FINANCIAL SERVICES REPORT

Quarterly News, Summer 2018

Award Winning Newsletter

IN THIS ISSUE

MOFO METRICS

3.5	Number of students who graduate from U.S. high schools each year, in millions
3.1	Number of teachers in the U.S., in millions
10	Percentage of students enrolled in U.S. private schools
78	Percentage of private school students in the U.S. enrolled in a religiously affiliated school
500	Average amount of their own money spent by teachers on classroom supplies per year
30	Percentage of teachers who have a second job
400	Average hours of overtime worked by teachers each year
88	Percentage of people who say a teacher had a significant, positive impact on their lives

MORRISON FOERSTER

EDITOR'S NOTE

No more pencils, no more books.

No more CFPB indirect auto lending guidance.

No more CFPB Consumer Advisory Board.

No more Volcker Rule and risk-based capital for community banks.

No more Eric Schneiderman.

It's the end of the school year, and we've seen enormous changes on the financial services regulatory landscape since our last Report. Hope you are hanging on to your seat, because there could be more to come:

No more payday lending rule?

No more disparate impact theory of fair lending liability?

No more CFPB complaint database?

Stay tuned and read on as we follow all the developments.

Before you do though, we want to tip our hats to our former colleague Andrew Smith as he takes over as the director of the FTC's Bureau of Consumer Protection. Andrew is a brilliant lawyer who takes a practical, hands-on approach to problem solving. The FTC is lucky to have him, and we will all benefit from his public service.

Enjoy your summer!

BELTWAY

The Wayback Machine

Congress passed, and on May 24, 2018, the president signed into law, the Economic Growth, Regulatory Relief, and Consumer Protection Act (S.2155). The law makes significant changes to the Dodd-Frank Act, including a relaxation of thresholds for the application of certain regulatory requirements (e.g., the Volcker Rule, mortgage underwriting standards, and stress testing).

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

FFIEC Initial Focus

As part of its review of regulations under the Economic Growth and Regulatory Paperwork Reduction Act, the FFIEC announced that it updated its Examination Modernization Project. The FFIEC started this project to identify and assess ways to improve the effectiveness, efficiency, and quality of the examination processes. After seeking input from industry stakeholders, the FFIEC plans to focus its initial efforts on four areas: (1) highlighting and reinforcing regulator communication objectives before, during, and after examinations; (2) leveraging technology and shifting, as appropriate, examination work from onsite to offsite; (3) continuing to tailor examinations based on risk; and (4) improving electronic file transfer systems to facilitate the secure exchange of information between institutions and supervisory offices or examiners.

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

Spring Progress

Following the release of its “Strategies for Improving the U.S. Payment System: Federal Reserve Next Steps in the Payments Improvement Journey” paper in September 2017, the Federal Reserve released a progress report that outlines the work that the Faster Payments Task Force has completed and next steps in the areas of (1) faster payments, (2) security, (3) efficiency, (4) cross-border payments, and (5) collaboration. For example, with respect to supporting efforts to implement “safe, ubiquitous, faster payments,” the progress report noted that next steps were to continue the Federal Reserve’s efforts to review options for settlement services to support faster payments and engage the industry for input.

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

Visions for Faster Payments

The 27-member Governance Framework Formation, which was established by the Faster Payments Task Force and facilitated by the Federal Reserve, released a draft Operating Vision for a Faster Payments Council (FPC), a proposed industry forum for collaboration, problem-solving, and decision-making to drive ubiquity in faster payment systems by 2020. The Operating Vision includes the Federal Reserve’s proposal on the FPC’s (1) guiding principles (such as openness, flexibility, and transparency) and core functions, (2) the structure and decision-making of the FPC (e.g., membership, board of directors, committees), and (3) funding of the FPC. The Federal Reserve is seeking comments from industry stakeholders on the draft Operating Vision, which are due no later than June 22, 2018.

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

BUREAU

Dear Bureau: Ten Things I Hate About You

On March 21, 2018, the CFPB requested public input on “all final rulemakings that the Bureau issued after providing notice and seeking public comment,” including its rules regarding prepaid accounts, remittance transfers, mortgage servicing, mortgage origination, and integrated mortgage disclosures. Since these comments can provide a legal basis for the Bureau to change its rules, this is an opportunity for consumers and providers to tell the Bureau how existing regulations impact delivery and consumption of financial services. Comments are due June 19, 2018.

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

Also, Ten Things I Hate About Your Inherited Authority

The CFPB published another Request for Information on March 26, 2018 requesting comment on the regulations the Bureau “inherited” from other federal agencies, including the Board of Governors of the Federal Reserve System and the Federal Trade Commission, under the Dodd-Frank Act. The Bureau seeks feedback specifically regarding whether the CFPB should issue additional regulations, specific changes the Bureau should make to inherited regulations, and identification of inherited regulations that the Bureau should not change. The Bureau is seeking feedback on areas of these inherited rules that could be streamlined to advance the statutory purposes of the consumer financial laws more effectively. Comments are due June 24, 2018.

