FINANCIAL SERVICES REPORT

Quarterly News, Winter 2020

Award Winning Newsletter

IN THIS ISSUE

MOFO METRICS

25.4	Total actual cost of the Apollo program from 1960–73, in billions of dollars
152	Total cost of the Apollo program in 2019 dollars, in billions of dollars
21.5	2019 NASA budget, in billions of dollars
0.47	2019 NASA budget as a percentage of the total 2019 U.S. budget
4.41	1966 NASA budget as a percentage of the total 1966 U.S. budget
250	Cost of ticket for private space travel on Virgin Galactic spaceship, in thousands of dollars
12	Cost of astronaut space suit, in millions of dollars
280	Weight of astronaut suit, in pounds

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EDITOR’S NOTE

Happy post-election, post-socially-distanced Thanksgiving, and pre-New Year’s newsletter. Banks, non-banks, and FinTechs can look forward to eight days of announcements from the Biden transition team with their latkes and jelly donuts, as well as speculation about who will be appointed as the new CFPB Director in their stockings. What’s coming? The better question is, what *isn’t* coming, once the new administration hits its stride? Hunker down and get ready.

Those of us who work for or with banks, non-banks, and FinTechs can look forward to more juggling of Zoom school and Zoom work, more desperate attempts to train our pandemic pets, and more masks and stretchy pants in our futures. How many different streaming services does one family that is sheltering-at-home need? I don’t know; the number is still climbing in my house. Hiking, bike rides, sourdough starter, winter gardens, crossword puzzles, board games, *Animal Crossing*, movie marathons, learning to knit—yeah, done that, now what?

For one thing, you can catch up on all the financial services news with reports on Beltway, Bureau, Privacy, Operations, Mortgage, TCPA, BSA/AML, and more. Enjoy the holidays and we wish all of our readers a happy and healthy New Year!

BELTWAY

Codification of Clarification

The federal banking agencies jointly proposed a rule to codify their September 2018 Interagency Statement Clarifying the Role of Supervisory Guidance. The 2018 Statement provided, among other things, that (i) supervisory guidance "does not have the force and effect of law"; (ii) the agencies "do not take enforcement actions based on supervisory guidance"; and (iii) the agencies would not criticize supervised entities for violations of supervisory guidance. The proposed rule follows a petition filed by the American Bankers Association and Bank Policy Institute requesting codification of, and clarifications to, the 2018 Statement. The proposed rule codifies the 2018 Statement and clarifies that supervisory criticisms (1) would not be based on violations of or non-compliance with supervisory guidance and (2) should be specific as to practices, operations, financial conditions, or other matters that could impact safety and soundness or cause consumer harm or violations of law. However, on the basis that the agencies have differing supervisory processes and the importance of early identification of deficiency practices, the agencies rejected the petition's suggestion that MRAs, MOUs, and examination downgrades be based solely on violation of statute, regulations, or orders, or "demonstrably unsafe or unsound practice." Comments are due January 4, 2021.

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

Line in the Sand

The OCC finalized its rule adopting a "simple, bright-line test" to determine the true lender of loans originated in connection with a lender partnership. Under the final rule, a national bank or federal savings association will be considered the "true lender" of a loan between the bank and a non-bank service provider if, as of the date the loan is originated, the bank is named as the lender in the loan agreement or funds the loan. Legal challenges to the final rule are expected, including from consumer advocate groups and state attorneys general, all of whom submitted public comments voicing their opposition to the OCC's proposed rule. The final rule becomes effective December 29, 2020.

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

FRB the Tinkerer

The FRB announced adjustments to terms of the Main Street Lending Program, including: (1) reducing the minimum loan size for the borrowers from $250,000 to $100,000; and (2) adjusting the fees to encourage lending of smaller loan amounts. In addition, to help smaller businesses access Main Street loans, the FRB and U.S. Treasury issued a new FAQ for the Paycheck Protection Program clarifying that PPP loans of up to $2 million may be excluded (i.e., not considered "outstanding debt") for purposes of determining the maximum loan size under the Main Street Lending Program.

