FINANCIAL SERVICES REPORT

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IN THIS ISSUE

Beltway Report
Page 2
Bureau Report
Page 2
Mobile & Emerging Payments Report
Page 3
Mortgage & Fair Lending Report
Page 5
Operations Report
Page 7
Preemption Report
Page 8
Privacy Report
Page 9
Arbitration Report
Page 11
TCPA Report
Page 11

MOFO METRICS

83: Percentage of mergers that don't increase shareholder value
44: Percentage of lawyers who would not recommend their profession
2: Number of new craft breweries that open daily
15: Dollars invested in offshore tax havens, in trillions
2: Eggs bought by McDonald's annually, in billions
20: Number of female senators
1: Number of dogs in the world, in billions
75: Percentage of world's dogs that are not pets

Editor's Note

It's summertime and, as Gershwin said, the livin' is easy. Looking for a little beach reading? How about 1,333 pages of CFPB-proposed payday lending rulemaking hot off the presses? Or a relatively paltry 377 pages of CFPB-proposed rules to ban class waivers in arbitration agreements and impose reporting requirements on individual arbitrations?

If that's not racy enough, check out the Federal Reserve Board's rules on single-counterparty credit limits or the Supreme Court's *Spokeo* ruling.

It's all in here, along with the latest on mortgage, mobile, and TCPA. Enjoy!

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Every Last Penny Counts

Five federal banking agencies issued a Supervisory Bulletin titled "Interagency Guidance Regarding Deposit Reconciliation Practices" (the "Guidance"). The Guidance outlines supervisory expectations for financial institutions' investigation and resolution of "credit discrepancies," which arise when a customer makes a deposit to a deposit account and the amount that the financial institution credits to that account differs from the total tendered for deposit. The Guidance states that financial institutions are capable of fully reconciling credit discrepancies, except in very rare cases. The agencies "expect financial institutions to adopt deposit reconciliation policies and practices that are designed to avoid or reconcile discrepancies, or designed to resolve the discrepancies such that customers are not disadvantaged."

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

Know Your Customer Never Ends

After a four-year rulemaking process, FinCEN published a Final Rule on customer due diligence. The Rule requires covered financial institutions, including banks, money services businesses, broker-dealers, mutual funds, and commodities brokers, to enhance their customer due diligence procedures by collecting and verifying information about "beneficial owners," who are the individuals who own or control the legal entity customers of the institution. The Rule adds a "fifth pillar" to the minimum requirements of an AML compliance program by requiring institutions to develop and update customer risk profiles and customer information and to conduct ongoing AML monitoring. As a concession to numerous commenters, FinCEN extended the compliance deadline to two years.

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

BUREAU

Buried in Rules

On June 2, 2016, the Consumer Financial Protection Bureau ("CFPB") released its long-anticipated Notice of Proposed Rulemaking on short-term lending. It appears to generally track the Outline of Proposals Under Consideration and Alternatives Considered released by the CFPB in March 2015. This proposal marks the first time the CFPB has relied on its UDAAP authority for rulemaking and also marks the first federal rulemaking focused on the short-term lending industry. Comments on the proposal are due on September 14, 2016. Want to know more? Read our Client Alert.

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

Speaking of Payday Loans

Borrowers who take out payday loans online often incur "hidden costs" in the form of overdraft or NSF fees for the pre-authorized recurring electronic debits usually used to make payment on such loans, according to a report by the CFPB entitled "Online Payday Loan Payments." The CFPB's study focused on an 18-month period in 2011 and 2012 using data from consumer checking accounts obtained from several large depository institutions. The CFPB found that online short-term borrowers were charged a mean total of $92 in overdraft and NSF fees by their depository financial institutions during the 18-month period studied.

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

CID Challenge Accepted

On April 21, 2016, a federal judge in the District of Columbia ruled on the first judicial challenge to the CFPB's authority to issue and enforce a civil investigative demand (CID). The CFPB had issued to the Accrediting Council for Independent Colleges and Schools ("ACICS") a broad-ranging CID, which ACICS first challenged before the CFPB. As has been the case with all such challenges, the CFPB Director rejected ACICS's arguments and upheld the CID. ACICS then challenged the CID in federal court. The Court held that the CFPB did not have the authority to issue the CID regarding "the process for accrediting for-profit schools" because that topic was beyond the scope of the Bureau's mandate with respect to "consumer financial products or services."

For more information, contact David Fioccola at dfioccola@mofo.com or read our Client Alert.