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

An Advisory Opinion Policy That Works?

On March 28, 2018, the CFPB issued an RFI seeking feedback on the Bureau's guidance and implementation support. This is the tenth in a series stemming from Director Mulvaney's efforts to determine whether the Bureau is fulfilling its appropriate functions. The RFI seeks input on the "effectiveness and accessibility of the Bureau's guidance" and potential new forms of guidance to support regulatory implementation and compliance. Notably, this presents an opportunity for industry to help the CFPB craft a meaningful advisory opinion policy to replace the current nonbinding, no action letter policy, which is not entitled to deference from the courts. An advisory opinion policy with some teeth to it could promote innovation and certainty in consumer financial services. Comments are due June 26, 2018.

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

Now's Your Chance to Complain About Complaints

The CFPB issued yet another RFI (its twelfth in this series) on April 17, 2018, seeking feedback on its handling of consumer complaints and inquiries. The Bureau has received 1.5 million consumer complaints since it began accepting them in July 2011. Currently, the Bureau accepts complaints through its website, through government agency referrals, and by telephone, email, mail, and fax. After submitting a complaint, a consumer usually waits 15 days for a response. The Bureau accepts consumer inquiries through a single toll-free telephone number. To improve the effectiveness of the process, the Bureau seeks comments relating to the positive and negative aspects of the complaint and inquiry process, suggestions for updates or modifications to the complaint and inquiry process, and best practices for the process. Comments are due July 16, 2018.

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

Mulvaney to Congress: Take My Power, Please

The CFPB issued its semi-annual report to Congress in April detailing its activities from April 2017 through September 2017. In his notable introductory letter, Acting Director Mick Mulvaney outlined his vision for the Bureau. According to Mulvaney, the Bureau is "far too powerful, with precious little oversight of its activities." In an effort to "establish meaningful accountability for the Bureau," Mulvaney proposed four legislative changes: 1) fund the Bureau through Congressional appropriations, 2) require legislative approval of major rules, 3) ensure that the director answers to the president, and 4) create an independent inspector general. If these reforms are adopted, they will alter the structure of the Bureau far beyond Mulvaney's tenure.

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

No Quick Regulatory Fix, So Payday Lenders Sue CFPB Instead

Payday lenders sued the CFPB on April 9, 2018, in an effort to block an agency rule that lenders say would "virtually eliminate" the payday-lending industry by requiring firms to verify that borrowers can afford the debt before giving them money. The lenders attacked the "deeply paternalistic" motivations behind the rule. Republicans in Congress have already introduced legislation to prevent the rule from going into effect, but those revisions—if they happen at all—would not occur until 2019. In a May 31 joint filing, the CFPB and the payday lenders asked the court to stay the litigation while the CFPB "reconsiders" the payday-lending rule.

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

CFPB Hits National Bank with Record $1 Billion Fine

The Bureau and the OCC announced a settlement with Wells Fargo on April 20, 2018, finding that the bank violated the CFPA in the way it administered a mandatory insurance program related to its auto loans, and in how it charged certain borrowers for mortgage interest rate-lock extensions. The Bureau imposed a $1 billion fine, and the OCC a $500 million penalty, to be credited toward the Bureau's fine. In addition, Wells will remediate harmed customers and submit plans to strengthen compliance and risk management. Although the fine—the first under Acting Director Mulvaney—is the largest civil money penalty in CFPB's history, it does not set a minimum amount that Wells must pay affected customers, which is a departure from previous CFPB fines.

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

AGs to Trump: Show Bureau R-E-S-P-E-C-T

A coalition of 16 attorneys general urged the Trump administration not to weaken the Bureau's civil investigative authority. Currently, the CFPB issues civil investigative demands to gather records, documents, and policies from companies and individuals who may be violating the law and taking advantage of consumers. In an RFI issued on January 26, 2018, however, the CFPB noted that the demands place a burden on those being investigated and sought public comment on "how best to achieve meaningful burden reduction." In their letter, the attorneys general emphasized that without the ability to investigate, the CFPB could not serve its intended watchdog function.

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

CFPB Weighs In on FDCPA Notification Requirements

On April 25, 2018, the CFPB filed an *amicus* brief in the Seventh Circuit in *Lavallee v. Med-1 Solutions*. The plaintiff is suing a collection agency for violating the FDCPA because she was sent a validation notice by email instead of by regular mail. At issue in the case is whether this email validation notice satisfies the FDCPA's requirement that a debt collector provide an individual with written notice containing details about the debt. In its brief, the Bureau argued that the defendant was required to use traditional mail relying on the E-SIGN Act's framework for electronic signatures which requires an individual's consent to receive messages and information via email. Although the Bureau has not offered any clarification on electronic delivery notifications since issuing an Advanced Notice of Proposed Rulemaking in 2013, the brief indicates that the CFPB is in the process of grappling with this issue.