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

SBA the Tinkerer

The SBA, in consultation with Treasury, announced an interim rule to provide a "simpler" loan forgiveness application for PPP loans of $50,000 or less. The interim rule also provides additional guidance for lender responsibilities with respect to the review of borrower documentation of eligible costs for forgiveness in excess of a borrower's PPP loan amount. The interim rule became effective October 14, 2020.

In addition, on October 2, 2020, the SBA provided new procedural guidance concerning requirements for lender and SBA consent in conjunction with M&A and investment activity.

For more information, please contact Tina Reynolds at treynolds@mofo.com.

Enforcing Compliance Risk Management and IT Risk Governance

The OCC announced a consent order with a federal savings bank for allegedly failing to implement and maintain an effective compliance risk management program and an effective information technology risk governance program. The OCC alleged that these deficiencies led to violations of the Military Lending Act and the Servicemembers Civil Relief Act, among other violations. The OCC further alleged that the FSB's practices were part of a "pattern of misconduct," and required the national bank to pay $85 million in civil money penalties.

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

Bank Charter Boom

Continuing the bank charter boom (and disregard for the challenged OCC FinTech charter), after granting conditional approval in August 2018, the OCC announced earlier this year that it had presented the first FinTech company with its full-service national bank charter. And in October 2020, the OCC conditionally approved an online lender's application for a full-service national bank charter. In presenting the FinTech with its national bank charter, Acting Comptroller of the Currency Brian Brooks noted that the FinTech's opening as a full-service national bank "represents the evolution of banking and a new generation of banks that are born from innovation and built on technology intended to empower consumers and businesses."

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

BUREAU

Who's Protecting Your Confidential Information?

The CFPB issued a [final rule](#) amending the existing rules governing the CFPB's confidential treatment of information received in connection with the exercise of its authority. In promulgating the rule, the CFPB explained that it "has sought to provide the maximum protection for confidential information, while ensuring its ability to share or disclose information to the extent necessary to achieve its mission." Notably, the CFPB decided not to make a proposed change that would have expanded the scope of the Bureau's authority to share confidential supervisory information with other agencies. The CFPB also eliminated a proposed definition of "agency" that similarly would have expanded the scope of the CFPB's sharing authority.

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

Hit from All Sides

A consumer group filed a [complaint](#) in federal court seeking to overturn the CFPB's June 2020 payday lending final rule, which repealed the underwriting provisions contained in the CFPB's 2017 payday lending final rule, including a requirement that covered entities assess borrowers' ability to repay. The consumer group alleges that the 2020 final rule violates the Administrative Procedure Act and the Dodd-Frank Act, and the complaint asks the court to set aside the 2020 final rule and order the CFPB to implement the underwriting provisions of the 2017 final rule.

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

This Is Your Final (Debt Collection Rule) Notice

The CFPB published a [final debt collection rule](#) implementing the FDCPA. Among other things, the final rule creates a rebuttable presumption of non-compliance if a debt collector exceeds certain telephone call frequencies; requires debt collectors to permit opting out of electronic communications; allows debt collectors to use limited-content messages; and prohibits debt collectors from selling a debt if the debt collector knows or should know that the debt has been paid, settled, or discharged in bankruptcy. The final rule does not include proposed rules regarding disclosures that must be provided when collecting time-barred debt; however, the CFPB may finalize those rules at a later date. The final rule will become effective on November 30, 2021.

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

You've Won a NAL

The CFPB granted a [no-action letter](#) (NAL) to a national bank, providing the bank with "increased regulatory certainty" that the CFPB will not take supervisory or enforcement action against the bank in connection with its Balance Assist small-dollar credit product. The bank based its application on a NAL Template issued by the CFPB in May 2020, which provides an outline for NAL applications by Bank Policy Institute members (which include insured depository institutions) that intend to offer standardized, small-dollar credit products that follow certain guidelines. The NAL Template is part of a Bureau effort to encourage responsible small-dollar lending, particularly in light of the COVID-19 pandemic. The NAL is limited to the bank only and to the aspects of the small-dollar credit products as described in the application (and not to other aspects of the product or different products and services).

