FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Fall 2020

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MORRISON FOERSTER

EDITOR'S NOTE

We join the nation in mourning the passing of Supreme Court Justice Ruth Bader Ginsburg. Over her 20-year career before appointment to the D.C. circuit court, Justice Ginsburg fought for equal rights in the workplace, among many other important issues. Justice Ginsburg knew firsthand what it felt like to lose a job because of her gender, including when Supreme Court Justice Felix Frankfurter declined to hire her as one of his clerks because he wasn't ready to hire a woman.

Justice Ginsburg's work had a profound impact on banking and access to credit for women. In a series of cases, the Supreme Court ruled in favor of Justice Ginsburg's clients, finding that discrimination on the basis of sex is unconstitutional. Her work paved the way for the passage of ECOA at a time when married women generally could not have a bank account solely in their name and when it was very difficult for women to get credit cards without male cosigners. ECOA changed the legal landscape for access to credit, making it illegal to discriminate against a borrower on the basis of sex, marital status, race, age, national origin, or receipt of public assistance. Financial independence, then, is one of the many ways in which Justice Ginsburg improved the lives of women and inspired women and men to stand up and continue fighting for gender equality.

BELTWAY

True Lender Test So Bright You Have to Wear Shades

Continuing its effort to reduce all the uncertainty, the OCC proposed to establish a "bright line" rule for establishing when national banks or federal savings associations (collectively, banks) are the "true lender" when making a loan, in the context of a partnership between the bank and a third party. The proposed rule provides that the bank has the predominant economic interest in the loan, and thus has made the loan, if the bank: (1) is named in the loan agreement as the lender as of the date of origination; (2) has conclusively exercised its authority to make loans; and (3) funds the loan as of the date of origination. The OCC received hundreds of comments, including from state AGs asking that the OCC withdraw the proposal and from industry groups seeking clarifications.

For additional information, please contact Crystal Kaldjob at ckaldjob@mofo.com or read our Client Alert.

The *Mad*[*den*]ness Continues

Three state AGs filed suit against the OCC challenging its final rule affirming the valid-when-made doctrine. The state AGs' complaint largely mirrors their comments in response to the proposed rule, including that the rule impermissibly extends NBA preemption to non-banks, the OCC lacks the authority to overturn the Second Circuit's *Madden* ruling, the OCC lacked evidence that the *Madden* ruling significantly interfered with lending, and the OCC did not follow the rulemaking requirements under the Dodd-Frank Act. Attorneys general in seven states and the District of Columbia filed a similar suit against the FDIC challenging its valid-when-made final rule.

For additional information, please contact Nancy Thomas at nthomas@mofo.com or read our Client Alert on the lawsuit against the OCC and our Blog on the lawsuit against the FDIC.

CRA Reimagined

The FRB issued an Advance Notice of Proposed Rulemaking seeking feedback on proposed modifications to CRA regulations. The FRB's stated objectives in modernizing Regulation BB are, among other things, to: (1) increase clarity, consistency, and transparency in supervisory expectations and of standards regarding CRA-eligible activities and how those activities are evaluated and assessed; (2) tailor CRA supervision to reflect differences in bank sizes and business models, local markets, needs, and opportunities; and (3) update standards given the passage of time, including delivery of banking services via mobile and the internet. The ANPR sets forth the FRB's proposed framework for evaluating CRA performance: a *Retail Test*, which includes a *Retail Lending Subtest* and a *Retail Services Subtest*, and a *Community Development Test*, which includes a *Community Development Financing Subtest* and a *Community Development Services Subtest*. Comments are due 120 days from the date of publication in the Federal Register.

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

FFIEC Principles for Loan Accommodations

The FFIEC issued a statement to set forth risk management and consumer protection principles and considerations for financial institutions in assessing additional COVID-19-related loan accommodations. The statement outlines: (1) prudent risk management practices; (2) consumer protection principles; (3) requirements for accounting and regulatory reporting; (4) internal controls; and (5) structuring and sustaining loan accommodations. For example, as part of the risk management principles, the statement provides that financial institutions should identify, measure, and monitor credit risks of loan accommodations, such as reassessing risk ratings based on the borrower's current debt level, financial condition, repayment ability, and collateral.