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

Congress Votes to Repeal Auto-Lending Discrimination Guidance

On May 8, 2018, Congress voted to repeal 2013 CFPB guidance aimed at preventing discriminatory markups by auto lenders that operate through dealerships, claiming that the CFPB exceeded its mandate. The resolution was brought under the Congressional Review Act (CRA)—the first time that the CRA has been used to nix informal guidance documents. Traditionally, the CRA allows Congress to overturn federal agency regulations within 60 days of their finalization. Because the 2013 CFPB never went through the Administrative Procedures Act process, proponents of the repeal effort argue that the clock on the CRA never started. If Congress continues to use the CRA against other agency guidance, it could mean the repeal of guidance reaching back many years.

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

MOBILE & EMERGING PAYMENTS

Branching Out from Bank Branches to FinTech

In remarks delivered at the American Bankers Association Government Relations Summit on April 24, 2018, Representative Patrick McHenry called for regulators to consider innovative means to deliver financial services while crafting reforms for the Community Reinvestment Act (CRA). McHenry, Vice Chairman of the House Financial Services Committee, has been a vocal supporter of using FinTech to expand access to capital and other financial services. "Having a branch in a neighborhood is not as powerful as . . . new ways of lending," McHenry said, pointing to the expanding use of mobile applications and online lending as innovative means to increase financial inclusion. His comments suggest the geographical assessment portions of CRA compliance examinations could be ripe for reform.

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

Stop That Screen Scraping? SIFMA Releases Data Aggregation Principles

On April 12, 2018, the Securities Industry and Financial Markets Association (SIFMA) released its data aggregation principles to help guide member firms working with data aggregators who seek access to consumer data. The SIFMA principles cover four areas: access, security and responsibility, transparency and permission, and scope of access and use. Of particular note to data aggregators who use traditional screen scraping methods, SIFMA's principles declare that customers should not have to provide account credentials to third parties and should receive assurances that the third party has adopted the same data and security standards applied to regulated financial institutions. SIFMA's principles also assert that customer information accessed by third-party aggregators should only include account data (such as holdings, balances, and transaction information) and should not include personal information.

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

Fifty Friends of FinTech: State Regulators Designate Innovation Staff Contacts

On April 10, 2018, the Conference of State Bank Supervisors (CSBS) announced that regulators from all 50 states and the District of Columbia had designated an Innovation Staff Contact within their respective offices to encourage increased outreach between regulators and the FinTech industry. State Innovation Contacts will spearhead communications with industry on a variety of topics, including money transmission, payments, lending, and non-bank regulation. The move is another step forward in CSBS's Vision 2020 Initiative, seeking to move to an integrated, 50-state licensing system by 2020.

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

Holding FinTech Accountable: GAO Releases FinTech Report

On March 22, 2018, the Government Accountability Office (GAO) released a report titled *Financial Technology: Additional Steps by Regulators Could Better Protect Consumers and Aid Regulatory Oversight*. The report assesses the benefits and risks of FinTech, regulatory oversight of FinTech firms in the United States, and initiatives implemented by other countries' regulators to encourage FinTech innovation. Based on the report, GAO made 16 recommendations related to improving interagency coordination on FinTech, addressing competing concerns on financial account aggregation, and evaluating whether it would be beneficial to adopt regulatory approaches similar to those undertaken by regulators in jurisdictions outside of the United States.

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

Cryptocurrency Crackdown Continues

Cryptocurrencies continue to dominate the headlines as increased public interest has brought heightened scrutiny from state and federal regulators. On March 16, 2018, the FTC shut down a chain referral cryptocurrency scheme, alleging in its complaint that the defendants violated the FTC Act's prohibition against deceptive acts. Meanwhile, on April 6, 2018, the SEC obtained a court order freezing $27 million in trading proceeds from a company that elevated its stock price by announcing the acquisition of a purported cryptocurrency business. The SEC alleges in its complaint that the company violated Section 5 of the Securities Act of 1933.

At the state level, on April 17, 2018, the NY AG's office announced an inquiry into cryptocurrency exchanges in an effort to increase transparency and protect investors. The NY AG sent letters and a questionnaire on virtual markets integrity to 13 virtual currency trading platforms and exchanges. The questionnaire asks the platforms to disclose information falling within six major topic areas: (1) Ownership and Control, (2) Basic Operation and Fees, (3) Trading Policies and Procedures, (4) Outages and Other Suspensions of Trading, (5) Internal Controls, and (6) Privacy and Money Laundering. Finally, the FTC announced a workshop to examine cryptocurrency scams on June 25, 2018, which is intended to bring together consumer groups, law enforcement, research organizations, and the private sector.

