FINANCIAL SERVICES REPORT

Quarterly News, Spring 2019

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MOFO METRICS

48	Number of people each year who get sick from food eaten in the U.S., in millions
128	Number of people each year in the U.S. who are hospitalized due to food-borne illnesses, in thousands
3	Number of people each year in the U.S. who die from food-borne illnesses, in thousands
46	Percentage of food-borne illnesses in the U.S. caused by eating vegetables
6	Percentage of food-borne illnesses in the U.S. caused by eating fish and shellfish
53	Percentage of food-borne illness outbreaks in the U.S. caused by sick food handlers
80	Percentage of food-borne illness outbreaks in the U.S. involving commercially prepared food
5.8	Number of times a week the average person in the U.S. eats commercially prepared food

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EDITOR'S NOTE

In the words of Willie Wonka: "Wait a minute — strike that, reverse it!" As loyal readers will recall, in our last issue, we tried to stay current in referring to the CFPB by what Mick Mulvaney declared would be its new name: the Bureau of Consumer Financial Protection. Well, what a difference a director makes. Shortly after Kathy Kraninger was confirmed by the Senate as the second Director of the agency, she scrapped the name change. We'll wait to see what happens to the big "bcfp" sign in the lobby of the CFPB's headquarters! Since Kraninger was confirmed we've seen the Bureau issue its first consent orders since former Director Cordray resigned. CFPB-watchers have noted that only one of these consent orders included restitution. A change in direction? A sub rosa recognition of self-reporting and self-remediation? We'll have to wait and see.

This quarter also brought an about-face by the CFPB on part of the controversial small-dollar loan rule. Consumer advocates and industry trade groups alike are threatening suit on different parts of the proposed rule. Does that indicate it's a good compromise? Again, we'll have to wait and see.

Read on to catch up on these and other developments in Washington, D.C. and beyond.

BELTWAY

Broke[red], So Fix It

The FDIC announced a "comprehensive review [of its] regulatory approach to brokered deposits and interest rate caps" for banks that are not "well-capitalized" with the release of an APNR. According to the FDIC, the review is driven by significant changes in technology, business models, products, and the economic environment. Under existing rules, banks that are not well-capitalized are subject to restrictions on brokered deposits and interest rate cap, but banks have argued that the regulations are outdated and unclear. The APNR seeks public comment on modifications to the regulations, including whether (1) certain deposits should not be considered brokered deposits, (2) there have been changes in the financial services industry that the FDIC should consider in its review of the regulations, (3) changes to Call Reports are required for purposes of brokered deposits, and (4) there are alternatives to existing interest rate restrictions on banks that are not well-capitalized.

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

Resolution in *Expressions*

On January 8, 2019, merchants and the State of New York filed a joint motion to vacate the final judgment in *Expressions Hair Design v. Underwood*, the surcharging case brought by New York merchants. This follows a long-standing battle between merchants and the State of New York, which included a Supreme Court decision in which the Court held that the New York law regulated speech, remanding the case to the Second Circuit to determine whether the law violated the First Amendment. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). By agreeing to vacate the final judgment, New York's anti-surcharging law would not be completely invalidated; merchants will be required to disclose "total credit-card price in dollars and cents" and not just a percentage.

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

Thanks, but No Thanks

The GAO released a report finding that the OCC could better address risks of "regulatory capture" and issued a series of recommendations for the OCC. For example, the GAO highlighted that the OCC's examination teams are not required to document internal deliberations and are required to delete document drafts that summarize supervisory reviews. The OCC responded to many of the GAO's recommendations — including recommendations to track and monitor use of informal recommendations, document communications with regulated banks' senior management and executives, and check conflicts before staffing examination teams — by stating that it was not "prepared to implement the recommendation" or that it disagreed with the GAO's characterization of a vulnerability or assessment.

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

BUREAU

Wait, Consent Doesn't Begin with Kay?

The CFPB and New York Attorney General entered into a consent order with a jewelry retailer in January with $11 million in penalties, alleging that the company enrolled customers in in-house credit plans and payment protection plans without their consent, and misrepresented the terms of promotional financing. The regulators' complaint is wide ranging, but notably alleges that some employees were instructed to complete customers' credit card applications for them on an electronic interface, and in so doing, to inform customers that personal information was being collected for a "survey" or "rewards card." Employees were also allegedly encouraged to "distract" customers during this process by offering to clean their jewelry.