For more information, please contact Jeremy Mandell at jmandell@mofo.com or visit our Financial Services COVID-19 Resources site.

Forward and Backward Thinking

The FRB announced updates to its Main Street Lending FAQs for both for-profit businesses and non-profit business to clarify the regulatory expectations of the FRB and Treasury regarding lender underwriting for the Main Street Lending Program. The revised FAQs emphasize that in underwriting loans, lenders are expected to assess each potential borrower's pre-pandemic financial condition and post-pandemic prospects to determine whether to approve a loan. The revised FAQs also included details and expectations on making loans to multiple borrowers.

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

Rescind and Replace

In a bid for uniformity, the FDIC rescinded its 2013 guidance on deposit advance products (small-dollar, short-term loans or lines of credit made available to customers with deposit accounts) in favor of the Interagency Lending Principles for Offering Responsible Small-Dollar Loans, which the FDIC jointly issued with the Federal Reserve, OCC, and NCUA.

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

The Fox Can't Guard the Henhouse

Following a review of its appeals process, including in-person listening sessions, the FDIC issued a Notice and Request for Comment on its proposal to replace the Supervision Appeals Review Committee (SARC) with an independent Office of the Supervisory Appeals (OSA) and

to amend its Guidelines for Appeals of Material Supervisory Determinations. The proposed OSA would report directly to the FDIC Chairperson's Office. It would have delegated authority to consider and resolve interagency supervisory appeals and to issue material supervisory determinations. The FDIC proposes to staff the OSA with individuals with bank supervisory and examination experience, including retired bank examiners. Comments on the proposal are due October 20, 2020.

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

BUREAU

Opening the Credit Door

The CFPB is considering how it can promote access to credit and actions it can or should take to (1) prevent credit discrimination; (2) encourage responsible innovation; (3) promote fair, equitable, and nondiscriminatory access to credit; (4) address potential regulatory uncertainty; and (5) develop viable solutions to Regulation B compliance challenges. The CFPB issued an RFI requesting input on whether and how the agency should provide additional clarity on certain topics, including the CFPB's approach to disparate impact analysis, special purpose credit programs, affirmative advertising to disadvantaged groups, and ECOA adverse action notices, among other topics. According to the CFPB, the RFI is one way in which it is "continuing to explore ways to ensure nondiscriminatory access to credit as well as cutting-edge issues at the intersection of fair lending and innovation, including how innovation can increase access to credit for all consumers . . . without unlawful discrimination."

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

How the Credit Card Market Is Faring

The CFPB is examining the economic impact on small entities of the CARD Act Rules through its recently issued RFI. The goal of the economic impact review is to determine whether the Rules should be amended, rescinded, or left as is. The CFPB will consider, among other things, the continued need for the Rules; public comments; whether the Rules duplicate or conflict with other rules; and the degree to which technology, market conditions, or other factors have changed the relevant market. In the same RFI, the CFPB launched a general review of the consumer credit card market, to be incorporated into the CFPB's fifth biennial CARD Act Report. The CFPB is seeking comments generally on how the credit market is functioning and specifically as to certain topics, such as the terms of credit card agreements, the effectiveness of disclosures, and credit card product innovation.

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

COVID-19 Is Not Infecting Consumer Credit for Now

The CFPB issued a report examining the effects of the COVID-19 pandemic on mortgages, student and auto loans, and credit card accounts from March 2020 to June 2020. Based on information from its Consumer Credit Panel, a nationally representative sample of about five million de-identified credit records maintained by one of the three CRAs, the CFPB found that, despite high unemployment rates, there has not been a significant negative impact on consumer credit or delinquencies and that creditors and lenders increased payment assistance to borrowers. Credit card balances also decreased steadily through June, although there was a slight decrease in credit limits on existing credit cards and an increase in account closures by card issuers (although borrowers with high credit scores accounted for most of the account closures).