Man Cannot Be Sued on Algorithm Alone

One of the largest debt collection law firms in New Jersey, two of its partners, and a debt buyer settled allegations by the CFPB that they violated the CFPA and the FDCPA by failing to adequately investigate "hundreds of thousands" of debt collection suits before they were filed. According to the CFPB, between 2009 and 2014, the law firm used non-attorney support staff and computer programs to determine which customers to sue, and in some cases, lawsuits were filed based solely on summary data. The consent order imposed a collective $2.5 million in civil monetary penalties, but did not include consumer redress or invalidate any judgments against borrowers.

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

Student Loans as Spectator Sport

The CFPB released its "Payback Playbook" initiative proposal with proposed templates (or "Payback Playbooks") for loan servicers to use in providing student loan repayment options in communications with borrowers. The Payback Playbooks are intended to "reduce defaults, improve borrower outcomes, and spur innovation" and would require that communications with borrowers include information about alternative repayment options, such as "Pay As You Earn" and "Income-Based Repayment." Comments on the CFPB's proposal are due by June 12, 2016.

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

MOBILE & EMERGING PAYMENTS

Marketplace Lending Under Siege

The news has not been pretty for marketplace lenders in recent months. Regulators are circling. The Department of Treasury issued a White Paper on May 10, 2016, summarizing the responses to Treasury's July 2015 Request for Information and providing recommendations for regulators and industry on "safe growth" in the marketplace lending industry. Treasury recommends greater borrower protections for small business and a public database created by industry to provide loan performance information. Treasury is only one regulator looking into marketplace lending. On March 7, 2016, the CFPB announced both (1) a press release describing the expansion of its consumer complaint portal to include marketplace lending products; and (2) a consumer bulletin, titled "Understanding online marketplace lending," which lists and explains factors consumers should take into account when considering marketplace loans. The CFPB is also reportedly inquiring into marketplace lender practices relating to charging origination fees.

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

FinTech Hears Heavy Steps

Regulators are also focusing on other FinTech companies. In remarks to the Senate Banking Committee on April 7th, CFPB Director Cordray acknowledged that FinTech companies should not be getting an unfair advantage over banks by arbitraging the regulatory system. Director Cordray indicated that the CFPB was focused on FinTech companies, particularly on the convergence between FinTech and financial institutions.

The FTC announced a "FinTech" forum focused on how FinTech is impacting consumers, and three democratic senators have sent a letter to the Government Accountability Office asking the GAO to investigate whether FinTech companies, particularly marketplace lenders, are being regulated properly under the existing regulatory framework.

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

A New York State of Mind

New York is backing up its bid to be at the forefront of virtual currency innovation by fostering a tailored regulatory environment. On May 5, 2016, the New York Department of Financial Services approved Gemini Trust Co. LLC's request to trade "ether," a new virtual currency, in addition to trading bitcoin. Gemini was created by Cameron and Tyler Winklevoss, of Facebook fame. Gemini follows New York's grant of a license to Circle Internet Financial Ltd. in September 2015 and New York's grant of a limited purpose trust charter to itBit Trust Co. in May 2015.

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

Mobile Banking, Mobile Risks

The FFIEC released new exam guidance for assessment of mobile banking and mobile payments services. The *Appendix E: Mobile Financial Services* to the *Retail Payment Systems* booklet is part of the Information Technology (IT) Examination Handbook. The exam guidance covers SMS messaging, mobile-enabled website and browsers, apps, and wireless payment technologies. The guidance notes that there are risks unique to mobile because of the power that users have to set security parameters and settings and because user choices may be device or platform specific.

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

CLASS DISMISSED

Class Action and Product Insights for Your Business

Morrison & Foerster is pleased to announce the launch of our new Class Dismissed blog, examining the latest news, developments, and trends. The blog provides insight on false advertising, consumer protection, privacy, TCPA and other issues, covering federal, multidistrict and state court class actions as well as government and National Advertising Division (NAD) actions.

We invite you to subscribe to Class Dismissed at **classdismissed.mofo.com** and follow us on Twitter at **@MoFoClassAction**.

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Everybody Loves White Papers

On March 31, 2016, the OCC released a White Paper on financial technology innovation, which lays out a preliminary framework for "responsible innovation." The White Paper articulates principles the OCC will follow when evaluating innovative products, services, and processes that require regulatory approval and identifies the potential risks associated with them. It also reflects the OCC's commitment to improving its own understanding of new technology and to improving collaboration with the CFPB and other banking regulators to develop a consistent supervisory approach in this space. Comments on the challenges banks face with respect to FinTech and how the OCC can facilitate innovation are due by May 31, 2016. A forum on responsible innovation will follow on June 23, 2016.