For more information, contact Jessica Kaufman at jkaufman@mofo.com or read our Client Alert.

Findings Aren't Major in College Affinity Report

The Bureau issued its seventh annual report to Congress regarding financial products marketed to students through colleges and universities in January. Former Director Richard Cordray used to take it as an opportunity to scold colleges for failure to make their affinity agreements available to the public. In contrast, this year's report focuses primarily on trends — the number of college credit card agreements between issuers and schools or affiliated organizations increased in 2017, the number of issuers maintaining such agreements also increased, but the overall number of accounts was down.

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

Priorities, People!

Regulated entities have had a difficult time predicting where the CFPB would place its enforcement attention one year versus the next. (Of course, the *only* effective way to understand the agency's enforcement priorities was to read *this Report every quarter, despite all of the terrible jokes and puns*!) In a recent report, the GAO recognized this

issue, recommending that the CFPB take a more systematic and consistent approach to prioritizing what it views as financial risks to consumers. The GAO noted that the CFPB currently lacks this kind of process, as well as any method for considering how it will use its tools — "rulemaking, supervision, and consumer education" — to address them.

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

Online Lender Fined for Debiting Wrong Accounts

The Bureau reached a settlement with an online lender, imposing a $3.2 million civil monetary penalty in connection with the company's alleged unauthorized debiting of borrowers' bank accounts and failure to honor certain loan extensions. Although borrowers had authorized payment deductions from certain accounts, the Bureau alleged that the company in many instances debited different accounts — accounts for which the company had received information purchased from lead generators subsequent to the borrower taking out the loan. The online lender self-reported the issue, and cited a "technical system error" as its cause.

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

Big Changes to Small-Dollar Loan Rule Proposed

The Bureau issued a proposed revision of its controversial November 2017 small-dollar loan rule. The proposed rule would rescind the current rule's requirement that lenders determine a borrower's ability to repay prior to extending small-dollar and certain other types of covered loans. The revision would not change the payment provisions of the current rule, which include a requirement that lenders obtain a new authorization from a consumer to initiate a payment transfer from an account where there have been two consecutive failed attempts to withdraw funds from the same account. The CFPB also proposed to delay the compliance date for the rule's existing ability to repay provisions.

For more information, contact Obrea Poindexter at opoindexter@mofo.com or read our Client Alert.

Veterans Pension Broker Is Right Out

In January, the Bureau announced a settlement with an individual pension broker of contracts offering high-interest credit to veterans. The broker acted as a financial agent for several lending companies from 2011 to 2018, and reportedly offered to send lump-sum payments to veterans in exchange for receiving all or part of the veteran's monthly pension or disability payments for a period of five to 10 years, according to the Consent Order. The consent order alleges that the broker misrepresented that the contracts he facilitated were valid and enforceable when, in fact, veterans' pension payments are unassignable under federal law; and misrepresented several material aspects of the contracts. The broker is permanently banned from brokering, offering, or arranging agreements between veterans and third parties under which the veteran purports to sell a future right to an income stream from the veteran's pension, and was fined $1 based on his stated inability to pay.

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

How's Your Market?

The Bureau published a Request for Information regarding the consumer credit card market in January. In accordance with the CARD Act of 2009, the Bureau conducts a biennial review of the consumer credit card market, including by soliciting public comment and feedback. In the past, the Bureau has used these reviews to help set the Bureau's priorities as they relate to the consumer credit card market. Comments on the 2019 RFI are due by May 1, 2019. Unlike in past years, the Bureau now seeks information only on specific enumerated topics under the statute, and not on any "areas of further interest" to the Bureau.

For more information, contact Jeremy Mandell at jmandell@mofo.com or read our Client Alert.

Payday Lender Meet Alphabet Soup Violations

The Bureau announced a settlement for a $100,000 civil monetary penalty with a payday lender to resolve allegations that the lender violated the CFPA, TILA, and the GLBA for a variety of alleged practices. Among the specific alleged violations was that the lender failed to include a payday loan fee charged to Kentucky customers in the APR, rounded APRs to whole numbers in advertisements, misused personal references from borrowers' applications by repurposing them as telemarketing leads, and failed to provide required privacy notices to some returning borrowers.

