secure the file was an unreasonable security practice, and that LabMD failed to secure another file with sensitive information found in the possession of suspected identity thieves. LabMD fought for years and appears to have obtained a significant victory—the judge ruled that the FTC failed to prove anything more than a "possibility" of harm to consumers as a result of LabMD's practices, which is insufficient under Section 5.

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

FTC & FCRA

A wireless carrier has agreed to settle FTC claims that the carrier violated FCRA by putting some customers into a more costly program if they had lower credit scores, without providing the required risk-based pricing notice to those customers. The FTC alleged that the wireless carrier was subject to the FCRA risk-based pricing rule because customers can be billed in arrears for phone services.

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

ARBITRATION

No Surprise Here

The CFPB announced that it is considering two rulemaking proposals that will limit the use of pre-dispute arbitration clauses in consumer financial products and services agreements. The CFPB proposes to require arbitration agreements to allow consumers to litigate class action claims in court. The proposals indicate the CFPB will not ban arbitration agreements for individual claims, but instead will require companies with these agreements to provide information about arbitrations to the CFPB. The CFPB further indicated that any final rule will become effective 30 days after issuance of the rule. The Dodd-Frank Act requires that any rule limiting or prohibiting arbitration be subject to notice and comment rulemaking. The CFPB has not indicated when it will start the formal rulemaking process.

For more information, read our Client Alert, or contact Nancy Thomas at nthomas@mofo.com.

Plaintiff Must Specifically Challenge Delegation Provision

A delegation provision in an arbitration agreement authorizes the arbitrator, not the court, to determine the enforceability of the arbitration agreement. The Eleventh Circuit reversed a lower court decision that had allowed a plaintiff to challenge an arbitration provision without also specifically challenging the delegation provision. *Parnell v. Cashcall, Inc.*, No. 14-12082, 2015 U.S. App. LEXIS 18770 (11th Cir. Oct. 28, 2015). Absent a specific challenge to the delegation provision, the Eleventh Circuit held that the arbitrator, rather than the court, has the authority to decide the enforceability of the arbitration agreement.

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

California's Rule Against Waiver of PAGA Claims Not Pre-Empted by FAA

In 2014, the California Supreme Court found that parties could not waive the right to bring representative actions under the Private Attorney Generals Act (PAGA). In *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), the Ninth Circuit clarified that the FAA does not preempt PAGA, even in light of the Supreme Court's decision in *Concepcion*, because the prohibition on PAGA waivers are not specific to arbitration clauses, and the rule does not conflict with the FAA's purposes. The decision includes a lengthy discussion of why PAGA representative claims are different from class actions, mainly because PAGA actions are statutory and damages are paid to the state, and PAGA claims do not implicate the due process rights of unnamed employees. One judge dissented, arguing that this case is in direct conflict with *Concepcion*, as it changes the text of arbitration agreements, forces employers to arbitrate on a representative basis, and increases the cost and procedural difficulty of arbitration.

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Ross Decision Affirmed

The Second Circuit affirmed the decision of the district court in the long-running *Ross v. Citigroup, Inc.* litigation. No. 14-1610(L), 2015 U.S. App. LEXIS 20025 (2d Cir. Nov. 19, 2015). After a five-week bench trial, the district court found that evidence of meetings between counsel for the banks to discuss legal issues, including arbitration clauses and class action waivers, coupled with the fact that individual banks decided to adopt such clauses, was not sufficient to prove an antitrust conspiracy. The Circuit Court upheld this decision, holding that the district court's findings were not "clearly erroneous."

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TCPA

Is Your iPhone an Autodialer?

The Third Circuit has become the first appellate court to endorse the FCC's broad definition of "autodialer" under the TCPA. In a July 10 declaratory ruling, the FCC defined "autodialer" as any device with the capacity to store or produce randomly or sequentially generated numbers, even if the device isn't currently used for that purpose. Relying on the FCC's decision, the Third Circuit reversed the district court's order dismissing the plaintiff's complaint, remanding to determine whether the defendant's technology constituted an "autodialer" under the FCC's definition. *Dominguez v. Yahoo, Inc.*, No. 14-1751, 2015 WL 6405811 (3d Cir. Oct. 23, 2015).

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Dead on Arrival

After noting at oral argument that the plaintiff's TCPA claim was one of the "silliest" the court had ever encountered, the Ninth Circuit issued an order affirming dismissal of the plaintiff's suit. *Roberts v. Paypal, Inc.*, No. 13-16304, 2015 WL 6524840 (9th Cir. Oct. 29, 2015). The plaintiff claimed that PayPal sent him a welcoming text message without his consent, thereby violating the TCPA. The panel disagreed, finding that under the FCC's 1992 interpretation of "prior express consent" under the TCPA, in providing PayPal with his cellphone number, the plaintiff expressly consented to receive calls from PayPal. The court also rejected the plaintiff's argument that the FCC's interpretation of "prior express consent" was limited to "normal business communications," but noted that, even if it adopted this position, nothing suggested that PayPal's message was anything but "normal." The panel accordingly affirmed the district court's grant of summary judgment in favor of PayPal.

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Do NOT Leave a Message at the Tone

The Fifth Circuit recently reversed partial summary judgment in favor of the plaintiff in a TCPA claim, finding that summary judgment instead should have been granted to the defendant on four of the seven calls at issue. *Ybarra v. Dish Network, L.L.C.*, No. 14-11316, 2015 WL 6159755 (5th Cir. Oct. 20, 2015). The plaintiff argued that the defendant violated the TCPA by making a call with a prerecorded voice. But, because the plaintiff did not answer the four calls at issue, no prerecorded voice was ever delivered or used. The Fifth Circuit held that the prerecorded voice must *speak* during the call to trigger liability. The court therefore reversed and remanded, directing the district court to enter partial summary judgment in favor of defendant.

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