For more information, contact Sean Ruff at sruff@mofo.com or read our Client Alert.

MORTGAGE & FAIR LENDING

Hawkish on ECOA

The Supreme Court delivered a 4-4 order in *Hawkins v. Community Bank of Raymore*, No. 14–520 (Mar. 22, 2016). The Supreme Court considered whether loan guarantors are "applicants" such that they can enforce ECOA's anti-discrimination provisions. The FRB had issued rules that add guarantors to the definition of "applicant." The Circuits are split on the issue, with the Sixth Circuit answering in the affirmative and the Eighth Circuit holding the "text of the ECOA clearly provides that a person does not qualify as an applicant under the statute." *Hawkins v. Cmty. Bank of Raymore*, 761 F.3d 937 (8th Cir. 2014). Because this is a 4-4 decision, the circuit split will remain unresolved for now, but the affirmance may influence other courts to follow the Eighth Circuit's lead.

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

A Rare RESPA Trial

In *McGinnis v. American Home Mortgage Servicing, Inc.,* 817 F.3d 1241 (11th Cir. 2016), a landlord sued the servicer of the loans on seven of her properties. She alleged that the servicer violated the governing mortgage document provisions regarding payments and foreclosure. The case went to trial, and the landlord prevailed, with the jury awarding over $500,000 in damages and $3 million in punitives. The district court, however, reduced the award to $250,000 and reduced the jury's punitive damages award. The Eleventh Circuit reversed the order on punitives, holding that the servicer failed to preserve the issue before trial.

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

RESPA Strikes Again

The Eleventh Circuit handed down another RESPA decision in May. In *Renfroe v. Nationstar Mortgage, LLC*, No. 15-10582, 2016 WL 2754461 (11th Cir. May 12, 2016), the Court of Appeals reinstated a borrower's suit against her mortgage servicer. Plaintiff, a retired bank manager, claimed that after her original loan servicer transferred servicing of her fixed-rate loan, the new servicer incorrectly increased her monthly payment. The district court granted the servicer's motion to dismiss, finding the servicer had complied with the statute by conducting a reasonable investigation into the issue and notifying the borrower of the result. The Eleventh Circuit disagreed, holding that, at this stage of the litigation, the borrower had adequately pled that the servicer's investigation was unreasonable and that its explanation to the borrower was inadequate.

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

TRID Trouble

To say that the new TRID rule has imposed "operational challenges" on mortgage originators is putting it mildly. Recognizing the operational challenges, the CFPB announced that it will propose amendments to the rule this July. In an April 28, 2016 letter to mortgage industry trade groups, Director Cordray signaled that the amendments would "incorporate[e] some of the Bureau's existing informal guidance" and make adjustments to the regulation text and commentary to provide "greater certainty and clarity." The CFPB plans to publish a notice of proposed rulemaking on the TRID rule in late July.

For more information, contact Ryan Richardson at rrichardson@mofo.com or *read our Client Alert.*

T-T-T-TILA!

The Eleventh Circuit held that a mortgage assignee cannot be held liable under TILA for a servicer's failure to provide the borrower with a payoff balance. *Evanto v. Fed. Nat'l Mortg. Ass'n*, 814 F.3d 1295 (11th Cir. 2016). Plaintiff sued the assignee of his mortgage after his original servicer failed to provide a payoff balance. TILA creates a cause of action against an assignee for a violation that is "apparent on the face of the disclosure statement" provided in the mortgage transaction. The Eleventh Circuit upheld the dismissal of Plaintiff's complaint because "failure to provide a payoff balance is not a violation apparent on the face of the disclosure statement" and rejected Plaintiff's "policy" arguments to the contrary. *Id.* at 1297.

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

FHFA to the Rescue?

This spring, the Federal Housing Finance Agency (FHFA) announced a principal reduction program for first-lien mortgages that are owned or guaranteed by Fannie Mae and Freddie Mac. According to the announcement, this program is a "last chance" for some borrowers to avoid foreclosure by allowing them to obtain a loan modification that permanently forgives a portion of their mortgage debt. The FHFA estimates that this program will impact approximately 33,000 seriously delinquent and underwater borrowers. Given the borrower solicitation guidelines, mortgage servicers with potentially eligible loans will be paying attention to the time frames laid out in the announcement. Additionally, as has been the case with other widely publicized mortgage loan modification programs, servicers may expect to receive inquiries from borrowers requesting information about the program.