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

Payday Part Two

The Bureau resolved a three-year-old enforcement action pending in New York federal court against a group of commonly controlled offshore payday lending companies. The allegations in the Bureau's 2015 complaint included collecting loan amounts and fees that were void under state licensing and usury laws, falsely threatening borrowers with lawsuits and imprisonment, and seeking

refunds of amounts paid on voided loans. After protracted fights over jurisdiction and the constitutionality of the CFPB, the settlement now bans the companies from making new loans and collecting on old ones, but imposes no civil monetary penalty or restitution.

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

Stop Means Stop

The Bureau entered into a Consent Order with a federal savings bank to settle allegations that the bank violated the EFTA and Regulation E by failing to enter some stop-payment orders after account holders had asked the bank to stop payment on preauthorized electronic transfers, and by allegedly requiring consumers to contact the merchants initiating the transfers prior to implementing stop-payment orders. The CFPB also alleged that the bank did not have a mechanism to stop payment systematically on preauthorized transfers processed on debit cards. The bank paid $12 million in restitution, and a $3.5 million penalty. The last few years have also seen certain fees for stop-payment requests on recurring debit transactions challenged in consumer class cases around the country.

For more information, contact Jeremy Mandell at jmandell@mofo.com or read our Client Alert.

MOBILE & EMERGING PAYMENTS

State AGs Tell CFPB to Get Out of the Sandbox

Twenty-two state Attorneys General (AGs) submitted a scathing letter in opposition to the CFPB's proposed No-Action Letter (NAL) Policy revision and new "Product Sandbox" initiative. The CFPB's revised policy is intended to fix several shortcomings of its 2016 Policy on NALs. These shortcomings include eliminating the data sharing requirement, indicating a new openness to issuing UDAAP-focused NALs, and removing the assumption of time-limited duration. In a parallel effort, the "Product Sandbox" initiative would offer applicants approval relief (i.e., immunity from federal/state enforcement actions and private lawsuits), exemptions by order (i.e., exemptions from certain statutory provisions), and No-Action relief. In their opposition to the proposal, the AGs cite two primary grievances: a lack of statutory authority for the CFPB to grant such sweeping immunities, and a failure to follow the formal rulemaking requirements of the Administrative Procedures Act.

For more information, contact Jeremy Mandell at jmandell@mofo.com or read our Client Alert.

Innovate to Keep Up

The Conference of State Bank Supervisors (CSBS) announced its decision to implement a number of recommendations from its FinTech Industry Advisory Panel with the goal of streamlining the multistate licensing experience while improving financial supervision. CSBS took recommendations from a variety of prominent FinTech companies, including payments companies and online lenders, and will implement 14 recommendations. Notably, CSBS will develop a 50-state model law to license money service businesses, create a standardized call report for consumer finance businesses, build an online database of state licensing guidance, and expand the use of the Nationwide Multistate Licensing System (NMLS). The initiative comes as part of CSBS's larger Vision 2020, and signals the increased willingness of state regulators to adapt their practices to stay competitive with innovation and stay ahead of federal regulation.

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

Reports of a Divergent Regulatory View

According to news reports, the Federal Reserve might be hesitant to grant access to its payment and settlement services for FinTech firms chartered under the OCC's special purpose national bank charter. Some of the regional Federal Reserve Bank presidents fear that FinTech firms will not be subject to the same level of regulatory scrutiny as traditional banks, even if they are chartered by the OCC. As for the fate of the FinTech charter itself, the OCC recently admitted in a court filing that the question of its legal authority to charter non-depository firms under the National Bank Act merits a legal decision, but that the CSBS's challenge to the FinTech charter "must wait" since it is premature and failed to state a claim. That time may come soon, with the OCC hoping to issue its first special purpose national bank charter in the first quarter of 2019.

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

MORTGAGE & FAIR LENDING

Servicemember Settlement

On February 6, 2019, the DOJ announced a $750,000 settlement with a mortgage company to resolve claims that the company violated the SCRA by unlawfully foreclosing on six servicemembers' homes. The agreement requires payment of $125,000 to each of the six servicemembers, and requires the company to provide SCRA training to employees and to notify the DOJ of future complaints regarding servicemembers' rights. The settlement

demonstrates that even a relatively small number of errors can, in the SCRA realm, bring financial and reputational risk.