For more information, contact Susan Gault-Brown at sgaultbrown@mofo.com.

MORTGAGE & FAIR LENDING

On Second Thought?

HUD has announced that it will "shortly" seek public comment on whether its controversial disparate impact rule is consistent with the Supreme Court's *Inclusive Communities* decision. In *Inclusive Communities*, the Court held that disparate impact is a cognizable theory of discrimination under the Fair Housing Act. The Court declined to decide the standard for evaluating disparate impact claims, but it did provide several guideposts for "necessary" "limitations." HUD's disparate impact rule is arguably inconsistent with those limitations and other Supreme Court decisions, and the agency's announcement suggests it is now considering revising the rule to conform to Supreme Court rulings.

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

Schneiderman Swan Song

Former NY AG Eric Schneiderman recently announced a $230 million settlement with UBS over alleged "misconduct leading up to [the] financial crisis." New York's Office of the Attorney General (OAG) claims that UBS knowingly sold investors residential mortgage-backed securities that were based on inaccurate statements in prospectus supplements and/or investor presentations. OAG argues that not only did investors eventually lose money as a result, but that this "harmed countless New York homeowners" as well. The settlement includes $189 million worth of "consumer relief" and $41 million in cash to New York State.

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

I Fought the Law . . . .

After a year-long court battle, the DOJ and Minnesota mortgage lender KleinBank (no relation to Mortgage editor Angela Kleine) settled their redlining dispute. The DOJ accused the bank—which has been based in Western Minnesota for over 100 years—of expanding eastward into the "the majority white suburbs" of Minneapolis-St. Paul, while "carv[ing] out the urban areas . . . that have higher proportions of minority populations." The resulting CRA assessment area was allegedly suspiciously "horseshoe-shaped." The court recently held that the government had adequately pleaded the bank's "alleged purposeful avoidance of majority-minority areas." *United States v. KleinBank*, No. 0:17-cv-136, slip op. at 2 (D. Minn. Apr. 2, 2018). The parties quickly settled, with the bank agreeing to revise its main CRA assessment area, open a new branch office, conduct fair lending training, and invest $600,000 in a loan subsidy fund, advertising, and other outreach.

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

Holy HMDA

The FFIEC has issued "A Guide to HMDA Reporting: Getting It Right!" updated to reflect the 2015 HMDA rule's new reporting requirements. Meanwhile, 2017 HMDA data is out, covering mortgage lending activity by over 5,800 financial institutions. Current loan-level data can be downloaded from the FFIEC HMDA Platform, and each HMDA filer's Loan/Application Registers (LARs) are on the organization's HMDA Data Publication page. Key CFPB observations on the data include declines in the number of institutions, loan applications, and originations reported; an increase in lending to low and moderate income borrowers; small increases in lending to minority borrowers; and continued higher denial rates for non-white applicants. The CFPB also noted that mortgage originations by nondepository, independent mortgage companies "ha[ve] increased sharply in recent years." Tools to search and analyze the HMDA data and more information about HMDA data reporting requirements are on the CFPB's website.

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

Mass Attack

Massachusetts' Division of Banks announced a $1 million consent order with a major loan servicer over allegedly deficient loan servicing practices. The consent order requires various corrective measures, including transferring all Massachusetts consumer loans onto a new servicing platform, an audit of consumer escrow accounts, a data integrity review of consumer loan information, and a financial condition plan. It also places restrictions on the loan servicer's ability to retain new mortgage servicing rights in Massachusetts.

For more information, contact Sarah Davis at sarahdavis@mofo.com.

"Know [More] Before You Owe"

In April, the CFPB finalized an amendment to its "Know Before You Owe" mortgage disclosure rule addressing when and how lenders can pass on increased closing costs to borrowers. The original 2015 rule contained a timing restriction on when lenders could communicate closing cost increases to borrowers. That restriction had the unintended consequence of preventing lenders from charging borrowers for certain valid closing cost increases. The amendment removes that timing restriction.

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

Growing Pains

The NY DFS announced that it was fining Nationstar Mortgage $5 million for alleged violations of New York Banking Law. Specifically, the DFS claims that during a period of rapid growth at the mortgage company, Nationstar failed to timely fund loans, retain required documentation, or maintain adequate audit functions, and made payment processing, forced-place insurance, and other servicing errors. As part of a DFS consent order, the company will pay $7 million in restitution to borrowers, donate $5 million in properties or mortgage to non-profit organizations, and hire an independent third-party consultant to assess its remedial measures.

