FINANCIAL SERVICES REPORT

Quarterly News, Winter 2018

Award Winning Newsletter

IN THIS ISSUE

MOFO METRICS

33	Average percentage of a person's life spent sleeping
66	Average percentage of a cat's life spent sleeping
1.9	Sleep needed for a giraffe, in hours per day
19.9	Sleep needed for a bat, in hours per day
1,440	Number of dreams a person has each year on average
10	Time by which 90% of dreams are forgotten, in minutes
60	Percentage of men who will snore by age 60
40	Percentage of women who will snore by age 60

MORRISON FOERSTER

EDITOR'S NOTE

In between holiday shopping and merriment, we here at the Financial Services Report are pondering what's in a name. Not much, said Shakespeare. Isaac Asimov begged to differ in a mystery story about who killed one of the library twins (we won't give away the twist that hinges on a name). So do companies that spend millions of dollars identifying names to reflect their brands, and parents-to-be who spend countless hours poring over baby-naming books in search of the perfect name.

While he was the acting Director of the agency originally called the Consumer Financial Protection Bureau, Mick Mulvaney waded into this debate when he announced in March that the agency name would change to the Bureau of Consumer Financial Protection. "We changed the name because it's the name in the statute," acting Director Mulvaney explained, in what he described as a "good, small way" to signal that the agency would "follow the statute."

Since then, it's been a bit of a mixed message from the Bureau — at least on branding — with a new seal reflecting the new name, but a website reflecting the old name. On substance, has the Bureau followed the statute under acting Director Mulvaney? And how will Kathy Kraninger put her mark on the agency as she becomes its second director?

To mark the change in command, we here at the Financial Services Report are adopting the new name for the Bureau with this issue. Let us know if you feel strongly — about our branding or our substance! Either way, we hope you keep reading for all the updates on the Beltway, the Bureau (aka the BCFP), Privacy, Mortgage, Preemption, BSA/AML, TCPA, and more. We wish you Happy Holidays and all the best in the New Year!

BELTWAY

Strongly Encouraged, But Not Legally Required

The OCC, Federal Reserve, FDIC, NCUA, and BCFP issued a joint statement on the role of supervisory guidance for supervised entities. In the joint statement, the agencies emphasized that supervisory guidance "does not have the force and effect of law" and that the agencies "do not take enforcement action based on supervisory guidance." The agencies state instead that supervisory guidance is intended to outline the agencies' expectations and priorities, or to articulate general views regarding appropriate practices. Compliance with supervisory guidance is not mandated and examiners will not criticize supervised entities for "violations" of supervisory guidance, but supervisory guidance may still be cited to provide examples of safe and sound conduct.

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

BUREAU

BCFP Starts Suing Again

The BCFP filed its first new lawsuit under acting Director Mick Mulvaney nearly 10 months after Mulvaney's initial appointment. The complaint is against a California pension advance company that purchases portions of pensions, legal settlements, and other income streams from retirees, veterans, and other consumers and provides them with upfront cash in exchange for the right to receive future payments due to the consumers. The complaint alleges that the company misrepresents the product as a cheaper alternative to a loan or credit with no applicable interest rate, when the products are, in fact, loans with the actual terms hidden from consumers.

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

Payday Lending Case Competes with Looming Compliance Date

Back in April, payday lenders sued the BCFP in an effort to block an agency rule that lenders say would "virtually eliminate" the payday lending industry. This summer, the BCFP and the payday lenders jointly asked the court to stay the litigation while the BCFP reconsiders the Payday Lending Rule. The court stayed the litigation but refused to stay the rule's August 19, 2019 compliance date. Now the lenders are back before the court seeking a preliminary injunction to bar the BCFP from enforcing the rule, and the BCFP has asked for a 45-day extension to respond. Acting Director Mulvaney has a stated goal of re-writing the rule by January 2019, but the BCFP has not yet taken clear action to delay the compliance date.

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

Rewritten Payday Lending Rule Coming in New Year

Speaking of the BCFP's stated intention to re-write the Payday Lending Rule, the BCFP announced in October that it plans to do so in the New Year and that it will "address" the current August 19, 2019 compliance date. In its press release, the BCFP further advised that it will "make final decisions regarding the scope of the proposal closer to the issuance of the proposed rules."

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

Are Your (Data) Secrets Safe with the BCFP?