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

Time Off for Good Behavior

The CFPB issued a [policy statement](#) describing a process by which an entity under a Bureau consent order may apply for early termination of the order. Noting the "essential role" that consent orders play in the Bureau's enforcement work, the CFPB also acknowledges the "burdens" the orders may impose on institutions subject to such orders, including reporting and recordkeeping requirements. Recognizing that in "exceptional circumstances" early termination of a consent order may be appropriate, the CFPB advised that it intends to grant applications for early termination if it finds that an applicant has met certain eligibility criteria (for example, the applicant must be an entity, not subject to a court-ordered settlement, and not subject to a ban on participating in a certain industry or a consent order that involves violations of an earlier Bureau order or criminal action related to the violations) and has complied with the order's terms and conditions.

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

MOBILE & EMERGING PAYMENTS

Do You Have Access?

On November 6, 2020, the CFPB published an [Advance Notice of Proposed Rulemaking](#) (ANPR) seeking feedback from stakeholders as it develops regulations to implement section 1033 of the Dodd-Frank Act, which requires covered persons to provide consumers with access to financial records. In its [press release](#), the CFPB noted that, "[w]hile consumer access to financial records can enable the development of innovative and beneficial consumer financial products, it can also present consumer risks." The Bureau is seeking comments on nine topics, including costs and benefits of consumer data access; competitive incentives; standard-setting; access scope; consumer control and privacy; other legal requirements; data security; data accuracy; and other information. Comments on the ANPR are due by February 4, 2021.

For more information, please contact Trevor Salter at tsalter@mofo.com or read our [Client Alert](#).

Third-Party Relationships? Social Distancing May Be Required

On November 9, 2020, the Financial Stability Board (FSB) published a discussion paper on *Regulatory and Supervisory Issues Relating to Outsourcing and Third-Party Relationships*. Citing financial institutions' increased dependence on outsourcing through third-party service providers, particularly in the context of the industry's response to the COVID-19 pandemic, the paper highlights industry concerns with the concentrated nature of the third-party service provider market. The FSB warns that without appropriate safeguards in place, a single outage or service disruption at one such provider could result in systemic risks to the safety and soundness of numerous global financial institutions. In addition, the paper discusses the importance of contractual provisions on rights to access, audit, and obtain information from third parties as well as the management of subcontractors and supply chains. Comments on the discussion paper will be accepted until January 8, 2021.

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

Cryptocurrency Enforcement Framework

The DOJ Cyber-Digital Task Force published a report titled "Cryptocurrency: An Enforcement Framework." The DOJ's report highlights the emerging threats and enforcement challenges surrounding cryptocurrencies and outlines the DOJ's strategies as it moves forward with its enforcement response to this burgeoning sector. Part One of the report details threats associated with the illicit use of cryptocurrency, including crypto-transactions relating to the commission of crimes and crypto-related money laundering. Part Two focuses on the legal and regulatory tools deployed by the DOJ and various federal financial regulators to police the cryptocurrency sector. The report concludes with a discussion of cryptocurrency enforcement challenges, including the sophisticated business models of certain cryptocurrency exchanges, concealment techniques like "mixing" and "tumbling," and jurisdictional problems arising from the digital nature of the market. Though the report does not outline any new binding legal requirements, its publication indicates the increased scrutiny of this complex and prominent industry.

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

MORTGAGE & FAIR LENDING

WayBack Machine for Mortgage Servicing

The CFPB, attorneys general from all 50 states and the District of Columbia, and bank regulators from 53 jurisdictions announced a $91 million settlement with a mortgage servicer. The servicer will pay a total of $85 million to over 40,000 consumers and $6 million in civil penalties for alleged violations of state and federal unfair and deceptive acts and practices laws, RESPA, and the Homeowner's Protection Act of 1998. The regulators claim that between January 2012 and January 2016 the servicer (1) failed to honor borrowers' loan modification agreements; (2) improperly increased borrowers' modified monthly loan payments; (3) misrepresented to borrowers when they would be eligible to have their private mortgage insurance premiums canceled; and (4) failed to timely remove private mortgage insurance from borrowers' accounts, disburse tax payments from escrow accounts, and properly conduct escrow analyses for borrowers during their Chapter 13 bankruptcy proceedings.