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

OPERATIONS

Divisions Among Regulators on Proposed Stress Capital Buffer

On April 10, 2018, the Federal Reserve Board and the OCC published a proposal intended to simplify capital rules for large banking organizations, including globally systemically important banks (GSIBs). The FDIC did not join the agencies in issuing the proposal. The proposal would introduce a stress capital buffer (SCB), which is a tailored and risk-sensitive capital regime for large banking organizations, rather than the fixed leverage standard (the enhanced supplementary leverage ratio) that large banking organizations are subject to today, regardless of their systemic footprint. The proposal would result in a reduction of the number of regulatory capital requirements, but based on the Agencies' estimates, GSIBs would generally be subject to the same or slightly elevated capital requirements, while non-GSIBs would be subject to modestly lower capital requirements. Nonetheless, the FDIC expressed concern that the proposal would lessen important capital requirements. Comments on the proposal are due by June 25, 2018.

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

Proposed Implementation of CECL Accounting Standard into Regulatory Capital Framework

On April 17, 2018, the FDIC, Federal Reserve Board, and OCC proposed a revision to the regulatory capital rules to address changes to U.S. GAAP related to accounting for credit losses, known as the Current Expected Credit Losses (CECL) methodology. Specifically, the proposal would revise the Agencies' regulatory capital rules to identify the credit loss allowances under the new accounting standard that are eligible for inclusion in the regulatory capital calculation. The proposal would allow banking organizations to phase in the regulatory capital effects of CECL adoption over three years. In addition, the proposal would revise the Agencies' regulatory capital rules to take into consideration differences between the new GAAP accounting standard and existing GAAP standards. Comments on the proposal are due by July 13, 2018.

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

PREEMPTION

Ninth Circuit Knows Better

The Ninth Circuit rejected a national bank's request for *en banc* review of a decision finding that the NBA did not preempt a state law requiring payment of interest on escrow account funds as applied to a national bank. *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185 (9th Cir. 2018), *pet. for reh'g denied*, No. 14-56755, 2018 U.S. App. LEXIS 12745 (9th Cir. May 16, 2018). The Ninth Circuit refused to take another look at the ruling despite the filing of an *amicus curiae* brief by the OCC arguing that the panel got it wrong. Specifically, the OCC argued that the panel applied an incorrect, overly narrow preemption standard, looked to Dodd-Frank even though the challenged conduct occurred before Dodd-Frank's effective date, did not give the proper deference to OCC regulations, and ignored the Supreme Court's finding that the NBA typically preempts contrary state law. The Ninth Circuit's ruling means that the panel's decision will remain in place absent a further appeal.

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

Jumping the Gun, Part 2

The Conference of State Bank Supervisors (CSBS) filed a highly publicized suit against the OCC in federal court in the District of Columbia challenging the OCC's "decision" to grant special-purpose national bank (SPNB) charters to FinTech companies. As we reported in our previous issue, a federal court in New York dismissed a similar suit brought by the superintendent of the New York DFS. A few weeks ago, the D.C. court followed suit, agreeing with the New York court that the plaintiff lacked standing and the claims were not yet ripe because the OCC hadn't reached any final decision on whether to issue SPNB charters. *CSBS v. OCC*, No. 17-0763 (DLF), 2018 U.S. Dist. LEXIS 72048 (D.D.C. Apr. 30, 2018). The court followed the New York court's lead in rejecting the CSBS's argument that federal regulatory action that preempts state law can create injury in fact that satisfies the Article III standing requirement.

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

Close But No Cigar, Part 2

Yet again, a Ninth Circuit panel has ducked the question of whether provisions in the California Homeowner's Bill of Rights (HBOR) are preempted by the NBA. *Narvasa v. U.S. Bancorp*, 713 F. App'x 728 (9th Cir. Feb. 28, 2018). [As we reported back in 2016](), the district court held that the NBA and OCC regulations preempted plaintiff's claim that a national bank violated the California HBOR based on an alleged failure to provide a requested NPV calculation statement. *Narvasa v. U.S. Bancorp*, No. 2:15-cv-02369-KJM-EFB, 2016 WL 4041317 (E.D. Cal. July 28, 2016). Plaintiff appealed. The Ninth Circuit panel declined to consider the preemption ruling and instead affirmed on grounds that "the complaint failed to adequately allege a plausible theory of liability." 713 F. App'x at 729.

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

Non-Bank – No Way

Plaintiff sues a non-bank entity in state court alleging state law usury claims. The non-bank entity removes the case to federal law, claiming to work closely with a state-chartered bank, so the FDIA completely preempts plaintiff's claims. Plaintiff moves to remand. Does complete preemption create subject matter jurisdiction over the lawsuit? No, according to a federal court in Colorado. *Meade v. Marlette Funding LLC*, No. 17-cv-00575-PAB-MJW, 2018 U.S. Dist. LEXIS 46814 (D. Colo. Mar. 21, 2018). The court recognized that courts have split on the question of whether the FDIA completely preempts state law usury claims. The court found there was no need to address the issue because courts have concluded that "'the FDIA does not apply to non-bank entities.'" *Id*. at *8 (citation omitted). This is the case even if the non-bank worked closely with a state-chartered bank.