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

Eighth Time's the Charm?

As part of a broad Bureau "sweep" of investigations into mortgage lenders and brokers, the CFPB has now settled with eight mortgage companies over allegations that the companies' mail advertisements for VA-backed mortgages to military service members and veterans were deceptive. The Bureau launched its investigations in response to concerns about false and misleading advertisements identified by the Department of Veterans Affairs. Between June and September 2020, the CFPB entered into consent orders with these eight companies over allegations that the companies sent mortgage advertisements with false, misleading, and inaccurate statements or failed to include required disclosures to consumers in violation of the prohibition on UDAAPs, Regulation Z, and the MAP Rule.

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

Payday Lending Rule Version 2.0

The CFPB issued a final rule amending its 2017 payday lending rule. The 2017 payday lending rules addressed two discrete topics: (1) underwriting provisions, which imposed various requirements in connection with the underwriting of covered loans, including an assessment of borrower's ability to repay; and (2) payment provisions, which established certain requirements and limitations with respect to attempts to withdraw payments on loans from consumers' accounts. The amended final rule eliminates the underwriting provisions from the final rule, but leaves the payment provisions unaltered. In connection with the final rules, the CFPB also issued new FAQs and compliance aids.

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

Small Business Data SBREFA Outline

The CFPB took its first major step towards issuing regulations regarding small business lending data collection by issuing an outline of proposals for the Small Business Regulatory Enforcement Fairness Act (SBREFA) review panel. Section 1071 of the Dodd-Frank Act amended ECOA to require financial institutions to compile, maintain, and submit to the CFPB certain data on applications for credit for women-owned, minority-owned, and small businesses. The SBREFA outline sets out, among other things, the CFPB's proposed scope of the rule, proposals to require that covered financial institutions collect and report certain mandatory and discretionary data points, and requirements related to shielding data from underwriters and other persons at a financial institution involved in making credit determinations.

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

It's My Data and I Can Use It How I Want To

Shortly after a symposium regarding consumer access to financial records, the CFPB announced its intent to issue an advance notice of proposed rulemaking on consumer-authorized access to financial records later this year. The ANPR is expected to implement Section 1033 of the Dodd-Frank Act, which states that, subject to rules prescribed by the CFPB, a covered person must make available to consumers, upon request, the consumer's financial information in the person's control. The CFPB has indicated that, although various stakeholders have helped make consumer-authorized data access more secure, effective, and subject to consumer control, it has concerns that some current practices do not reflect the access rights in Section 1033.

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

MOBILE & EMERGING PAYMENTS

If You Release It, They Will Challenge It

The NY DFS submitted a comment letter in opposition to the OCC's proposed "True Lender" rule in early September. Echoing its opposition to other OCC initiatives, the NY DFS claimed in its comment letter that the OCC lacks the authority to issue the rule, and also states that the OCC "failed to undertake the substantive and procedural steps required before preempting state consumer protection laws." The NY DFS was joined by numerous state AGs commenting that the OCC's proposal will enable rent-a-banks "to evade state usury laws and state regulation."

Meanwhile, the CSBS, which also submitted a comment letter opposing the OCC's "True Lender" proposal, dealt a further blow to the OCC's special-purpose FinTech charter by announcing a streamlined state examination program for payments firms, to be rolled out in 2021. Although the CSBS proposal is short on detail, the announcement stresses that payments firms will be subject to one centralized exam "to satisfy all state examination requirements." CSBS and state regulators have long argued that they are better positioned than the OCC to supervise payments and technology firms.

For more information, please contact Crystal Kaldjob at ckaldjob@mofo.com or read our Client Alert on the proposed rule.

Dropping Anchor in the (Safe) Harbor in Colorado

Ending years of litigation, the Colorado AG and the Administrator of the Colorado Uniform Consumer Credit Code announced a settlement of long-running true lender lawsuits against banks and their non-bank service providers. The settlements create a safe harbor for the programs as long as they meet specified conditions, including licensing of the non-bank partners and a 36% interest rate cap.