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

HUD Up

A federal district court entered a preliminary injunction staying HUD's new disparate impact rule. *Mass. Fair Hous. Ctr. v. HUD*, No. 3:20-cv-11765, 2020 WL 6390143 (D. Mass. Oct. 25, 2020). Plaintiff seeks to vacate the rule under the APA on grounds that it is "arbitrary and capricious" and violates the notice and comment requirements. The court found plaintiff was likely to prevail on the "arbitrary and capricious" theory. *Id.* at *6–8. The order stays the October 26 effective date of HUD's Implementation of the Fair Housing Act's Disparate Treatment Standard, 85 Fed. Reg. 60288 (Sept. 24, 2020) ("2020 Rule"), enjoins HUD from enforcing the 2020 Rule, and keeps HUD's earlier rule in place until further order of the court.

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

Strike 2

The Bureau announced a settlement with a national bank for "flawed" reporting about 7,000 mortgage transactions in 2016 and 2017. The Bureau alleges that the bank violated HMDA, Regulation C, and the Consumer Financial Protection Act by failing to report accurate data about its mortgage-loan applications. The bank is already subject to a 2013 consent order with the Bureau for HMDA data reporting. It will pay an additional $200,000 civil monetary penalty in connection with the new settlement.

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

Patch It Up

The CFPB issued a final rule (the "Patch Extension Final Rule") amending its Ability-to-Repay/Qualified Mortgage Rule. The Rule extends the GSE Patch, a temporary category of QMs that was set to expire on January 10, 2021 or when the GSEs exit conservatorship, whichever comes first. The Bureau also issued an executive summary and "unofficial redline" of the final rule.

For more information, contact Joseph Gabai at jgabai@mofo.com.

OPERATIONS

Piloting Faster Payments

The FRB announced a pilot program to assist in the development of the FedNow Service, a real-time payments service in development by the Federal Reserve Banks. Financial institutions, service providers, and payment processors that are members of the FedNow Community, a community of self-identified industry stakeholders, were invited to express their interest in participating in the pilot program by November 16, 2020. Though the deadline has passed, the FRB indicated that it may open up the pilot program to additional participants in the future. The pilot program will proceed in three phases: (1) advisory; (2) testing; and (3) closed loop production. The FRB may ask participants in the pilot program to engage in discussions, review demos, and test the service, among other things.

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

Banking Agencies Finalize Rule Discouraging Investment in TLAC Debt

The federal banking agencies issued a final rule designed to limit the systemic impact of large bank failures by reducing interconnectedness among the largest banking organizations. The final rule is mostly consistent with the banking agencies' proposal published on April 8, 2019. Under the FRB's capital rules, the largest domestic and foreign banking organizations are required to maintain a minimum amount of total loss absorbing capacity (TLAC), which can include certain long-term debt instruments. The final rule discourages larger banking organizations from investing in long-term debt instruments that constitute the TLAC of U.S. and foreign global systemically important banking organizations ("TLAC Debt"). To discourage such investments, subject to exceptions and thresholds, banking organizations subject to the final rule are required to deduct investments in TLAC Debt from their regulatory capital. The final rule will be effective on April 1, 2021.

For more information, please contact Barbara Mendelson at bmendelson@mofo.com.

Minimum Net Stable Funding Ratio

The federal banking agencies finalized a rule establishing a minimum net stable funding ratio for the nation's largest banks (the "NSFR Rule"). The NSFR Rule was originally proposed in May 2016. The NSFR Rule is designed to ensure effective liquidity risk management by banking organizations by ensuring such organizations hold a minimum level of stable funding to support households and businesses at all points in the business cycle. To do this, the NSFR Rule requires certain banking organizations to maintain a one-to-one ratio of stable funding (calculated as a weighted measure of the organization's equity and liabilities) to required minimum stable funding (calculated based on the liquidity characteristics of the organization's assets, derivative exposures, and other commitments), calculated over a one-year time horizon. Governor Lael Brainard voted against the NSFR Rule, explaining in a statement that she believes the NSFR Rule went too far in weakening certain requirements relative to the proposed rule. The NSFR Rule will be effective on July 1, 2020.