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

OPERATIONS

Try, Try, Try Again

The Federal Reserve Board has re-proposed a rule that would establish single counterparty credit limits for U.S. bank holding companies (BHCs) and foreign banking organizations (FBOs) with at least $50 billion in total consolidated assets. Dodd-Frank requires the Board to prescribe rules that limit the amount of credit exposure of BHCs and FBOs to an unaffiliated company. The Rule incorporates comments received in response to the original proposed rule, revised lending limit rules applicable to national banks, the Basel Committee on Banking Supervision's large exposures standards, and quantitative impact studies by the Board on the impact of the original proposed rule. The Board also issued a supporting white paper.

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

New Volcker Rule FAQ

The Volcker Inter-Agency Group posted FAQ 21, clarifying the capital deduction requirement under the Volcker Rule for investments in qualifying trust preferred securities collateralized debt obligations ("Qualifying TruPS CDOs"). FAQ 21 confirms that a banking entity is not required to deduct from its tier 1 capital an investment in a Qualifying TruPS CDO retained pursuant to Section 248.16(a) of the Volcker Rule. Section 248.16(a) permits banking entities to retain an interest in, or act as sponsor of, an issuer of TruPS CDOs that would meet the definition of a "covered fund," subject to certain conditions discussed further in our Client Alert. FAQ 21 also confirms that the capital deduction requirement does not apply to Qualifying TruPS CDOs held in accordance with section 248.16(a) of the Volcker Rule.

For more information, contact Jiang Liu at jiangliu@mofo.com.

Agencies Propose Net Stable Funding Ratio

The federal banking agencies have issued a proposed rule that would implement a quantitative long-term liquidity requirement—the net stable funding ratio (NSFR)—for large and internationally active banking organizations. The proposal aims to promote the stability of banking organizations covered by the proposed rule ("covered companies") and across the U.S. financial sector by requiring covered companies to be in a position to fund themselves over a one-year time horizon. It further seeks to ensure that covered companies maintain sufficient liquidity profiles to support their activities in times of economic stress. The proposed rule is consistent with the October 2014 and June 2015 Basel Committee on Banking Supervision NSFR standards, and it complements the federal banking agencies' prior line of liquidity

management and liquidity risk rules. Comments are due by August 5, 2016.

For more information, contact Elizabeth Schauber at eschauber@mofo.com or read our Client Alert.

Score One for the Munis?

The Federal Reserve Board adopted a Final Rule amending its Liquidity Coverage Ratio Rule and Modified Liquidity Coverage Ratio ("LCR Rule") to cover certain U.S. municipal securities as high-quality liquid assets ("HQLAs"). Companies subject to the LCR Rule can treat certain U.S. municipal securities as Level 2B liquid assets for purposes of calculating the company's total HQLAs under the LCR Rule, subject to certain unique limitations. The Final Rule represents a loosening of the LCR Rule's strict regulatory requirements and should reduce the cost of underwriting, selling, and purchasing municipal securities. The scope of the Final Rule is limited, though, because it only applies to Federal Reserve-regulated financial institutions that are subject to the LCR Rule and contains a number of restrictions unique to municipal securities.

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

PREEMPTION

Payment Protection Preempted (Maybe?)

Are claims challenging a national bank's payment protection plan preempted by the NBA and OCC regulations? It depends on the nature of the claims. A federal district court in New York City held that state consumer protection claims challenging a payment protection plan offered by a national bank were preempted by the NBA and OCC regulations. *Edwards v. Macy's Inc.*, No. 14 Civ. 8616, 2016 U.S. Dist. LEXIS 31097 (S.D.N.Y. Mar. 9, 2016). The court found claims that the program had little value and that plaintiff was enrolled without consent were expressly preempted by OCC regulations.

A federal court in Philadelphia agreed that claims that the program had little value were expressly preempted. *Gordon v. Kohl's Dep't Stores, Inc.*, No. 15-730, 2016 U.S. Dist. LEXIS 40008 (E.D. Pa. Mar. 28, 2016). The court held, though, that claims that the national bank was not authorized to charge fees for the program after the accounts were purchased from the previous issuer did not arise from an agreement, and therefore were not preempted.