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

Incidentally, Your Claims Are Not Preempted

A federal court in Hawaii held that breach of contract and UDAP claims based on alleged affirmative misrepresentations made by a mortgage servicer about force-placed insurance were not preempted by HOLA or OTS regulations. *Wieck v. CIT Grp., Inc.*, Civ. No. 16-00596 JMS-RLP, 2018 U.S. Dist. LEXIS 55257 (D. Haw. Mar. 30, 2018). The court found that the breach of contract claim was not preempted because requiring a mortgage servicer to comply with the parties' agreement would only incidentally affect lending operations. *Id*. at *37-42. On the UDAP claim, the court distinguished between claims based on misrepresentations and claims based on omissions: claims based on omissions were preempted as imposing a state-law disclosure obligation; claims based on affirmative misrepresentations were not preempted because they would not impose any such obligation.

For more information, contact Nancy Thomas at [nthomas@mofo.com.](mailto:nthomas@mofo.com)

PRIVACY

GDPR: A Penny of Prevention Worth a Euro of Cure?

The General Data Protection Regulation (GDPR) finally took effect on Friday, May 25, 2018, just over two years after its approval by the EU Parliament. The far-reaching privacy and security law dramatically expands the scope of business obligations and individual rights relating to the processing and handling of personal information relating to individuals in the EU. The last several months have seen a flurry of urgent assessment and preparation, particularly among American-based enterprises facing many of the stringent GDPR-type requirements for the first time. Now, with the deadline here, attention will likely turn to how the GDPR will be enforced by local data protection authorities, especially given that penalties can be up to €20 million or 4% of global annual revenue for non-compliance.

For more information, contact Miriam Wugmeister at mwugmeister@mofo.com or visit our GDPR Readiness Center.

GDPR Coming to America?

In November, California voters will decide whether to enact the California Consumer Privacy Act (the "Act") through a ballot initiative. The Act would impose significant privacy obligations on companies, such as requiring businesses to disclose the categories of personal information they collect, sell, or share about California consumers, as well as allowing consumers to opt out of the "sale" of personal information. It would provide for a private right of action for violations of the Act, with the bare allegation that the Act was violated enough for a plaintiff to have standing to sue. That said, the Act would apply only to businesses that meet certain thresholds, including annual gross revenues in excess of $50 million or selling significant amounts of consumer personal information. Nonetheless, the Act does not include a GLBA exception and would apply to financial institutions doing business in California that otherwise meet the Act's applicability tests.

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

Opportunity Costs

Courts in data breach cases continue to broaden the scope of what may constitute cognizable harm to meet standing requirements. In *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826 (7th Cir. 2018), the Seventh Circuit allowed individuals to move past the preliminary stages of litigation stemming from a 2012 breach of PIN pads at Barnes & Noble. After the company announced that it had been breached, some customers allegedly spent money on credit-monitoring services and personal time to sort out issues related to the breach. In its ruling, the Seventh Circuit went beyond its past rulings regarding standing in data breach cases and held that the "time value of money" and "significant time and paperwork costs incurred to rectify violations" could qualify as economic losses. *Id.* at 829.

For more information, contact Tiffany Cheung at tcheung@mofo.com or *read our Client Alert.*

NIST 1.1

In April, the National Institute of Standards and Technology (NIST) announced its first formal update to its Cybersecurity Framework. NIST issued Version 1.1 following feedback it received on the draft update it released in December 2017. Throughout the update process, NIST was focused on the extent to which changes could impact the use of the Framework by a company relying on the then-current Framework and whether changes could cause a company not currently using the Framework to do so. Version 1.1 includes updates on authentication and identity, self-assessing cybersecurity risks, managing cybersecurity within the supply chain, and vulnerability disclosure.

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

Cyber Insurance: A Piece of the Risk Mitigation Pie

In April, the FFIEC issued a joint statement for financial institutions considering using cyber insurance as part of their risk management programs. Noting the increasing frequency of cyber incidents and their potential to impose great monetary and other costs, the FFIEC acknowledged the potential benefits of cyber insurance, but noted that it is neither a requirement nor a panacea. Instead, it should be one part of an institution's broader risk management program. In assessing the benefits and costs of cyber insurance, the FFIEC suggests involving multiple stakeholders in the cyber insurance decision, performing adequate due diligence of available cyber insurance coverage, and evaluating cyber insurance in the annual insurance review and budgeting process.

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

SEC Cyber Risk Reporting Guidance: Something is Better Than Nothing?