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

Focus on Climate Risk

NY DFS published industry guidance for all New York State regulated financial institutions regarding the financial risks associated with climate change. The NY DFS guidance identifies the primary risks of climate change as physical risks (i.e., risks associated with destruction to the environment from severe weather events, like property damage and supply chain disruption) and transition risks (i.e., risks associated with a transition to a low-carbon economy). NY DFS expects that regulated institutions will begin to integrate financial risks associated with climate change into their governance framework, risk management processes, and business strategies. NY DFS also encourages institutions to develop an approach to climate-related financial risk disclosure. For non-depositories regulated by NY DFS, NY DFS expects such institutions to conduct a risk assessment of climate-related risks and to develop strategic plans to deal with identified risks. NY DFS noted that it is developing a strategy to integrate climate risk into its supervisory practices and will work with regulated entities to develop an appropriate framework.

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

Community Bank COVID Flexibility

The FDIC published an interim final rule (IFR) concerning applicability of section 36 of the Federal Deposit Insurance Act and part 363 of the FDIC's regulations. In general, those provisions require insured depository institutions (IDIs) that have $500 million or more in consolidated total assets to comply with certain audit and reporting requirements (additional requirements apply to IDIs with greater than $1 billion and $3 billion). Throughout 2020, the federal government established various economic stimulus programs, some of which may have resulted in temporary growth of an IDI's consolidated total assets. Through the IFR, the FDIC seeks to mitigate the regulatory burden associated with participation in these programs. Specifically, the IFR permits IDIs to determine applicability of part 363 of the FDIC's regulations with respect to fiscal years ending in 2021 based on the lesser of the IDI's consolidated total assets as of December 31, 2019 and consolidated total assets as of the beginning of its fiscal year ending in 2021. The IFR is effective on October 23, 2020 through December 31, 2020, unless extended.

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

PREEMPTION

FCRA Means What It Says

A federal court in Maine held that FCRA preempts state laws restricting when medical debts can be included in credit reports and requiring reinvestigation and removal of references to debt that is the product of economic abuse. *Community Data Indus. Ass'n v. Frey*, No. 1:19-cv-00438-GZS, 2020 WL 5983881 (D. Me. Oct. 8, 2020). The court rejected what it characterized as the state's overly narrow reading of the FCRA preemption provision, explaining that Congress intended to set uniform standards regarding information in consumer credit reports. The court also noted that Congress had considered and rejected proposed FCRA amendments to restrict reporting of certain medical debts.

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

PRIVACY

More Privacy (Law) in California

California voters approved Proposition 24, the California Privacy Rights Act of 2020 (CPRA), enacting sweeping amendments to the California Consumer Privacy Act into law. The CPRA creates a new California privacy agency, the California Privacy Protection Agency, to administer and enforce the CPRA, making California the first state with its own privacy regulator. Among its numerous changes, the CPRA will give California residents the right to request that inaccurate personal information about them be corrected, require covered businesses to include additional information in privacy notices, and impose a purpose limitation on the collection, use, retention, and sharing of consumers' personal information. Most of the CPRA's provisions will become operative on January 1, 2023, giving businesses about two years to get ready for a new and amended CCPA.

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

Also More CCPA, in the Meantime

The California attorney general issued another set of proposed modifications just two months after the CCPA's final implementing regulations were approved and took effect. The proposed modifications would, among other things, require a business that collects personal information in the course of interacting with consumers *offline* to provide an opt-out notice by an *offline method* that facilitates consumers' awareness of the opt-out right. The proposed modifications also address the submission of opt-out requests, clarify the process for submission of consumer requests to know about or request deletion of information by an authorized agent, and clarify how to handle notices to consumers under the age of 16.

For more information, please contact Christine Lyon at clyon@mofo.com or read our Client Alert.

Indiana AG to Issue Breach Rule

The Indiana attorney general proposed a significant new data breach and data security rule. The proposed rule would impose a new breach-related obligation that has never before been seen in the U.S. In particular, the proposed rule would require that a business prepare a written corrective action plan following a noticeable breach and certify to the attorney general (under penalty of perjury) that the plan has been implemented within 30 days after notifying the attorney general of the breach. This plan would be required to include, among other things, "a specific corrective plan to mitigate and prevent the continued unlawful use and disclosure of personal information." The proposed rule would also create a safe harbor from suits by the attorney general for businesses whose security programs comply with certain security standards (e.g., PCI DSS) or law (e.g., HIPAA) and that meet other requirements.

