Financial Services Report

Award Winning Newsletter

Editor's Note

Occupy Starbucks. Have you ever wondered who makes up the one percent that sit in coffee houses sipping sun-dried Ethiopian soy milk lattes reading Nietzsche on their Kindles and tweeting Herman Cain jokes? If you haven't got scone crumb gravel stuck in the Smartphone pocket of your hoodie, chances are it's not you. You're part of the 99 percent. You should be grande angry.

We turn our back for one quarter and look what happened. Kim Kardashian got married and divorced, and so did the "Super Committee." Other stuff happened too. Living wills are this season's "singing trout." And with the demise of the "SuperComs," Congress has time on its hands and is turning again to privacy. The "Volcker Rule" is getting implemented by the Fed, OCC, SEC, and FDIC. FinCen issued a bunch of proposed rules. And there is a lot of noise about reserve requirements, both here and in Baselville. Finally, the Consumer Financial Protection Bureau ("CFPB") issued a number of edicts, so many that we needed to create a new section of this Newsletter called "Bureau Report."

By the way, if you're not already a subscriber to our "FranknDodd" daily alert service it doesn't necessarily mean that you are committing malpractice. But why take a chance? Lower your risk profile by registering now at register@frankndodd.com.

Until next time, eat more fiber, use your turn signal before lane-changing, and have a wonderful holiday and a Happy New Year.

William Stern, Editor-in-chief

IN THIS ISSUE

MoFo Metrics

- **35:** Number of football bowl games this year
- **0:** Number of Protestant U.S. Supreme Court justices
- **8.65:** Average seconds it took 2011 Rubik's Cube world champ to solve a game
- **43:** Turkeys consumed at Thanksgiving, in millions
- **10:** Law review articles published annually in U.S., in thousands.
- **17:** Christmas trees sold in the U.S., in millions
- **86:** Percentage of office workers who hate their chairs
- **100:** Fine imposed on Samoan rugby coach for not qualifying for World Cup, in pigs

Beltway Report

The Volcker Rule Proposal

Ever since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act in July 2010, banking organizations (and some nonbank financial institutions) have attempted to determine the breadth and impact of the Volcker Rule. This rule, now section 13 of the Bank Holding Company Act, generally prohibits a covered banking entity ("CBE") from proprietary trading and from investing in or controlling private equity or hedge funds. Long-awaited guidance is now at hand. The Federal Reserve Board ("Federal Reserve"), the Office of the Comptroller of the Currency ("OCC"), the

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Federal Deposit Insurance Corporation ("FDIC") and the Securities and Exchange Commission ("SEC") all approved the proposed regulation for publication. The Commodities Futures Trading Commission ("CFTC") is expected to release its own proposal to implement the Volcker Rule in the near future. The proposed rule sweeps more broadly than the Volcker Rule requires but provides some greater specificity on certain provisions of the Dodd-Frank Act. Permitted activities are subject to an array of restrictions and compliance requirements. For a detailed overview of the proposal, please see our client alert available at http://www.mofo.com/files/Uploads/Images/111014-Volcker-Rule.pdf.

For more information, please contact Marc-Alain Galeazzi at mgaleazzi@mofo.com, Chrys Carey at ccarey@mofo.com, Dwight Smith at dsmith@mofo.com, Oliver Ireland at oireland@mofo.com, Charles Horn at charleshorn@mofo.com, Barbara Mendelson at bmendelson@mofo.com, Henry Fields at hfields@mofo.com, Anna Pinedo at apinedo@mofo.com, Jerry Marlatt at jmarlatt@mofo.com, or David Kaufman at dkaufman@mofo.com.

NCUA Makes Headway

The National Credit Union Administration ("NCUA") and Citigroup reached a $20.5 million settlement regarding potential claims relating to the sale of residential mortgage-backed securities to five failed wholesale credit unions. The NCUA also reached a $145 million settlement with Deutsche Bank Securities regarding similar claims. The NCUA is the first regulatory agency to recover losses on behalf of failed financial institutions that resulted from investments in these securities. The NCUA will use the net proceeds from this settlement to reduce assessments being charged to credit unions to pay for the losses.

For more information, please contact Steve Colangelo at scolangelo@mofo.com.