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

That's Fair

In December, the CFPB issued its sixth Fair Lending Report. The Report highlighted one ECOA and one HMDA enforcement action, as well as the referral of 11 ECOA matters to the DOJ. The CFPB states that its 2017 fair lending priorities were redlining, mortgage and student loan servicing, and small business lending. Fair lending priorities were based on consumer complaints; tips and leads from advocacy groups, whistleblowers, and government agencies; supervisory and enforcement history; and the CFPB's own data analysis. On the exam front, the CFPB notes that it found weaknesses in fair lending compliance monitoring and data quality issues at several institutions.

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

Report Cards Are in for Ability to Repay and Mortgage Servicing Rules

There aren't any A-pluses — or any specific cost-benefit analyses for that matter — but the CFPB's reports cards came out for the Ability to Repay and Qualified Mortgage Rule and its RESPA Mortgage Servicing Rule. The Reports were triggered by the Dodd-Frank Act's requirement that the Bureau provide an assessment of any significant rule or order within five years of the effective data. They contain detailed analysis and findings, including whether the Ability to Repay Rule had a measurable impact on delinquencies (not yet) and whether the Servicing Rules have any impact on borrowers' ability to recover from delinquencies (looks good, but improvements started before enactment). The Bureau has also expressed interest in parent teacher conferences, i.e., is requesting feedback from stakeholders and hopes to incorporate feedback into future rulemaking.

For more information, contact Kathleen Ryan at kathleenryan@mofo.com.

New Protections for Vets and Servicemembers

The benefits for veterans and servicemembers that were included in the Economic Growth, Regulatory Relief, and Consumer Protection Act (Regulatory Relief Act) are now or soon will be in effect. The new protections include additional requirements for refinancing VA home loans, protection from non-judicial foreclosure for a year after active duty (previously a temporary provision that was set to expire), special exclusions from credit reporting for VA medical debts, and free credit monitoring while on active duty.

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

Say Cheese: Mortgage Complaints in the Spotlight

The Mortgage Complaint Snapshot for January shows high-level trends over the last 24 months for CFPB complaints focusing on mortgage complaints. Good news: complaints are down approximately 15 percent year-over-year. Bad news: the complaints keep on coming. The most common complaints concerned trouble during the payment process and struggling to pay mortgages. Iowans had the greatest percentage increase in mortgage complaints year-over-year between 2017 and 2018, and Utah residents had the greatest percentage decrease during the same period.

For more information, contact Kathleen Ryan at kathleenryan@mofo.com.

Can I Get Some Privacy Here?

The CFPB announced final policy guidance on the loan-level HMDA data it will make available to the public later this year. The CFPB made some modifications to protect consumers' privacy, including the exclusion of identifying data such as property address and mortgage applicants' credit scores and disclosing ranges rather than specific values for an applicant's age, loan amount, and the number of units in the dwelling. The CFPB has indicated that it will conduct a separate notice-and-comment rulemaking to incorporate any modifications of HMDA data into the text of Regulation C, which will determine the HMDA data that will be disclosed in future years.

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

Just the FAQs

The CFPB issued the first answers to frequently asked questions for the TRID rules, more than three years after the rules took effect. The FAQs clarify a creditor's obligation to provide a new three-day waiting period along with a corrected Closing Disclosure (CD) when a term previously disclosed has changed, how creditors may use model forms that do not reflect the CFPB's 2017 amendments to the Rule, and the impact of a recent TILA amendment to the requirement for corrected disclosures. The FAQs were posted without advance notice and comment, signaling that perhaps the CFPB will dispense with lengthy processes when providing written guidance in this context.

For more information, contact Kathleen Ryan at kathleenryan@mofo.com or read our Client Alert.