To date, the BCFP has undertaken more than 188 data collections from public sources, government agencies, commercial vendors, financial institutions, and consumers. Ever wonder what happens to that data once it is in the BCFP's hands? In September, the agency issued a Report and Request for Information regarding the BCFP's sources of data and how data is used. The Report describes what data the BCFP collects, where data comes from, and how data is used. Most interesting, perhaps, is the Report's discussion of how data obtained for a particular purpose may be "reused" within the BCFP for a different purpose. The Report states that this has occurred most frequently with respect to data collected during supervisory exams and later considered potentially relevant for research, market monitoring, rulemaking, or the assessment of significant rules.

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

BCFP Settles Delayed Payment Forwarding Allegations

In October, the BCFP entered into a Consent Order with a company operating online to resolve allegations that the company unfairly delayed the transfer of payments that customers had made to them on charged-off accounts to the third-party debt buyers who had purchased those accounts. The BCFP found that for the three-year period at issue, the company delayed forwarding payments for more than 31 days in 18,000 instances; and that in 3,500 of those instances, the delay exceeded one year, subjecting

customers to collection activity on paid-off accounts. The Consent Order requires the company to change its processes for forwarding consumer payments and to notify consumers when their accounts have been sold. It also imposes a $200,000 civil monetary penalty.

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

I Got 500,000 Problems, But Complaint Reporting Isn't One of Them

The BCFP issued a 50-state Report of complaints received from January 2017 through June 2018. Although overall volume is down ever so slightly, there were almost 500,000 complaints lodged during that time. Topping the list of complaints are attempts to collect debts not owed, erroneous credit reporting information, difficulties making mortgage payments, unauthorized purchases on credit card statements, and problems managing checking or savings accounts.

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

BCFP Issues Remittance Rule Assessment

In October, the BCFP released an assessment of the effectiveness of the Remittance Rule, which requires remittance transfer providers to give consumers disclosures showing costs, fees, and other information before they pay for a remittance transfer. The Remittance Rule also requires remittance transfer providers to provide cancelation and refund rights, investigate disputes, and remedy certain errors. Key takeaways are: volume of transfers is up (but it was trending up before the issuance of the Rule); prices are down (but they were trending down before the issuance of the Rule); compliance is mixed; and compliance costs are significant.

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

MOBILE & EMERGING PAYMENTS

Anything You Can Do, I Can Do Better

In remarks delivered at the American Bankers Association's annual convention in New York, FDIC Chairperson Jelena McWilliams announced a new Office of Innovation within the FDIC. Her announcement comes hot on the heels of similar initiatives launched at the other prudential regulators, including the OCC and the BCFP. Although the proposal was short on specifics, Chairperson McWilliams stressed that the move was designed to foster innovation within the traditional banking sector and to streamline internal FDIC procedures relating to innovation and financial technology.

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

Déjà Vu All Over Again

The OCC's ongoing FinTech charter saga continues. The New York Department of Financial Services (NYDFS) and Conference of State Bank Supervisors (CSBS) filed new separate suits seeking once again to halt the OCC's plan to offer charters to financial technology companies. Echoing the language of the original complaint, Superintendent Maria Vullo characterizes the OCC's decision to offer special-purpose national charters as "lawless, ill-conceived, and destabilizing of financial markets." Both the NYDFS and the CSBS believe that their claims are ripe because the OCC announced over the summer that it would begin accepting applications for the FinTech charter. Comptroller of the Currency Joseph Otting is on record as saying the OCC should be in a position to act on applications by mid-2019.

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

Online Lenders, Real World Regulators

In California, Governor Jerry Brown signed the nation's first commercial financing disclosure bill into law on September 30, 2018. The law requires disclosure of key terms in connection with certain commercial financing by nonbanks and could impact bank/nonbank arrangements as well. With the passage of the Act, California became the first state to require consumer-style disclosures for commercial financing. The California Department of Business Oversight (DBO) sent out an invitation for comments to seek input from stakeholders in developing the implementing regulations required by the Act. Comments are due by January 22, 2019.

Separately, the DBO recently sent letters to a variety of alternative consumer lenders examining their interest rates and marketing practices.

On the other Coast, the NYDFS released an Online Lending Report in July and the Superintendent announced in October that the NYDFS was examining potential regulations for online lenders operating with a bank partner in so-called "true-lender" partnerships.

For more information, contact Trevor Salter at tsalter@mofo.com or read our Client Alert.

SEC Launches "FinHub" Focused on Financial Innovation and Technology

On October 18, 2018, the SEC announced the launch of its new Strategic Hub for Innovation and Financial Technology (FinHub). The SEC's new resource consolidates existing efforts from internal agency working groups and provides a one-stop shop for public engagement with the SEC on FinTech issues such as blockchain/distributed ledger technology, digital marketplace financing, and artificial intelligence/machine learning.