Noah's Ark 2.0

The federal banking agencies published guidance updating the *Interagency Questions and Answers Regarding Flood Insurance* was most recently published on July 21, 2009. The guidance finalizes two questions and answers previously proposed: one relating to insurable value, and the other relating to forced placement of flood insurance. The agencies withdrew a third question regarding insurable value. The agencies requested comment on three additional proposed updates to questions and answers relating to forced placement of flood insurance. Two answers were significantly and substantively changed. The third change, regarding forced placement of flood insurance, revises a previously finalized Question and Answer for consistency with the proposed changes. After public comment is received and considered and the guidance adopted in final form, the agencies will issue a final update to the 2009 *Interagency Questions and Answers Regarding Flood Insurance*. Comments are due 45 days after publication in the *Federal Register*, which is expected shortly.

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

Prepaid Abroad

On October 17, 2011, the Financial Crimes Enforcement Network ("FinCEN") published a proposed rule that would add "tangible prepaid access devices" to the list of monetary instruments that must be reported when they are "transported, mailed, or shipped into or out of the United States." A "tangible prepaid access device" is defined as "any physical item…dedicated to obtaining access to prepaid funds or the value of funds by the possessor in any manner without regard to whom the prepaid access is issued." The value of the accessible funds would be determined by the amount of the funds available through the access device at the "time of physical transportation, mail, or shipment into or out of the United States." Because the value accessible through a prepaid access device may change without the knowledge of the holder of the device, FinCEN requested comment as to whether the value of the access device should be determined based upon the maximum potential value, rather than the value at the time the device crosses the U.S. border.

For additional information on this proposal, please see our client alert available at http://www.mofo.com/files/Uploads/Images/111019-FinCEN-Proposes-Requirement.pdf.

For more information, please contact L. Richard Fischer at lfischer@mofo.com, Obrea O. Poindexter at opoindexter@mofo.com, or Sean Ruff at sruff@mofo.com.

Prepaid Access Rule

FinCEN issued guidance in the form of frequently asked questions ("FAQs") to clarify various aspects of its final rule regarding "prepaid access" ("Final Rule"). Following the issuance of the Final Rule, which amended the Bank Secrecy Act ("BSA") regulations applicable to Money Services Businesses ("MSB") with respect to "prepaid access," financial institutions, retailers, and others have had questions regarding their compliance obligations under the Final Rule.

The mandatory compliance date for the majority of the Final Rule is March 31, 2012. The FAQs can be accessed at http://www.fincen.gov/news_room/nr/html/20111102.html. For detailed information on the provisions of the FAQs, please consult our client alert available at: http://www.mofo.com/files/Uploads/Images/111109-Prepaid-Access.pdf.

For more information, please contact L. Richard Fischer at lfischer@mofo.com, Obrea O. Poindexter at opoindexter@mofo.com, or Sean Ruff at sruff@mofo.com.

Registration Rules for Securities Holding Companies

The Federal Reserve proposed a new Regulation OO for the registration of

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companies that control registered brokers or dealers as securities holding companies ("SHCs"). Section 618 of Dodd-Frank establishes a new regime at the Federal Reserve for the supervision of SHCs—available only for those SHCs that are not nonbank financial companies that have been designated as systemically important by the Financial Stability Oversight Council ("FSOC"), an insured bank or savings association, or an affiliate of one, a foreign banking organization, a foreign bank that controls an Edge Act corporation, or any company subject to comprehensive consolidated regulation by a foreign supervisory. Registration would not be required or necessary for companies that are already supervised on a consolidated basis by the Federal Reserve. The proposal itself is procedural, but it would require a detailed submission. The Federal Reserve projects that five companies are likely to register. Supervision of these companies will be comprehensive, and the enhanced prudential standards for systemically important financial institutions are likely to influence this supervision. For a detailed discussion of this proposal, please review our client alert available at http://www.mofo.com/files/Uploads/Images/110906-Securities-Holding-Companies.pdf.

For more information, please contact Dwight C. Smith at dsmith@mofo.com.

FinCEN Proposal on Mandatory Electronic Filing of Bank Secrecy Act Forms

FinCEN issued a notice and request for comments pursuant to which FinCEN would require electronic filing, beginning June 30, 2012, of all Bank Secrecy Act reports (other than the Report of International Transportation of Currency or Monetary Instruments). Comments on the Notice were due by November 15, 2011.

THE FEDERAL RESERVE RELEASED A SECOND SET OF FAQS ON DEBIT INTERCHANGE FEES.