For more information, please contact Nancy Thomas at nthomas@mofo.com and see our Client Alert.

FedNow for Real

The FRB published details on the FedNow Service, the Board's highly anticipated interbank settlement service with clearing functionality to support real-time payments. In its announcement, the Board indicated that the service will be implemented in phases, with the first phase providing core clearing and settlement features aimed at helping banks manage the transition to a 24x7x365 system. The Board also highlighted the interoperability of the FedNow service, which will use the globally accepted ISO 20022 standard, making it compatible with the existing private-sector Real Time Payments system operated by the Clearing House. In the accompanying press release, FRB Governor Lael Brainard highlighted the "critical importance" of the Board's work updating the U.S. payment system, pointing to the disbursement of COVID-19 emergency relief payments as an example of a real-life use case that would benefit from the operability of the FedNow Service. The Board anticipates launching the FedNow Service in 2023 or 2024.

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

MORTGAGE & FAIR LENDING

Oaktown Blues

The Ninth Circuit Court of Appeals ruled that Oakland, California can proceed with its lawsuit against a national bank for allegedly causing the city to lose property tax revenue. The Appeals Court held that under the Supreme Court's decision in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), Oakland's allegations were sufficient to plead that the bank's alleged discriminatory

lending practices caused the city's reduced property tax revenues, but not its increased municipal expenses.

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

Machine Underwriting

The CFPB published a blog post on the use of artificial intelligence (AI), especially machine learning (ML), in credit underwriting. The blog post addresses industry concerns about how AI and ML models interact with the existing regulatory framework, specifically the adverse action notice requirements in ECOA and FCRA.

For more information, please contact Rick Fischer at lfischer@mofo.com or read our Client Alert.

Hey, HMDA

The National Community Reinvestment Coalition and a group of community organizations filed a lawsuit against the CFPB to overturn the Bureau's 2020 HMDA rule. The plaintiffs assert that the rule "exempts thousands of financial institutions from reporting data that is key to uncovering housing discrimination." They brought suit under the Administrative Procedures Act, arguing (among other things) that the Bureau failed to provide a reasoned explanation for reversing its prior positions and that the rule is not a product of reasoned decision-making, lacks support in the record, and will undermine the ability to determine whether community housing needs are being met.

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

ECOA Explorations

The CFPB issued a July 28, 2020 request for information on whether it should provide additional guidance on a variety of topics under ECOA and Regulation B. The Bureau's overarching question is how to "prevent credit discrimination and build a more inclusive financial system." More specifically, the Bureau asked commenters to weigh in on whether it should provide clarity on questions regarding: (1) the disparate impact rule; (2) serving limited English proficiency customers; (3) special purpose credit programs; (4) affirmative advertising to disadvantaged groups; (5) small business lending; (6) whether the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (holding that the prohibition against sex discrimination in Title VII encompasses sexual orientation and gender identity discrimination) should affect how the Bureau interprets ECOA; (7) the scope of federal preemption; (8) consideration of public assistance income; (9) artificial intelligence and machine learning used in credit underwriting decisions; and (10) adverse action notice requirements. Comments are due December 1, 2020.

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

Disparate Impact, Part Deux

HUD finalized its contentious disparate impact fair lending rule, with modifications to align with the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015). The new rule revises the burden-shifting test for determining whether a practice has an unjustified discriminatory effect, adds to illustrations of discriminatory housing practices, establishes a uniform standard for determining when a housing policy or practice with a discriminatory effect violates the Fair Housing Act, and attempts to "provide[] greater clarity of the law."

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

OPERATIONS

Amended Margin Rules for Non-cleared Swaps

Five U.S. prudential regulators published in the Federal Register a final rule and an interim final rule significantly amending the margin rules for non-cleared swaps applicable to swap dealers that are subject to prudential banking regulation. Taken together, the new rules substantially limit initial margin (IM) requirements arising from such swap dealers' inter-affiliate swaps, facilitate the continuing phase-in of IM requirements, including by delaying remaining IM compliance dates, and clarify that certain amendments of legacy swaps, including to accommodate the transition away from LIBOR, may be made without jeopardizing their grandfathered status.