Earlier this year, the SEC unanimously approved issuing long-awaited guidance for public companies on cybersecurity risk and incident reporting obligations. The new guidance, which comes directly from the Commissioners, builds on guidance issued by the Division of Corporation Finance in 2011. The new guidance urges companies to maintain "disclosure controls and procedures that provide an appropriate method of discerning the impact" of cybersecurity risks and incidents. The new guidance also stresses the need for controls around insider trading by a company's directors, officers, and other corporate insiders who may possess material nonpublic information regarding a cybersecurity risk or incident.

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

Not Friendly

Facebook continues to defend litigation in California alleging that it collected and stored the biometric data of millions of users without consent, allegedly in violation of the Illinois Biometric Information Privacy Act. *In re Facebook Biometric Info. Privacy Litig.*, No. 3:15-cv-03747-JD (N.D. Cal. Apr. 16, 2018) concerns the "faceprints" Facebook allegedly uses to identify individuals in photographs. A U.S. District judge recently ruled that the case could proceed despite Facebook's arguments that the plaintiffs had not suffered a concrete injury and thus lacked standing. The court found that the harm was precisely what the Illinois law sought to protect against—namely, the breach of a user's legal right to biometric privacy.

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

Clear Skies

Amid much press coverage, the Clarifying Lawful Overseas Use of Data Act (the "CLOUD Act") squeezed into a spending bill of more than 2,000 pages that was signed into law in March. The CLOUD Act affirms the U.S. government may compel a company operating in the United States to produce data that it stores outside the country. In particular, the CLOUD Act addressed the key question at the heart of litigation between the U.S. government and Microsoft about the scope of the Stored Communications Act (SCA), and led the Supreme Court to dismiss the case as moot. The Act also contains a provision that U.S. tech companies strongly supported: It allows providers served with orders or subpoenas under the SCA to file a petition to modify or quash the order or subpoena subject to certain conditions.

For more information, contact John Carlin at jcarlin@mofo.com or read our Client Alert.

ARBITRATION

Employees Must Arbitrate Too

In a 5-4 decision, the Supreme Court landed a major victory for employers in *Epic Systems v. Lewis*, No. 16-285. Justice Gorsuch, writing for the majority, found that the FAA compels enforcement of arbitration agreements, and that neither the savings clause of the FAA nor the National Labor Relations Act suggests otherwise. Justice Ginsberg, writing for the dissent, strongly disagreed, stating that the decision was "egregiously wrong" based on her view that without the fear of class actions employers might not treat workers fairly. As the majority decision holds, employees and employers are free to contract for individual arbitration of employment disputes.

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Arbitration Continues to Be a Supreme Court Hot Topic

The Supreme Court agreed to hear a case regarding arbitration next term. The plaintiff is an employee whose information was compromised in a phishing attack. The Ninth Circuit found that the arbitration provision in his employment agreement, which compelled arbitration of "all claims," was ambiguous and that it could authorize class arbitration. *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670 (9th Cir. 2017). The plaintiff asked the Supreme Court to consider this decision in light of the 2010 Supreme Court decision in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, 599 U.S. 662 (2010), in which the Court held that parties cannot be assumed to have agreed to class arbitration if the arbitration is silent on the issue of class arbitration. The Court agreed to hear this case next term.

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

Wells Fargo Did Not Waive Arbitration Rights in Overdraft Saga

The Eleventh Circuit held that Wells Fargo had not waived arbitration rights against absent class members in the long-running overdraft saga. *Gutierrez v. Wells Fargo Bank*, No. 16-16820, 2018 U.S. App. LEXIS 12227 (11th Cir. May 10, 2018). The panel overturned a district court finding that Wells Fargo had waived its right to seek arbitration by litigating against the pre-certified class and not moving to compel arbitration sooner. As the three-judge panel found, though, the district court's decisions requiring briefing of all motions were ambiguous about whether they applied to absent class members (as opposed to class representatives), and Wells Fargo had raised arbitration provisions as an affirmative defense and had not waived its right to compel arbitration on absent class members after class certification.

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Seventh Circuit Weighs In on Authorized Users in TCPA Suit

The Seventh Circuit reversed a victory by Credit One Bank to compel mandatory arbitration in a TCPA suit. *A.D. v. Credit One Bank, N.A.*, 885 F.3d 1054 (7th Cir. 2018). The minor plaintiff's mother used the minor's cell phone to call Credit One, which led to Credit One associating the cell phone with the mother's credit card account. When the mother fell behind on payments, Credit One called all numbers associated with the account, including the minor's phone. The lower court found that the minor was bound by the arbitration agreement in the mother's cardholder agreement because the minor was an "authorized user" who had used the card to pick up smoothies that her mother pre-purchased. The Seventh Circuit reversed, finding that neither the definition of authorized user in the agreement, nor any rules of equity, caused the minor to be bound by her mother's agreement.