OPERATIONS

Proposed Reg Relief, Volcker Rule

The federal banking agencies released a proposal to conform the Volcker Rule implementing regulations to the statutory amendments provided under Sections 203 and 204 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "Regulatory Relief Act"). As a practical matter, the proposal would not change the way the Volcker Rule is currently administered, because the relevant provisions of the Regulatory Relief Act were effective upon enactment. Nonetheless, consistent with the Regulatory Relief Act, the proposal would amend the Volcker Rule regulations in two respects: first, the proposal would incorporate the Regulatory Relief Act's exclusion of certain community banks from coverage of the rule; and second, the proposal would incorporate the Regulatory Relief Act's provision alleviating the restrictions on banking entities using the same name as hedge funds and private equity funds. Comments on the proposal are due by March 11, 2019.

For more information, contact Marc-Alain Galeazzi at mgaleazzi@mofo.com or read our Client Alert.

Proposed Reg Relief, Stress Tests

The federal banking agencies proposed rules amending their respective stress testing rules to align with the requirements imposed by Section 401 of the Regulatory Relief Act. Among other things, the proposed rules would (1) revise the minimum dollar threshold for banks to conduct stress tests to $250 billion, from $10 billion; (2) revise the frequency by which certain banks would be required to conduct stress tests; and (3) reduce the number of required stress testing scenarios from three to two. The proposed rules would also make other conforming and technical changes to the stress testing rules, including changes that were previously proposed, prior to the enactment of the Regulatory Relief Act. The comment periods on the proposed rules closed in mid-February.

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

Proposed Reg Relief, Capital and Liquidity Thresholds

The federal banking agencies published a proposal that would establish risk-based categories for determining the applicability of requirements under the regulatory capital rule, the liquidity coverage ratio rule, and the proposed net stable funding ratio rule for large U.S. banking organizations (i.e., U.S. banking organizations with more than $100 billion in total consolidated assets). Specifically, the proposal would establish four categories of standards and apply tailored capital and liquidity requirements to each category. The categories would be based on a variety of factors, including asset size, cross-jurisdictional activity, off-balance-sheet exposures, reliance on short-term wholesale funding, and other risk factors. The comment period on the agencies' proposed framework closed in January.

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

Agencies Finalize Phase-In for CECL Methodology

The federal banking agencies issued a final rule providing an option to phase in over three years the day-one regulatory capital effects of the "Current Expected Credit Losses," or CECL, methodology. The final rule follows the FASB's June 2016 update to the accounting standards for credit losses, which included the CECL methodology. The CECL methodology replaces the existing incurred loss methodology for certain financial assets. The federal banking agencies have committed to monitoring the impact of CECL adoption during the phase-in period. The agencies' final rule also revises other related rules to reflect the CECL methodology and the updated accounting standards. The final rule will take effect April 1, 2019; however, banking organizations may choose to adopt the CECL methodology as of the first quarter of 2019.

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

PREEMPTION

The Great Divide

As our loyal readers have read in past Reports, federal courts in California are deeply divided over which charter governs preemption analysis when a loan is originated by an entity with one charter (e.g., a federal thrift) and transferred to an entity with another charter (e.g., a national bank) at some point before the borrower files suit. The trend continues with two recent decisions from the Northern District of California. *Compare McShannock v. JPMorgan Chase Bank*, No. 18-cv-01873-EMC, 2018 U.S. Dist. LEXIS 207262 (N.D. Cal. Dec. 7, 2017) *with Fowler v. Wells Fargo Bank, N.A.*, No. 18-cv-01254-MMC, 2018 U.S. Dist. LEXIS 194423 (N.D. Cal. Nov. 14, 2018). The *Fowler* court found that HOLA preemption "travel[s] with the loan," relying on, among other things, HOLA's intent to preserve the ability of federal thrifts to sell mortgages under a uniform federal system. 2018 U.S. Dist. LEXIS 194423, at *3-6. The *McShannock* court found that preemption travels with the lender because HOLA preemption would "run afoul" of the consumer protection purpose of HOLA, and the defendant bank failed to submit any evidence that applying HOLA preemption was

required for the stability of the secondary market. 2018 U.S. Dist. LEXIS 207262, at *17-26.

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

You Can Cure If You Want To

Is a state statute requiring lenders to provide a 15-day cure period for delinquent credit card debt preempted as applied to a national bank? Not according to a federal court in Wisconsin. *Boerner v. LVNV Funding LLC*, No. 17-CV-1786-JPS, 2019 U.S. Dist. LEXIS 2952 (E.D. Wis. Jan. 8, 2019). The court relied on the savings clause in the OCC regulations indicating that state debt collection statutes are an example of laws that are "not inconsistent with the non-real estate lending power of national banks." 12 C.F.R. § 7.4008(e)(4). The court refused to credit a determination by the state banking regulator that the statute was preempted because the determination was made with respect to a different set of parties.