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

MORTGAGE & FAIR LENDING

New Model Forms in Town

The BCFP recently issued an Interim Final Rule updating two model disclosures to reflect the recent changes to the FCRA. The new Summary of Consumer Rights and the Summary of Consumer Identity Theft Rights reflect an option to have a "national security freeze" free of charge and explain that CRAs must include an initial fraud alert on a consumer's file for a minimum of one year (up from 90 days) if it is requested. If you are still using old forms, it is time to update, but the Interim Rule also provides various compliance alternatives for the interim.

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

HMDA Data Sparks Redlining Suit

The Connecticut Fair Housing Center (CFHC) and National Consumer Law Center (NCLC) recently filed an action against Liberty Bank alleging violations of the Fair Housing Act, including allegations that Liberty Bank engaged in unlawful redlining, discriminated against African-American and Latinx mortgage applicants, and made statements that discourage minority applicants from applying for credit. *Conn. Fair Hous. Cntr., Inc. v. Liberty Bank*, No. 3:10-cv-01654-AVC (D. Conn. Oct. 4, 2018). CFHC and NCLC largely base their allegations on their analysis of the HMDA data that was publicly released on September 28, 2017, but they also describe the experiences of several white and nonwhite "secret shoppers" to further support their claims.

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

OPERATIONS

OCC Publishes PCA Guidelines

On September 28, 2018, the OCC issued a Bulletin (OCC Bulletin 2018-33) setting forth the guidelines and procedures for Prompt Corrective Action (PCA) under section 38 of the Federal Deposit Insurance Act and rescinding the 1994 Bulletin on the same subject (OCC Bulletin 1994-43). The Bulletin details how an insured depository institution would be resolved under the section 38 authority to ensure the least possible long-term loss to the Deposit Insurance Fund. Qualifying community banks are specifically excluded because the simplified leverage ratio capital framework for those entities had not yet been established at the time the Bulletin was published.

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

No More Nonbank SIFIs

On October 17, 2018, the FSOC announced that it was removing Prudential's designation as a SIFI. With this removal, there are no longer any nonbank financial companies subject to enhanced prudential standards under FSOC's authority under section 113 of the Dodd-Frank Act. Prudential had been designated as a nonbank SIFI since 2013. In making the determination to de-designate Prudential, U.S. Treasury Secretary Steven Mnuchin cited "extensive engagement with the company and a detailed analysis showing that there is not a significant risk that the company could pose a threat to financial stability."

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PREEMPTION

Two Times the Charm

Does federal or state law govern the question of whether a national bank can be appointed as a foreclosure trustee? The Utah Supreme Court considered the question twice. Most recently, it reversed itself, finding the meaning of "located" in the NBA ambiguous and deferring to the OCC's interpretation of that term for situations in which a national bank acts in a fiduciary capacity. *Bank of America v. Sundquist*, ___ P.3d ___, 2018 WL 4856543 (Utah Oct. 5, 2018). The Utah Supreme Court found "exceptional circumstances" allowed it to revisit the "erroneous conclusion" in its prior ruling. *Id.* at *4. The court remanded to allow the trial court to consider the national bank's arguments that it was located in its home state under the test set out in the OCC regulation.

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

Not This Time

An Alabama federal court waded into the murky waters of FCRA preemption, holding that state-law claims of an allegedly impermissible credit pull are *not* preempted by the FCRA. *Blumenfeld v. Regions Bank*, No. 4:16-cv-1652-ACA, 2018 WL 4216369 (N.D. Ala. Sept. 5, 2018). The court held that FCRA section 1681h(e) preempts state law when the claim is based on information disclosed: a) pursuant to specified FCRA provisions that do not apply here; b) by a user of a consumer report to a consumer against whom the user has taken adverse action; and c) by a user of a consumer report for a consumer against whom the user has taken adverse action. Since the plaintiff did not apply for credit, the court reasoned that the defendant could not have taken any adverse action against her. So, the court found plaintiff's claims were not preempted.

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

Charter Application

A federal court in California held that the charter of the current note owner governs the question of whether claims for violation of the California law requiring payment of interest on escrow accounts are preempted as applied to a national bank. *Smith v. Flagstar Bank, FSB*, No. 18-02350 WHA, 2018 WL 3995922 (N.D. Cal. Aug. 21, 2018). Plaintiff's loan was originated by a federal thrift and later transferred to a national bank. The court recognized that neither the federal thrift nor the national bank had paid interest on the escrow account. It found, though, that the claims against the defendant national bank accrued in 2011, which is after the effective date of the Dodd-Frank Act. The court found that NBA preemption applied because Dodd-Frank eliminated HOLA preemption.