For more information, please contact James Schwartz at jschwartz@mofo.com or see our Client Alert.

Amendments to Volcker Rule Covered Fund Provisions

Five federal agencies finalized amendments to the Volcker Rule related to the prohibition on investing, sponsoring, and having certain relationships with "covered funds" (the "Final Funds Rule"). The Final Funds Rule is largely consistent with the agencies' proposal released on January 30, 2020, and is the final anticipated amendment in a series of recent changes to the Volcker Rule. In general, the changes effected by the Final Funds Rule can be organized into five categories: (1) codification of relief previously provided for so-called "qualifying foreign excluded funds"; (2) modifications to certain existing exclusions from the definition of a "covered fund," including exclusions for foreign public funds and loan securitizations (among others); (3) adoption of a number of additional exclusions to the definition of a "covered fund," including exclusions for venture capital funds, credit funds, and others; (4) new exemptions from the Volcker Rule's restrictions on transactions with "covered funds," *i.e.*, the "Super 23A provisions"; and (5) revisions related to the determination of a banking entity's "ownership interest" in a covered fund

to narrow the scope of interests that fall within the definition.

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

COVID-19 Interim Rules

The federal banking agencies finalized three interim final rules providing relief from certain regulatory capital requirements. First, as of January 1, 2021, the federal banking agencies are revising the definition of "eligible retained income" for purposes of the capital rule and total loss absorbing capacity (TLAC) rule, making certain limits on capital distributions more gradual. Second, effective immediately, the federal banking agencies gave banking organizations the option to delay for two years a three-year transition period for incorporating the current expected credit losses methodology (CECL) into the regulatory capital rule, stress testing rules, and regulatory disclosure requirements. Third, as of October 1, 2020, the federal banking agencies finalized an interim final rule reducing the community bank leverage ratio to 8% through 2020, with a staged increase to 8.5% through 2021, and back to 9% for 2022 and beyond. The interim final rule also softens the two-quarter grace period for banks that fall below these thresholds.

For more information, please contact Mark Sobin at msobin@mofo.com.

PREEMPTION

Madden Mitigation

Two district courts held that the National Bank Act preempted claims that affiliates of national bank credit card issuers violate state usury laws in continuing to charge interest at the rate assessed by the national bank after sale of the credit card receivables to the affiliates. *Peterson v. Chase Card Funding, LLC*, No. 19-cv-00741, 2020 WL 5628935 (W.D.N.Y. Sept. 21, 2020); *Cohen v. Capital One Funding, LLC*, No. 19-cv-3479, 2020 WL 5763766 (E.D.N.Y. Sept. 28, 2020). Both cases involved the sale of credit card receivables by a national bank to an affiliate non-bank special-purpose subsidiary and then to a single-purpose entity for securitization. The courts found that state usury laws were expressly preempted by the NBA and implied preemption, including based on the OCC's recent Permissible Interest Rule that reaffirms valid-when-made.

The courts found that their rulings were consistent with *Madden*, which they found turned on the fact that the national banks sold the loans without retaining any interest in them. In contrast, here, the national banks retained ownership of the accounts and determined the challenged interest rates.

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

Charter Confusion Clarified

Loyal readers will recall the conflicting rulings by district courts on which charter applied to loans originated by a federal thrift and then transferred to a national bank. The Ninth Circuit has finally weighed in, finding HOLA preemption applies to loans originated by federal thrifts even if the complaint challenges actions taken by a national bank after transfer of the loan. *McShannock v. JPMorgan Chase Bank, N.A.*, No. 19-15899, 2020 WL 5639700 (9th Cir. Sept. 22, 2020). The court then held that the California law requiring payment of interest on escrow accounts was preempted by HOLA and OTS regulations. The court explained that "*Lusnak*'s holding that preemption did not apply [to the same statute] under the NBA's standard [] says little about whether preemption applies under HOLA's less onerous [preemption] standard." *Id.* at *8.