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

HEA and TILA Don't Help Student Loan Servicer

A federal court in Pennsylvania rejected a student loan servicer's arguments that the Higher Education Act and TILA preempted state-law claims based on the servicer's alleged steering to less favorable mitigation options, alleged failure to disclose deadlines for return of recertifications required to maintain a particular mitigation option, alleged failure to disclose impact of paying ahead on timing of cosigner releases, and alleged payment processing errors. *Pennsylvania v. Navient Corp.*, No. 3:17-CV-1814, 2018 U.S. Dist. LEXIS 212093 (M.D. Pa. Dec. 17, 2018). The court found that the HEA provision preempting state law "disclosure requirements" applied only to claims based on "highly prescribed standardized forms, rather than the affirmative misconduct alleged in the instant matter." *Id.* at *48. The court found that conflict preemption did not apply either, declining to follow Department of Education guidance on the preemptive effect of the HEA issued after the case was filed. Finally, the court rejected the servicer's argument that TILA preempted the State's claims, because, among other things, the TILA implementing regulations specify that state laws imposing more detailed disclosure requirements do not conflict with and therefore are not preempted by TILA.

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

An Argument Too Far

A New York federal court found that a state-law usury claim based on interest assessed by a national bank before the debt was sold to a non-chartered entity was preempted by HOLA. *Cole v. Stephen Einstein & Assocs., P.C.*, No. 6:18-cv-06230 EAW, 2019 U.S. Dist. LEXIS 18383 (W.D.N.Y. Feb. 5, 2019). The court rejected the plaintiff's argument that the Second Circuit's *Madden* ruling applied, finding *Madden* applies only to interest assessed by a non-chartered entity after the loan is transferred from a federally chartered entity. Here, the court explained, it was a federal thrift that assessed the challenged interest, and state usury law is preempted as to federal thrifts. The court further explained that the usury statute also did not apply because plaintiff's debt had been charged off and all past interest had become part of the principal balance defendant was seeking to collect.

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

PRIVACY

Can We Talk?

The California Attorney General (AG) has been holding a series of public forums regarding the California Consumer Privacy Act. A range of issues has been raised at the forums, including concerns about responding to and verifying opt-out requests, and clarifications of key definitions, such as the definition of "consumer" (e.g., that the apparent legislative intent was to focus on *customer* or traditional consumer privacy and not *employee* privacy). At the public forums, the California AG's office has been listening, but not responding to or commenting on statements made by industry and consumer representatives. Transcripts of the forums are available on the AG's website. In addition, the California AG has made available presentation slides for the forums, indicating that proposed rules will be published in the fall of 2019, and that there will be a period for public comment and additional public hearings after proposed rules are published.

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

About Face

At the end of 2018, the risks to businesses from the Illinois biometric privacy law (BIPA) seemed likely to recede when a district court ruled that alleging actual harm caused by a BIPA violation was a requirement for Article III standing. *Rivera v. Google LLC*, No. 16 C 02714, 2018 U.S. Dist. LEXIS 217710 (N.D. Ill. Dec. 29, 2018). In this regard, BIPA requires that a business provide notice and obtain

consent prior to collecting or otherwise obtaining biometric data from individuals (e.g., fingerprints), and provides a private right of action for any "person aggrieved" by a violation of the law. In late January this year, however, the Supreme Court of Illinois ruled that an allegation of a bare violation of BIPA is sufficient to allege standing under Illinois law. *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186.

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

AG Breach Settlements Continue

More than five years after a point-of-sale payment card breach, a retailer entered into a settlement with the Attorneys General of 43 states and the District of Columbia. According to the Illinois Attorney General, the breach involved the compromise of approximately 370,000 payment cards. Meanwhile, a company that processes payments for rental and vacation properties recently agreed to a $155,000 settlement with the Massachusetts AG. The Massachusetts AG alleged that the company accidentally removed password protections from publicly viewable websites, which made pages containing bank account numbers, Social Security numbers, and driver's license numbers viewable on the Internet for more than a year. According to the Massachusetts AG, the "company broke the law by failing to take immediate action when consumers' personal information was at risk."