The courts split on whether claims asserted against the retailer that acted on behalf of the national bank were preempted. The federal court in New York City found the claims were preempted. *Edwards*, 2016 U.S. Dist. LEXIS 31097, at *20. The federal court in Philadelphia disagreed, finding the Dodd-Frank Act eliminated preemption for affiliates and agents. *Gordon*, 2016 U.S. Dist. LEXIS 40008, at *52-53.

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

Express Train to State Court

A state law challenge to a federal thrift's overdraft protection disclosures and confusing manner of posting transactions is not completely preempted by HOLA and OTS regulations, according to a federal court in Hawaii. *Mendonca v. W. Coast Life Ins. Co.*, No. 15-00359, 2016 WL 845302 (D. Haw. Mar. 1, 2016). Plaintiff contended the federal thrift's decision to decline payment of her life insurance premiums instead of paying it under an overdraft program breached the plaintiff's contract and violated a state consumer protection statute. The court found these claims were not completely preempted because the complaint did not primarily challenge the form of notice and instead alleged the federal thrift did not comply with its agreement with plaintiff.

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

PRIVACY

The Supreme Court Has Spoken

On May 16, 2016, the Supreme Court issued its highly anticipated decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, holding a statutory violation, without some showing of concrete harm, does not create Article III standing. The Court declined to evaluate whether plaintiff had made this showing and instead remanded the case to the Ninth Circuit for further proceedings. The Court did provide several guideposts, though, explaining "concrete" injury "must be 'de facto'; that is, it must actually exist," but that "concrete" is not "necessarily synonymous with 'tangible.'"

For more information, contact Angela Kleine at akleine@mofo.com or read our Client Alert.

CFPB Enters Uncharted Waters

On March 2, 2016, the CFPB brought its first data security enforcement action, entering into a consent order with Dwolla, an online payment platform. The CFPB alleged Dwolla misrepresented to consumers that it maintained "reasonable and appropriate" data security safeguards. The consent order lists several alleged misrepresentations, including, for example, that the Dwolla network and transactions were "safe" and "secure," Dwolla's data security practices "exceed" or "surpass" industry standards, and the company "sets a new precedent for the industry for safety and security." The consent order requires Dwolla to pay a civil money penalty of $100,000 and take a wide variety of steps to improve its security practices.

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

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Why Order Takeout?

The Seventh Circuit continues to expand the definition of concrete injury required for consumers whose data is stolen as a result of a data breach to pursue claims against the retailer. In *Lewert v. P.F. Chang's China Bistro, Inc.*, No. 14-3700, 2016 WL 1459226 (7th Cir. Apr. 14, 2016), the court held that plaintiffs had standing to pursue their claims, finding "time and money spent resolving fraudulent charges are cognizable injuries for Article III standing" and that future injuries, such as increased risk of fraudulent charges and identity theft, are "concrete enough to support a lawsuit." The court further found that the plaintiffs had plausibly alleged their data was stolen based on the defendant's initial, broad statement that it did not know how many stores were affected—thus enabling any plaintiff who had made a payment at the restaurant during the timeframe of the incident to pursue a claim.

For more information, contact Dave McDowell at dmcdowell@mofo.com.

Taking It to the Bank

Another big data privacy settlement was announced recently. Together with five district attorneys, the California Attorney General entered into an $8.5 million settlement with a major bank of claims alleging the bank recorded the phone calls of consumers without obtaining appropriate consent. Consumers receive nothing from the settlement, while $8 million goes to the district attorneys and the Attorney General, and $500,000 donated to *cy pres* recipients. According to the *very* brief complaint, employees of the bank failed to "timely and adequately disclose the recording of communications they had with members of the public." California is a "two-party consent" state, meaning that each party to a confidential conversation must be advised at the outset if a call is being recorded and have an opportunity to object or terminate the call.

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

Another Regulator Charges In

The New York Department of Financial Services (NYDFS) entered into a consent order with payday loan lead generator Blue Global LLC based on loans the company advertised and solicited that allegedly violated New York usury laws. But NYDFS made this a data security case, assessing a civil penalty of $1,000,000 and issuing a press release noting that this was "DFS's first action to require a company to implement consumer data security measures to its future collection of consumers' personal information." NYDFS alleged the defendant collected and shared with third parties personal information on loan applications (including Social Security numbers) without requiring those third parties to protect the information. NYDFS alleged that these practices were misleading, in violation of New York law, in light of representations on the company's website regarding its information security practices.