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

Whistle a Non-preempted Tune

A federal court in Minnesota found the NBA does not preempt a state-law whistleblower claim. *Bowen v. U.S. Bank Nat'l Ass'n*, No. 19-cv-2683, 2020 WL 3429698 (D. Minn. June 22, 2020). The national bank argued that the state law conflicted with the "dismiss-at-pleasure" clause in the NBA. The court rejected the argument, finding the NBA provision addressed only fixed-term employment contracts and the state law substantively mirrors the federal whistleblower laws, which are not preempted.

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

PRIVACY

It's Official

The California AG's final regulations implementing the CCPA were approved by the California Office of Administrative Law (OAL) on August 14, 2020, taking effect immediately. The OAL made some minor changes to the regulations during its review process, including removing certain provisions that it believed were not required by the CCPA. As an example, the OAL deleted a section that would have required a business to obtain explicit consent from a consumer prior to using the consumer's previously collected personal information for a purpose materially different than what was previously disclosed to the consumer. The OAL also made what it characterized as "non-substantive" changes for accuracy, consistency, and clarity.

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

But Wait, There's More

California Governor Newsom signed into law two bills, A.B. 1281 and A.B. 713, that would amend the CCPA. A.B.

1281 would extend the CCPA's partial exemptions for personal information relating to employees and contractors, as well as for personal information obtained in a business-to-business context, until January 1, 2022, **if** Californians reject the privacy ballot initiative that would overhaul the CCPA in the November general election. If Californians instead approve the ballot initiative, the CCPA's employee and business-to-business exception would be extended to January 1, 2023, the effective date of the ballot initiative if it passes. In addition, A.B. 713 addresses the CCPA's exemptions and requirements related to patient medical information and businesses that are subject to, for example, the Health Insurance Portability and Accountability Act and California's Confidentiality of Medical Information Act.

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

Cybersecurity Sheriff Comes to Town

The NY DFS brought charges against a title insurance company alleging violations of the DFS's cybersecurity regulations. The statement of charges alleges, among other things, that the company had a vulnerability on its public-facing website that exposed "tens of millions of documents that contained consumers' sensitive personal information," such as bank account numbers, Social Security numbers, and drivers' license images. After identifying the vulnerability, the company allegedly failed to remediate it effectively and promptly. The DFS press release notes that violations of New York financial services law for a title insurance company carry penalties of $1,000/violation, and that each instance of the millions of exposed documents is alleged to be a violation.

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

A Hot Cup of Coffee

Dunkin' Brands, Inc. ("Dunkin") recently settled a lawsuit with the New York AG based on its information security practices in connection with two data breaches in 2015 and 2018. According to press reports, Dunkin disputed the AG's allegations, taking the position that it had no notice obligations under the New York breach law because no customer payment card information was involved and no customer account was wrongfully accessed. Nevertheless, under the settlement, Dunkin has agreed to pay $650,000 in penalties and costs, to provide notice to certain customers, and to "maintain a comprehensive information security program."

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

Pandemic Cybercrime

FinCEN issued an advisory "to alert financial institutions to potential indicators of cybercrime and cyber-enabled crime observed during the COVID-19 pandemic." The advisory notes risks and red flag indicators relating to the transition to remote work environments, increases in broad-based and targeted phishing campaigns relating to COVID-19 information and supplies, and business e-mail compromise schemes, "particularly targeting municipalities and the healthcare industry supply chain." FinCEN also cautions that it anticipates that instances of extortion will continue to increase in the wake of the COVID-19 pandemic and reports that "FinCEN has received numerous suspicious activity reports (SARs) involving ransomware targeting medical centers and municipalities."

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

Cybersecurity Risks – A Known Unknown

A recent report from the GAO concludes that the Department of the Treasury does not have adequate visibility into cyber risk mitigation efforts of financial institutions. The report notes that the financial services industry faces significant risks—such as social engineering, malware, and insider threats—because of its reliance on sophisticated technologies and information systems, "as well as the potential monetary gain and economic disruption that can occur by attacking the sector." The GAO found that both industry and government are taking steps to enhance the security and resilience of the U.S. financial services sector through a broad range of cyber risk mitigation efforts, but "Treasury does not track efforts or prioritize them according to goals established by the sector for enhancing cybersecurity and resiliency."