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

PRIVACY

Privacy Revisited, Again

On September 26, 2018, the National Telecommunications and Information Administration (NTIA) issued a Request for Comments to assist the Administration in developing a framework for consumer privacy. NTIA is looking to "determine the best path toward protecting individual's privacy while fostering innovation." It is focused on the "outcome" — a "reasonably informed user" and "products and services that are inherently designed with appropriate privacy protections." NTIA sought comment on how to achieve outcomes that mirror commonly accepted privacy principles such as transparency, user control, data minimization, appropriate security, access and correction rights, management of risk associated with disclosure or harmful uses of personal data, and accountability. NTIA has just released the comments it received.

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

Very Influential

The FTC has focused considerable attention on online advertising involving the use of "influencers" or other endorsements, requiring that any connection that might affect the weight or credibility that consumers give an endorsement must be clearly and conspicuously disclosed. The FTC has now brought yet another case alleging that failure to do so violates section 5 of the FTC Act. This time, the FTC alleges (among other things) that a PR firm and magazine publisher partnered to promote a new mosquito repellent, including by paying gold-medal gymnasts to promote the product and by running ads in a gymnastics magazine that "were disguised as features or other articles of interest to its readers." Neither the paid endorsements nor promotional materials included any disclosures indicating that they were, in fact, paid advertisements.

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

Secure Your IoT

On September 28, the California Governor signed into law two companion bills (AB 1906 and SB 327) to impose security obligations for the Internet of Things, the network of Internet-connected devices that includes a growing array of products such as televisions, cars, and refrigerators. As of January 1, 2020, "reasonable security feature[s]" must be included in all "connected devices" that are capable of connecting directly or indirectly to the Internet and that have an IP or Bluetooth address and are sold in California. The law focuses in particular on user authentication, requiring the manufacturer of a connected device to equip the device with reasonable measures "appropriate to the nature and function of the device, appropriate to the information it may collect, contain, or transmit, [and] designed to protect the device and any information contained therein from unauthorized access, destruction, use, modification, or disclosure."

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

ARBITRATION

Another Circuit Weighs in on Who Decides Class Arbitrability

The Eleventh Circuit is the latest circuit to weigh in on whether courts or arbitrators decide if an arbitration

provision permits class arbitration. The court held that there is a presumption that the court decides this important threshold question, absent clear language in the contract evincing the parties' intent for an arbitrator to decide. *See JPay, Inc. v. Kobel & Houston*, 904 F.3d 923 (11th Cir. Sept. 19, 2018). The court found that the arbitration provision at issue unequivocally delegated the question of authorization of class arbitration and all other arbitrability issues to the arbitrator.

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

Seventh Circuit Agrees with Eleventh Circuit

The Seventh Circuit also held that the issue of class arbitration is presumptively decided by the court. *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502 (7th Cir. Oct. 22, 2018). In *Herrington*, the court found a clear class action waiver unenforceable because it violated the NLRA's prohibition on employers forbidding collective action. The case proceeded to class arbitration, and the employees won a $10 million class arbitration award. The Supreme Court then ruled that arbitration agreements with class action waivers do not violate the NLRA (*Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018)). The class arbitration victory is now at risk. The Seventh Circuit remanded the action to determine whether the arbitration provision permits class arbitration, which the Seventh Circuit indicated was unlikely, given the express class action waiver in the agreement.

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

TCPA

The Supreme Court Takes up the TCPA

The U.S. Supreme Court granted certiorari to address whether the Hobbs Act requires a district court to defer to the FCC's interpretation of the TCPA. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705, 2018 WL 3127423 (U.S. Nov. 13, 2018) (mem.). The district court previously dismissed the suit after engaging in a *Chevron* analysis and declining to defer to the FCC's position that a fax promoting free services is an "unsolicited advertisement." The Fourth Circuit reversed, holding that the Hobbs Act requires courts to defer to regulators like the FCC and deprives the district court of jurisdiction to undertake a *Chevron* analysis. Petitioners argue that the Fourth Circuit's decision improperly shifts the power to interpret the law to the executive branch and limits courts' ability to use *Chevron* to determine when to defer to administrative agencies.