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

Standards to the Rescue

The Payment Card Industry Data Security Standards (PCI DSS) was recently upgraded to version 3.2. The key change is requiring multi-factor authentication for all access to sensitive cardholder data (such as payment card numbers). PCI DSS previously required dual-factor authentication only for remote access to the cardholder data environment from an *untrusted* network. Meanwhile, the FTC has sent orders to nine companies that conduct PCI DSS compliance assessments to ask them to provide information on how they conduct the assessments, as well as the other services they provide (such as forensic audits). The FTC is collecting this information to "study the state of PCI DSS assessments."

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

No Snapchat for Bankers

The Office of the Comptroller of the Currency (OCC) issued a Bulletin reminding national banks that they must keep records of internal communications, even those occurring on chat platforms or related electronic messaging mechanisms. The guidance was apparently spurred by the revelation that some financial institutions were using messaging technologies that enabled or permitted deletion or encryption. The OCC notes specifically that "some chat and messaging platforms have touted an ability to 'guarantee' the deletion of transmitted messages." OCC's regulatory authority, however, requires that communications technology should not be used in a way that limits examiner access to bank records. The OCC warns that even when using these new technologies, banks must make sure that records are appropriately kept and maintained for examination purposes.

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

ARBITRATION

CFPB Issues Proposed Arbitration Rule

Surprising no one, the CFPB announced a proposed rule that would bar class waivers in arbitration agreements for consumer financial products and services and would require reporting about individual arbitration claims and damages awards. Industry participants and consumers have until Monday August 22, 2016 to comment on the rule.

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

A Click Is Just a Click

The Seventh Circuit denied TransUnion's motion to compel arbitration, finding that no contract had been formed with an Internet user. *Sgouros v. TransUnion Corp.*, No. 15-1371, 2016 U.S. App. LEXIS 5648 (7th Cir. Mar. 26, 2016). The Court noted that the website failed to give notice to the consumer that purchasing a product from the site constituted agreement to the Service Agreement, which included an arbitration agreement. The Court evaluated the specific language and content of the web page, finding that clicking on an "I Accept" button was not sufficient because it did not inform the consumer that she was agreeing to terms and conditions, and the link to the Agreement was titled "Printable Version" rather than Service Agreement or Terms and Conditions.

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

TCPA

Can You Identify Me Now?

On May 3, 2016, the Eighth Circuit reversed the denial of class certification in a TCPA junk fax case on ascertainability grounds. *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, No. 15-1317, 2016 U.S. App. LEXIS 7992 (8th Cir. May 3, 2016). Defendant argued that the proposed class—defined as all persons who were sent the faxes—could not be ascertained because multiple persons (owner, subscriber, lessee) may claim injury for each fax. Finding that the "best objective indicator of the 'recipient' of a fax is the person who subscribes to the fax number," the Eighth Circuit concluded that available "fax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable." *Id.* at *10-11.

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

The Punishment Doesn't Fit the Crime

A federal court in New York explained in dicta that the TCPA's statutory recovery of $500 "for a phone call, which could be trebled up to $1,500, is wholly disproportionate to the harm"

allegedly suffered. *Hannabury v. Hilton Grand Vacations Co.*, No. 14-CV-6126-FPG, 2016 U.S. Dist. LEXIS 39493, at *16 (W.D.N.Y. Mar. 25, 2016). The court denied a motion to substitute the estate in place of the deceased plaintiff on grounds that the TCPA is penal in nature, not remedial, and thus, the damages claim abated upon plaintiff's death. While the holding was narrow, the underlying rationale that the TCPA statutory "recovery is disproportionate to the harm suffered" may have broader implications.

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

Act Like a Human

Calls made using a manual clicker application are not made with a predictive dialer according to a federal court in Florida. *Strauss v. CBE Grp., Inc.*, No. 15-62026-CIV, 2016 WL 1273913 (S.D. Fla. Mar. 25, 2016). The court granted summary judgment because there was "substantial evidence that human intervention is essential at the point and time that the number is dialed," and the "equipment used does not have the functionalities required to classify it as a predictive dialer." *Id.* at *4, the Court held that the debt collector placed calls were not made using an "automatic telephone dialing system," and the TCPA claims could not survive.

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

This newsletter addresses recent financial services developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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Obrea Poindexter and Trevor Salter, Managing Editor

Bureau Report
Jessica Kaufman

Beltway Report
Joseph Rodriguez

Mortgage and Fair Lending Report
Angela Kleine

Operations Report
Jeremy Mandell

Preemption Report
Nancy Thomas

Privacy Report
Nate Taylor and Adam Fleisher

Arbitration Report
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TCPA Report
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