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

No Arbitration for Joint Campaign Claim

In *Rahmany v. T-Mobile USA Inc.*, No. 17-35094, 2018 U.S. App. LEXIS 8645 (9th Cir., April 3, 2018), the Ninth Circuit reversed a district court decision compelling consumers to arbitrate their TCPA claims against a wireless carrier and a fast-food retailer based on allegations that the two companies sent unsolicited text messages to the wireless carrier's customers in a joint advertising campaign. The district court granted the motion to compel based on an arbitration clause in the wireless carrier's contract requiring arbitration of all claims "related" to that contract. The Ninth Circuit ruled that the joint advertisements at issue in the case fell outside the scope of the arbitration clause because they did not relate to the wireless carrier's contract. *Id.* at *3.

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TCPA

D.C. Cir. Strikes Down Autodialer and Reassigned Number Rules

In *ACA International v. Federal Communications Commission et al.*, the D.C. Circuit struck down portions of the FCC's 2015 order that had expanded the definition of an "autodialer" and created strict rules for contacting "re-assigned" telephone numbers. *See ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The 2015 FCC order defined an "autodialer" under the TCPA as any device with the "potential capacity" to make autodialed calls, which would include virtually all smartphones because those devices can be configured to randomly call telephone numbers. The D.C. Circuit held that this definition was overbroad and therefore was an "unreasonabl[e], and impermissibly, expansive" definition of "autodialer." *Id.* at 700. Similarly, the court struck down the 2015 FCC order's "one-call safe harbor" for calls to reassigned telephone numbers as "arbitrary." *Id.* at 706. The 2015 FCC order's one-call safe harbor was based on the theory that callers would have "constructive notice" of the reassigned number after only one call, but the D.C. Circuit rejected that reasoning and strongly suggested that "actual notice" of reassignment was required.

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

People Still Send Faxes, Apparently

In *Health One Med Center Eastpointe v. Mohawk Inc. et al.*, the Sixth Circuit unanimously affirmed a district court's decision dismissing a putative TCPA class action against Pfizer and Bristol-Myers based on allegations that a pharmaceutical wholesaler sent unsolicited faxes advertising Pfizer's and Bristol-Myers' products. *Health One Med. Ctr., Eastpointe P.L.L.C. v. Mohawk, Inc.*, 889 F.3d 800 (6th Cir. 2018). There were no allegations that either Pfizer or Bristol-Meyers knew that the wholesaler had sent the faxes. The court found that the TCPA "does not purport to impose liability upon parties that did not 'send' the fax at all," and that the two drug companies therefore could not be held liable because they "neither dispatched the faxes nor caused them to be sent." *Id.* at 802.

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BSA/AML

FinCEN CDD Rule

May 11, 2018, was the applicability date for FinCEN's new rule, "Customer Due Diligence Requirements for Financial Institutions" ("CDD Rule"). The CDD Rule requires covered financial institutions to: (i) establish and maintain written procedures to identify and verify the beneficial owners of their legal entity customers; and (ii) adopt risk-based procedures for conducting ongoing customer due diligence, including to develop customer risk profiles, to conduct ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. On the same date, the FFIEC issued related updates to its "Bank Secrecy Act/Anti-Money Laundering Examination Manual." The updates provide some insight regarding examiner expectations with respect to implementation of the CDD Rule.

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Precious Metals

On March 16, 2018, a Dallas-based gold refinery that purchased and refined billions of dollars of gold from countries around the world between 2012 and 2016 pled guilty in federal court in Florida for violating the BSA by failing to maintain an adequate BSA/AML program. *United States v. Elemetal LLC*, No. 1:18-cr-20173-FAM (S.D. Fl. 2018). Pursuant to the Plea Agreement, the gold refinery agreed to a $15 million forfeiture, a five-year probation period during which time the company would be prohibited from purchasing precious metals outside the U.S., and the development of a compliance and ethics program, among other provisions. These requirements were incorporated into the court's May 25, 2018 judgment. In related criminal cases, three individuals formerly affiliated with the company pled guilty to conspiracy to commit money laundering, and four Peruvian citizens have been indicted for their alleged involvement in the multibillion-dollar, international gold money laundering scheme.

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Bank Secrecy Act Not Vague

The Ninth Circuit recently rejected the argument that the BSA and implementing regulations are unconstitutionally vague. *California Pacific Bank v. FDIC*, 885 F.3d 560 (9th Cir. 2018). A bank appealed the issuance of a cease and desist order by the FDIC, which had found that the bank violated the BSA and ordered it to implement a remediation plan. In affirming the constitutionality of the BSA and its implementing regulations, the court noted that the FFIEC BSA/AML Examination Manual "frames the examiners' expectations in anticipation of routine compliance checks," and that a "BSA Officer at the Bank bearing the requisite 'specialized knowledge' would understand that compliance with the FFIEC Manual ensures compliance with the BSA." *Id.* at 572.

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ABOUT MORRISON & FOERSTER

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