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

More from Massachusetts

Amendments to the Massachusetts data breach law were signed into law in January 2019 and will take effect on April 11, 2019. As part of these amendments (Chapter 444 of the Acts of 2018), a breach notice required by the Massachusetts law must inform consumers that there is no charge for obtaining a security freeze and include an offer of 18 months of no-cost credit monitoring services if the breach involves Social Security numbers. In addition, while notice is still required as soon as practicable and without unreasonable delay, under the amended law, notice may *not* be delayed on grounds that the total number of Massachusetts residents affected has not yet been ascertained. In addition, the Massachusetts law's requirements for notice to the Massachusetts AG and Office of Consumer Affairs and Business Regulations were expanded to require that such notice include additional details, such as the person responsible for the breach (if known), the type of personal information compromised, and a sample copy of the notice sent to consumers.

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

The Long Arm of the GDPR

France's data protection authority (DPA) levied a €50 million fine against Google for allegedly violating the GDPR's transparency, information, and consent requirements in deploying targeted advertisements. The fine — the largest fine under GDPR to date and the first involving a U.S. technology company — sheds additional light on the DPA's GDPR enforcement priorities and practices. The DPA's investigation was triggered by complaints alleging that Google "forced consent" by users of Android-powered mobile devices to Google's entire privacy policy and terms of service before using the Android device, and that Google lacks a legal basis to process users' personal data, particularly as it relates to ad personalization. Of note, the DPA determined that it has jurisdiction to handle these complaints, despite the fact that Google maintains its EU headquarters in Ireland, because, among other things, Google's Irish establishment "did not have a decision-making power on the processing operations" related to its Android operating system and thus could not be considered Google's "main establishment" in the EU.

For more information, contact Alex van der Wolk at avanderwolk@mofo.com or read our Client Alert.

ARBITRATION

Supreme Court Rejects "Wholly Groundless" Exception to Arbitrability

A unanimous Supreme Court reversed a Fifth Circuit decision and held that when the issue of arbitrability is delegated to the arbitrator, the arbitrator must decide issues of arbitrability, even if the Court thinks the motion to compel arbitration is "wholly groundless." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). The Supreme Court rejected policy and efficiency arguments in support of a "wholly groundless" exception to arbitrability, which would have permitted courts to determine that arbitration of certain claims was not permitted under the parties' agreement, even if issues of arbitability were delegated to an arbitrator. The Court found that a "wholly groundless" exception was not contemplated by the text of the FAA.

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

You Clicked It, You Agreed to It

AT&T successfully moved to compel arbitration against former employees bringing a putative age-discrimination suit. *Horowitz v. AT&T Inc.*, No. 3:17-cv-4827-BRM-LHG, 2019 U.S. Dist. LEXIS 60 (D.N.J. Jan. 2, 2019). AT&T sent an email to employees with a link to the arbitration agreement and the option to opt out within a given time

frame. The employee plaintiffs acknowledged clicking the link, but argued that this action was not sufficient to indicate agreement. The court disagreed, finding that by clicking on the link, and then failing to opt out within the time frame, the employees had agreed to arbitrate their claims.

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

Arbitration Nation?

The Ninth Circuit declared that "we have become an arbitration nation" in a decision affirming the trial court's ruling vacating an arbitration award. *ASPIC Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1169 (9th Cir. 2019). After noting the increasing frequency of arbitration awards, the court explained that trial courts "must intervene" when an arbitrator "disregards the plain text of a contract without legal justification simply to reach a result that he believes is just." *Id.* Here, the court agreed with the trial court that the arbitrator had expressly refused to enforce material provisions of the parties' subcontract on grounds that the contractual requirements were not reasonable.

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TCPA

No Cert for You!