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

Data Breach Reports Are in Demand

Consumers litigating against a large bank in connection with a data security incident have continued to try to obtain additional documents relating to the bank's investigation of the incident. While plaintiffs did obtain production of a report prepared for the bank by the bank's forensic consultant, they were not successful in obtaining a report prepared by the bank's consultant that was intended to help the bank address litigation arising out of the incident. The current dispute relates to information and materials that the plaintiffs are seeking to obtain from the FRB that the bank had provided to the FRB. The FRB has asserted that the materials are protected from discovery by the examination privilege. *In re: Capital One Customer Data Sec. Breach Litig.*, No. 1:19-md-02915 (E.D. Va. Nov. 4, 2020), ECF No. 1000.

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

We Will Rock You

Anthem, Inc., entered into a settlement (an Assurance of Voluntary Compliance or AVC) with attorneys general in 43 states and the District of Columbia relating to its widely publicized 2014 data security incident. According to the AVC, the incident, which was disclosed in early 2015, affected approximately 78,800,000 individuals. As part of the settlement, Anthem agreed to a fine of $39.5 million. The AVC sets forth extensive requirements for the Anthem information security program, including that Anthem "consider and adopt where reasonably feasible the principles of zero trust architecture throughout" its network. Such principles include regularly monitoring, logging, and inspecting network traffic, "including login attempts, through the implementation of hardware, software, or procedural mechanisms that record and evaluate such activity."

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

ARBITRATION

The Ninth Circuit Digs In on *McGill*

In *Stover v. Experian Holdings, Inc.*, 978 F.3d 1082 (9th Cir. 2020), the Ninth Circuit affirmed the district court's grant of defendant's motion to compel arbitration. First, the court found that the parties' relationship was governed by the broader terms of a 2014 arbitration provision, rather than narrower terms from 2018. The court found that a visit to the defendant's website four years after the consumer canceled her subscription and where she did not see or agree to the 2018 terms was not sufficient to find the consumer was bound by the 2018 agreement. *Id.* at 1085–86. Second, the court found that by mandating arbitration to the greatest extent permitted under law, the arbitration provision was not rendered unenforceable under the *McGill* rule. *Id.* at 1087–88. Finally, the consumer did not have Article III standing to bring a claim for public injunctive relief because she had not used defendant's products in years and did not allege that she desired to use defendant's products in the future. *Id.*

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

PAGA Claims Are Still Not Arbitrable

A California Court of Appeals denied defendant's motion to compel arbitration of PAGA claims. *Olson v. Lyft, Inc.*, 56 Cal. App. 5th 862 (2020). The driver's agreement included a waiver of the right to bring a PAGA claim, which the court found to be unenforceable under *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348 (2014). The court rejected defendant's argument that *Iskanian* was no longer good law in light of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). The court reasoned that plaintiff in a PAGA action is acting on behalf of the state, which is not a party to the arbitration agreement. So the arbitration agreement cannot require arbitration of PAGA claims.

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

Circuit Split on Later-Acquired Affiliates

In an acknowledged split with the Fourth Circuit, a divided Ninth Circuit denied a motion to compel arbitration by a successor to a party that had entered into an arbitration agreement with plaintiff four years before the successor acquired that party. *Revitch v. DirectTV, LLC*, 977 F.3d 713 (9th Cir. 2020). Defendant argued that an arbitration agreement between the consumer and the predecessor entity that covered all "affiliates" was broad enough to require arbitration with the successor entity. The court rejected this argument, finding it would run afoul of the California canon against "absurd results." *Id.* at 717. The dissenting judge disagreed, noting that the express terms of the arbitration agreement include claims against "affiliates" and did not place temporal limitations on that term. *Id.* at 724–26. The dissent also noted that the "absurd results" canon cannot be read to disfavor arbitration. *Id.* at 728.