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

Matchmaker in Chief

On September 7, 2011, the FDIC announced the launch of a new initiative aimed at encouraging small investors and asset managers to partner with larger investors to participate in the FDIC's structured transaction sales of assets from failed institutions. The Investor Match Program allows smaller investors to use a customized database that identifies potential collaborators, and is designed to expand opportunities for participation by minority- and women-owned ("WMO") investors in FDIC structured sales transactions, and to transfer knowledge from larger investors and improve organizational competencies of smaller investors. To participate, investors must be pre-qualified to bid in FDIC structured sales transactions.

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

Federal Savings Associations Subject to Standard OCC Appeals Process

Pursuant to Section 316 of Dodd-Frank, the OCC issued a bulletin revising its procedures for national banks to appeal OCC actions and decisions to include federal savings associations. The issuance provides for a uniform appeals process for national banks, federal savings associations, and federal branches and agencies, and replaces the prior OCC appeals guidance relating to national banks, and repeals existing OTS appeals guidance.

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

Additional Interchange FAQ

The Federal Reserve released a second set of FAQs on debit interchange fees, focusing on general-use prepaid cards and clarifications on compliance with the prohibitions on circumvention, evasion, and net compensation. The FAQs clarify section 235.5(c) requiring the card be "the only means of access to the underlying funds, except when all remaining funds are provided to the cardholder in a single transaction." They confirm that a general-use prepaid card retains its exemption if the cardholder is able to use information from the card to pay a merchant or other payee on the merchant's or other payee's website, provided the card meets the other criteria for the exemption. This is true whether the cardholder enters card information on the merchant's or other payee's website to initiate a one-time payment or to authorize the merchant or other payee to initiate recurring payments. But if a cardholder is able to use the issuer's (or issuer's agent's) online card or account management system to authorize the issuer to pay a merchant or other payee from the cardholder's account or subaccount, then the card is not the only means of access to the underlying funds and the card loses its exemption. Thus, if a cardholder is able to pay a creditor by

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authorizing the issuer or issuer's agent to make electronic fund transfers out of an account or the card is linked to a bill payment service, the card is not the only means of access to the underlying funds. The FAQs clarify several issues related to the new restrictions on issuers receiving net compensation from a payment card network related to debit card transactions, and explain how issuers should allocate these payments as the rule goes into effect in the middle of the calendar year.

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

Black Friday

Retailers represented by the National Retail Federation, the Food Marketing Institute, and the National Association of Convenience Stores as well as two individual retailers—Boscov's Department Store and Miller Oil Co.—have sued the Federal Reserve in U.S. District Court in Washington, D.C. over the recent interchange fee rule. The complaint alleges that the final interchange rule exceeded the statutory authority delegated to the Federal Reserve by the Durbin Amendment, is an unreasonable interpretation of that statute, and is invalid under the Administrative Procedure Act because it: (1) ignores the statutory direction that the final rule distinguish between the allowable "incremental cost" of "authorization, clearance, or settlement of a particular electronic debit transaction" and all "other costs incurred by the issuer which are not specific to a particular transaction," which are not includable in the interchange fee as the Federal Reserve declined to determine incremental costs associated with particular debit transactions, and invented a third category of costs not mentioned in the statute claiming unfettered discretion over the inclusion (and exclusion) of those costs in setting an allowable interchange transaction fee; (2) impermissibly counts within the category of recoverable costs a 5-basis-point (0.05 percent) allowance for fraud losses incurred by issuing banks, which, contrary to the statutory provision, permits recovery of fraud losses without regard to any measures by an issuer to prevent fraud; (3) includes network switch fees as a component of allowable costs, notwithstanding the fact that the Durbin Amendment creates a structure for regulation of network fees that is separate and apart from the interchange fee calculations; and (4) circumvents the statutory prohibitions against network or issuer exclusivity arrangements by allowing issuing banks and networks to satisfy the non-exclusivity requirement by providing only one personal identification number ("PIN") network provider and one "signature" debit network provider per debit card, and not allowing those networks to provide network services for all transactions performed on the card. In summary, the retailers argue that "the Final Rule permits banks to recover significantly more costs than permitted by the plain language of the Durbin Amendment and deprives plaintiffs of the benefits of the statute's anti-exclusivity provisions" and that exceeds the Board's statutory authority and constitutes an unreasonable construction of the Durbin Amendment. Plaintiffs seek declaratory relief.

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

"THE FINAL RULE PERMITS BANKS TO RECOVER SIGNIFICANTLY MORE COSTS THAN PERMITTED BY . . . THE DURBIN AMENDMENT . . ."