A Connecticut federal court rejected a bid to certify a class of motel business owners and employees in a TCPA action against the defendant because it "would have to determine whether each of the several thousand potential class members consented to receive the Fax" at issue. *Gorss Motels, Inc. v. AT&T Mobility LLC*, No. 3:17cv403 (JBA), 2019 U.S. Dist. LEXIS 24726, at *14-15 (D. Conn. Feb. 14, 2019). To defeat class certification, the defendant pointed to "a variety of potential sources of individual consent," including wireless customer agreements and franchisee agreements with potential class members. *Id.* at *15. Based on that evidence, the court concluded that the determination of individual consent would require "individualized, fact based 'mini-trials' for each potential class member." *Id.*

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

Platform Providers Can Be Liable Too

A Nevada district court refused to dismiss a putative TCPA class action against a cloud-based communications platform, based on allegations that the defendant's clients sent marketing text messages to plaintiffs after representing that they would not do so. *Bauman v. Saxe*, No. 2:14-cv-01125-RFB-PAL, 2019 U.S. Dist. LEXIS 23351 (D. Nev. Feb. 13, 2019). Although defendant did not initiate the texts, plaintiffs alleged that defendant "took steps necessary to send the automated text messages," knowingly allowed the clients to use the platform for automated texts, and "actively helped [them] bypass spam filters." *Id.* at *9. In finding that plaintiffs sufficiently stated a claim, the court relied on the FCC's clarification that "text broadcasters can be liable for TCPA violations" based on an analysis of the "totality of the facts and circumstances surrounding the placing of a particular call." *Id.* at *8.

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Subclasses to Resolve Consent?

On a class certification motion, a Nevada district court refused to certify a proposed TCPA class that would have included "some individuals who never received phone calls or texts from the defendants." *Bauman v. Saxe*, No. 2:14-cv-01125-RFB-PAL, 2019 WL 157923, at *2 (D. Nev. Jan. 10, 2019). After narrowing the class definition, the court addressed defendants' arguments that differing issues of proof of consent that varied by class member weighed against certification. According to the court, subclasses were "an appropriate way to resolve the consent issue." *Id.* at *3. Based on the FCC's 2013 order requiring that prior consent be given in writing and defendants' argument that some class members provided signed consent, the court created four subclasses dividing the class both chronologically and based on whether a class member signed a written or electronic release.

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BSA/AML

Innovate with Prudence

The federal banking agencies issued a [joint statement](#) describing their support for certain "innovative approaches" to BSA/AML compliance. In the statement, the agencies expressed their commitment to continued engagement with the private sector and other interested parties, but cautioned that banks should adopt and implement innovative approaches only after prudent evaluation, and must continue to meet their compliance obligations notwithstanding the development of new technologies or approaches. The statement by the agencies is the [second](#) in recent months concerning innovation with respect to BSA/AML compliance, and it coincides with continued congressional interest in reforming the BSA framework.

For more information, contact Marc-Alain Galeazzi at mgaleazzi@mofo.com.

In a First, Broker-Dealer Hit with BSA Criminal Charges

The U.S. Attorneys' Office for the Southern District of New York announced the first-ever criminal BSA charges against, and entered into a deferred prosecution agreement (DPA) with, a Kansas broker-dealer. The charges stem from a long-running payday lending fraud orchestrated by Scott Tucker, who was convicted in October 2017 and subsequently sentenced to more than 16 years in prison. As part of the DPA, the broker-dealer stipulated to a statement of acts detailing its relationship with Tucker and numerous failures to act on red flags, including failure to file SARs. Under the DPA, the broker-dealer agreed to pay a $400,000 forfeiture penalty and enhance its AML compliance program. The broker-dealer also reached a settlement with the SEC, which included a censure and the requirement that the broker-dealer hire and work with an independent AML consultant for two years.

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BSA Enforcement Continues

We have three BSA-related enforcement actions to report in this issue. In the first action, FinCEN assessed a $14.5 million penalty against the financial institution based on allegations that the defendant "did not adequately structure its AML program to address the use of securities accounts for the purpose of moving funds rather than trading securities." FINRA and the SEC assessed concurrent penalties. In the second action, a financial services company agreed to pay FINRA $10 million to settle alleged BSA/AML violations. In assessing its own penalty, FINRA cited data deficiencies with respect to the company's AML monitoring system, staff shortages, and other issues. Third, the OCC issued a Cease and Desist Order against three federally-licensed branches of a foreign bank for BSA violations, requiring the branches to take comprehensive corrective actions and improve their BSA/AML compliance programs.

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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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