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

TCPA

Hey Hey, Goodbye

Two district courts held that the Supreme Court's ruling in *Barr v. American Association of Political Consultants*—which struck down the TCPA's exemption for calls made in connection with collecting federally backed debts—bars courts from enforcing the TCPA's "robocall" provisions ***entirely*** for the nearly five-year period between the date when Congress added the exemption in November 2015 and the Supreme Court severing it in its July ruling. *Creasy v. Charter Commc'ns, Inc.*, No. 20-1199, 2020 WL 5761117 (E.D. La. Sept. 28, 2020); *Lindenbaum v. Realgy, LLC*, No. 1:19 CV 2862, 2020 WL 6361915 (N.D. Ohio Oct. 29, 2020). A Louisiana district court reasoned that, "in the years in which § 227(b)(1)(A)(iii) permitted robocalls of one category of content (government-debt collection) while prohibiting robocalls of all other categories of content, the *entirety* of the provision was, indeed, unconstitutional," depriving the court of jurisdiction over much of the putative class action. 2020 WL 5761117, at *2. Shortly thereafter, an Ohio district court came to the same conclusion, granting defendant's motion to dismiss a proposed class action. 2020 WL 6361915, at *7.

For more information, please contact Adam Hunt at adamhunt@mofo.com.

You've Got Mail, but No TCPA Claim

The Middle District of Florida recently found that a single fax received by email was not enough to establish an injury sufficient to confer Article III standing. *Daisy, Inc. v. Mobile Mini, Inc.*, No. 2:20-cv-17-FtM-38MRM, 2020 WL 5701756 (M.D. Fla. Sept. 24, 2020). The court granted summary judgment for defendant, finding that because the fax was received by email—thereby not actually tying up a fax line—the plaintiff could allege only "an intangible harm of wasted time." *Id.* at *2.

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

BSA/AML

FinCEN Assesses First Bitcoin Mixer

FinCEN announced the assessment of a $60 million civil money penalty against the founder, administrator, and primary operator (the "Operator") of a convertible virtual currency (CVC) mixer (the "Mixer"). The Mixer acted as an exchanger of CVC by accepting and transmitting bitcoin through a variety of means. FinCEN's investigations revealed that the Operator offered its services on the darknet as a way for customers to pay anonymously for things like drugs, guns, and child pornography. FinCEN determined that the Operator had willfully failed to meet BSA requirements to register with FinCEN, implement an anti-money laundering program, maintain records, and report suspicious activities. The Operator also faces criminal charges for conspiracy to commit money laundering.

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

The OCC Updates Its Director's Toolkit

The OCC published an update to its *Director's Toolkit*, revising the *Director's Book: Role of Directors for National Banks and Federal Savings Associations* ("Director's Book") and issuing a new publication, the *Director's Reference Guide to Board Reports and Information* ("Reference Guide"). The Director's Book outlines the laws applicable to national banks and federal savings associations, the role of directors in overseeing an institution, and the role of management in operating an institution. Director responsibilities are highlighted, and the publication also explains the standards for safe and sound banking operations. The Reference Guide is a handbook with detailed information on proper oversight and provides guidance for 18 key areas, including capital planning, risk governance, and BSA/AML.

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

FinCEN Proposes Amending the Recordkeeping and Travel Rules

FinCEN released a proposed rule, requesting comment on lowering the $3,000 threshold for the Recordkeeping Rule and Travel Rule (the "Rules") to $250 for covered funds transfers that begin or end in the United States. The Rules require certain financial institutions to collect and retain transactional (and sometimes also customer) information for transfers at or above the threshold, and to share that information in the payment or transmittal order with the other financial institution(s) involved. FinCEN also proposes modifying the definition of "money" in the Rules to include convertible virtual currency. This would be the first extension of BSA regulations to explicitly cover virtual currency.

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

Treasury Issues Ransomware Advisories

In response to the rise in ransomware scams and attacks, two branches of the Treasury released advisories to assist in combating these threats. The FinCEN advisory provides information on the role of financial institutions in detecting and preventing ransomware attacks, and trends and typologies of ransoms paid, noting in particular the increasing sophistication of ransomware operations. The advisory includes red flags to look out for, e.g., a customer largely ignorant about CVC asking about or purchasing CVC may indicate the customer is a ransomware victim. FinCEN also emphasizes the importance of reporting and sharing information. The OFAC advisory addresses the sanctions risks associated with facilitating ransomware payments.

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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