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

ARBITRATION

No "Mulligan" for Arbitration Losses in Fifth and Eleventh Circuits

The Eleventh Circuit reminded parties of the binding nature of arbitration and the limited review of arbitration rulings even if the arbitration panel made legal errors. *Gherardi v. Citigroup Global Markets, Inc.*, No. 18-13181, 2020 U.S. App. LEXIS 29683 (11th Cir. Sept. 17, 2020). After an arbitration panel awarded $4 million for wrongful termination, the employer argued the award should be vacated because the plaintiff was an at-will employee. The district court agreed, vacating the award. But the Eleventh Circuit reversed that ruling, explaining that judicial review of arbitration awards "is among the narrowest known to the law," and the losing party does not get a "mulligan in federal court." *Id.* at *2. The "sole question" for the reviewing court was whether the panel even arguably interpreted the contract, "not whether [it] got its meaning right or wrong," and win or lose, the parties "must now live with the results." *Id.* at *9, 13.

The Fifth Circuit similarly reiterated the narrow scope of review of arbitration awards. *KBFA Inv. Grp. v. FedEx Ground Package Sys., Inc.*, No. 19-51068, 2020 U.S. App. LEXIS 26955 (5th Cir. Aug. 24, 2020). The court noted that "even if the arbitrator erred, clearly erred, or grossly erred in his interpretation," the award must be upheld unless the opinion was "so unfounded in reason and fact" or completely "unconnected with the wording and purpose of the contract" as to demonstrate "an infidelity to the obligation of an arbitrator." *Id.* at *1.

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

Clutter Is Not Arbitration's Friend

The Second Circuit recently held that a website with a small font terms-and-conditions hyperlink at the bottom of the page did not provide sufficient inquiry notice of an arbitration provision. *Arnaud v. Doctor's Assocs., Inc.*, No. 19-3057, 2020 U.S. App. LEXIS 29504 (2d Cir. Sept. 15, 2020). The court found that a reasonable user would not have known that by clicking "I'm in" to take advantage of a coupon, she also was agreeing to the Terms and Conditions, which included an arbitration agreement. In light of the relative clutter of the webpage, the hyperlink was not conspicuous and did not include any language indicating that the user was consenting to anything other than the coupon.

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

TCPA

Autodialer Expansion

The Sixth Circuit held that a number-storing system that also placed calls qualified as an autodialer, or ATDS. *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567 (6th Cir. 2020). Although the system only created calling lists and did not use a random or sequential number generator, the court held that the system qualified as an ATDS under the ambiguous definition of that term in the TCPA. The Sixth Circuit joined the Ninth and Second Circuits in this broad interpretation of an ATDS. The court rejected the conflicting interpretation of the Seventh and Eleventh Circuits as "too labored and problematic." *Id.* at 573.

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

Que RICO?

The Eastern District of Pennsylvania recently dismissed a civil RICO case against a "professional plaintiff" with a history of bringing TCPA lawsuits. *Jacovetti Law, P.C. v. Shelton*, No. 2:20-cv-00163, 2020 WL 5211034 (E.D. Pa. Sept. 1, 2020). The suit alleged the defendant filed frivolous litigation in an attempt to extract settlement awards. *Id.* at *1. The court explained that the individual's conduct "might be unseemly," but the plaintiff had not demonstrated that the individual "intend[ed] to cheat or defraud anyone—[a]t best, they have alleged that James Everett Shelton has turned enforcement of the Telephone Consumer Protection Act into a business and that he takes pecuniary considerations into account when he decides who to sue." *Id.* at *1, 3.

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

Does One Text Suffice in Texas?