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

What Is an Autodialer, Take 97

Adopting an expansive definition of an autodialer, the Ninth Circuit reversed a district court's determination that a text messaging system was not an autodialer under the TCPA because it lacked present or potential capacity to randomly or sequentially generate numbers. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018). Based on a review of the D.C. Circuit's opinion in *ACA International v. FCC* and the TCPA's language, the Ninth Circuit concluded that an autodialer is any device that "stores telephone numbers to be called," whether or not those numbers were randomly or sequentially generated. The Ninth Circuit further determined that an autodialer is not required to be "fully automatic" and operate without any human intervention. The Ninth Circuit's decision creates a circuit split with the Second and Third Circuits' post-*ACA International* decisions regarding autodialers.

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

Is a Single Text Concrete Enough?

The Eleventh Circuit recently heard argument regarding whether a single unwanted text message constitutes a concrete injury-in-fact sufficient to confer Article III standing under the Supreme Court's standard in *Spokeo*. This question arose in a putative class action in which a former client alleged that a law firm and traffic ticket attorney violated the TCPA by sending a promotional text. *Salcedo v. Hanna*, No. 16-CV-62480, 2017 WL 4226635, at *1 (S.D. Fla. June 14, 2017). The district court granted an interlocutory appeal to address standing, noting that Eleventh Circuit precedent holding that a single communication could be sufficient to confer Article III standing predates *Spokeo*.

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

Opt-Out Evader Stopped

The Ninth Circuit unanimously affirmed dismissal of an "opt-out evader's" TCPA action, becoming one of the first appellate courts to address this issue. *Epps v. Earth Fare, Inc.*, 740 F. App'x 627, 628 (9th Cir. 2018) (mem.). Plaintiff alleged that the defendant violated the TCPA by contacting her after she revoked her consent to receive text messages. Rather than text "STOP," as instructed by the defendant in the text messages, plaintiff responded using lengthy sentences. The Ninth Circuit agreed with the lower court's findings that plaintiff failed to plausibly allege that she reasonably revoked consent, given: the availability of a one-word opt-out procedure; the plaintiff's failure to use the one-word opt-out; and defendant's notice to plaintiff that it did not understand her nonstandard messages.

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

BSA/AML

Insurance Premium Finance Loans Exempted from CIP Rules

On September 28, the OCC, Federal Reserve, FDIC, and NCUA collectively issued an Order granting an exemption from customer identification program (CIP) rules implementing section 326 of the USA PATRIOT Act for certain premium financing loans. The exemption applies to loans extended by banks and their subsidiaries to commercial customers in order to facilitate the purchase of property and casualty insurance policies. The exemption was made with the concurrence of FinCEN, which has stated that such loans present a low risk of money laundering.

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

FinCEN Provides Relief from Beneficial Ownership Rule for Certain Rollovers and Renewals

FinCEN issued a Ruling in September creating a permanent exception for financial institutions from certain obligations under the "Beneficial Ownership Rule." Covered financial institutions will not be required to identify and verify beneficial ownership information from legal entity customers at the time of rollover, renewals, modifications, or extensions of certain financial products (CDs, safe deposit rentals, loans, commercial lines of credit, or credit card accounts that do not require underwriting review and approval). The exception does not apply to the initial opening of such accounts. FinCEN emphasized that the relief does not excuse financial institutions from their other requirements under the BSA and that the exception can be revoked at FinCEN's discretion.

For more information, contact Meghan Dwyer at meghandwyer@mofo.com.

Agencies Clarify Permissible Resource Sharing

In October, the OCC, Federal Reserve, FDIC, NCUA, and FinCEN published a statement addressing when banks may enter into collaborative arrangements to share resources to manage BSA/AML obligations. The statement provides that such arrangements are "most suitable for banks with a community focus, less complex operations, and lower-risk profiles for money laundering or terrorist financing," and cautions that collaborative arrangements must be developed with consideration as to the bank's risk profile. The statement provides examples of resource sharing with respect to independent testing and training, but notes that sharing a BSA officer may create certain challenges.

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

NYDFS Assesses AML Penalty Against Foreign Branch

The NYDFS recently announced a $40 million civil money penalty and Consent Order against Mashreqbank psc and its New York branch. The Order cited compliance weaknesses with respect to the branch's BSA/AML compliance program, including its alert disposition process and its written policies. Among other things, the Order requires the Bank to engage a third-party consultant to address deficiencies in the branch's compliance function. The NYDFS gave "substantial weight to the laudable conduct of Mashreqbank [...] in agreeing to the terms and remedies of this Consent Order, including the amount of the civil monetary penalty imposed" and acknowledged the Bank's strong cooperation and commitment to remediation.

For more information, contact Meghan Dwyer at meghandwyer@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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