Federal courts in Texas appeared to reach inconsistent conclusions about whether receipt of one unsolicited text satisfied the injury-in-fact requirement for Article III standing. *Shields v. Dick*, No. 3:20-CV-00018, 2020 WL 5522991, at *4 (S.D. Tex. July 9, 2020); *Cunningham v. Radius Global Solutions LLC*, No. 4:20-CV-00294, 2020 WL 5518073, at *1 (E.D. Tex. Sept. 14, 2020). One court found one text was sufficient based on planntiff's alleged "laundry list of harms" resulting from the text, including privacy invasion/nuisance, deprivation of his cellphone, depletion of his battery, and "waste [of] precious time." *Shields*, 2020 WL 5522991, at *4-5. The other court reached the opposite result because unlike a call,"[i]t only takes one glance at a text message to recognize it is for an extended warranty for a car you have never owned or a cruise you have won from a raffle you never entered." *Cunningham*, 2020 WL 5518073, at *4.

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BSA/AML

BSA/AML in the Enforcement Crosshairs

The federal banking agencies issued a joint statement on how the agencies determine whether to bring BSA/AML enforcement actions. The joint statement updates and replaces prior guidance from 2007. It addresses how the agencies evaluate components of a BSA/AML compliance program, as well as the agencies' policy for issuing cease-and-desist orders (CDOs). The agencies are required to issue CDOs when depository institutions or credit unions fail to: (1) establish and maintain adequate AML programs; or (2) correct deficiencies previously brought to the institution's attention by its regulator. The joint statement confirms that isolated or technical violations will generally not result in a CDO.

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

Enforcement Focus, Take 2

Following release of the joint statement on BSA/AML enforcement, FinCEN issued a related statement on its approach to BSA enforcement. The statement lists the administrative actions available to the agency. It also

identifies a range of factors that FinCEN may consider in evaluating BSA violations, including the quality and extent of the institution's cooperation with government, and the systemic nature of the violations. In the associated press release, FinCEN Director Kenneth Blanco emphasized that the statement is intended to lend transparency and that the agency is looking to cooperate with the industry to protect the financial system and national security, not to engage in "gotcha" enforcement.

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

Prominent Public Figure Protection

The federal banking agencies issued a joint statement to clarify the BSA due diligence requirements relating to politically exposed persons (PEPs). Although PEP is not defined in the BSA and its implementing regulations, the statement explains that the term refers to a foreign individual entrusted with a prominent public function, along with close associates and family members. Depending on the circumstances, a financial institution's relationship with foreign officials may pose significant money laundering and national security risks. The statement clarifies that there is no regulatory requirement or supervisory expectation for financial institutions to have additional or unique due diligence steps for PEPs, but due diligence on PEPs should be commensurate with risk.

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

No Falling Through the Cracks

FinCEN issued a final rule setting certain minimum BSA/AML compliance standards for banks that lack a federal functional regulator, such as private banks, non-federally insured credit unions, and certain trust companies. These entities must comply with certain BSA obligations, such as filing suspicious activity and currency transaction reports, and the rule mandates that they also comply with customer identification and beneficial ownership requirements. Entities subject to the rule will have 180 days from the date of publication to comply. FinCEN is required to coordinate with the applicable federal agency in prescribing customer identification program requirements, but FinCEN issued this rule under its sole authority because no other federal agency has comparable authority over the entities subject to this rule.

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

FinCEN Seeks Comments on Improving AML Program Effectiveness

FinCEN issued an Advance Notice of Proposed Rulemaking (ANPR) seeking comments on how to improve BSA/AML compliance program effectiveness. FinCEN seeks information about: (1) the assessment and management of risk, based on the institution's risk profile and national AML priorities; (2) assuring and monitoring compliance with BSA recordkeeping and reporting requirements; and (3) the reporting of information with a high degree of usefulness to the appropriate governmental authorities. The ANPR also requests comments on whether the regulations should contain explicit risk assessment requirements and whether the Director of FinCEN should issue a list of AML priorities on a regular basis.

For more information, please contact Marc-Alain Galeazzi at mgaleazzi@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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BSA/AML Report
Marc-Alain Galeazzi

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