Credit Rating References

In compliance with Section 939A of Dodd Frank, the OCC proposed a rule to remove references to credit ratings from various OCC regulations and related guidance to assist national banks and federal savings associations in meeting due diligence requirements in assessing credit risk for portfolio investments. Comments may be submitted through December 29, 2011. The proposed OCC rule would remove references to credit ratings in the OCC's non-capital regulations. In particular, the OCC proposes to amend the definition of "investment grade" in 12 CFR Part 1 to no longer reference credit ratings. In addition to following the standard under the proposed rule, national banks and federal savings associations would be expected to continue to maintain appropriate ongoing reviews of their investment portfolios to verify that they meet safety and soundness requirements appropriate for the institution's risk profile and for the size and complexity of the portfolios. The proposed guidance clarifies steps national banks should take to demonstrate they have properly verified their investments meet the newly established credit quality standards under 12 CFR Part 1 and steps national banks and federal savings associations should take to demonstrate they met due diligence requirements when purchasing investment securities and conducting ongoing reviews of their investment portfolios. Additionally, when purchasing corporate debt securities, Federal savings associations will need to follow requirements to be established by the Federal Deposit Insurance Corporation pursuant to 12 U.S.C. 1831e(d) (as amended by section 939(a)(2) of the Dodd-Frank Act).

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

Be Nice to Each Other

The Government Accountability Office (the "GAO") issued a study finding that financial regulators do not have formal protocols in place for interagency cooperation on Dodd-Frank rulemaking. The GAO recommended four ways to improve the effectiveness of collaboration: ensuring that the specific practices in the Office of Management and Budget's regulatory analysis guidance are better incorporated into rulemaking policies; the Financial Stability Oversight Council ("FSOC") needs to work with the banking agencies to establish formal coordination policies clarifying when coordination should occur, the process used to solicit and address comments, and the role FSOC should play in facilitating this coordination; banking agencies should develop plans for measuring the impact of Dodd-Frank Act regulations; and the FSOC should direct the Office of Financial Research to work with regulators to identify and collect data necessary to analyze the impact of the Dodd-Frank Act regulations on the stability, efficiency and competitiveness of US financial markets.

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

Bureau Report

CFPB Releases Prototypes for Closing Mortgage Disclosures

In its latest round to streamline TILA and RESPA disclosures, the CFPB unveiled two different prototypes of the final disclosure form intended to combine the Truth in Lending Disclosure and the HUD-1. Previous rounds had focused on two different proposals for the initial disclosure form to integrate the Good Faith Estimate and Truth in Lending Disclosure. In this round, the CFPB says it boiled down ten pages of content to five or six. Testing of the final disclosure prototypes will follow the same pattern for the initial disclosure forms and will involve consumer interviews and input requested on the website. The agency will then revise these forms and request additional input in the next round.

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

Complaining, 24/7

The CFPB has been collecting consumer complaints (in 191 languages) concerning credit cards for over three months, and in late November it released its first report. Many in the industry are concerned that the complaint registry will become a Petri dish for nascent class actions. We can't rule that out, but so far, it's gone pretty much as anyone familiar with bank customer relations would expect: 5,000 complaints, 3,100 of those resolved with consumers disputing the outcome in only 400 cases (13%). Most of the complaints were from consumers who misunderstood their agreements or their monthly statements.

Warning: I am Coming After You!

The CFPB outlined plans to provide advance notice of potential enforcement actions to individuals and firms under investigation. The *Early Warning Notice* process, modeled on similar procedures successful at other agencies, allows the subject of an investigation to respond to any potential legal violations that CFPB enforcement staff believe have been committed before the Bureau ultimately decides whether to begin legal action. The process begins with the Office of Enforcement explaining to individuals or firms that evidence gathered in a CFPB investigation indicates they have violated consumer financial protection laws. Recipients of an *Early Warning Notice* are then invited to submit a response in writing, within 14 days, including any relevant legal or policy arguments and facts. Enforcement staff will have the ability to bypass providing a notice when prompt action is deemed necessary. Factual assertions included in any written response must be made under oath by someone with personal knowledge of such facts, and responses will be discoverable by third parties. The CFPB will decide whether to proceed with an enforcement action following its review of the written response. In July 2011, the CFPB's Office of Enforcement made public its rules regarding the initiation and execution of enforcement investigations. More information about the *Early Warning Notice* can be found at: www.consumerfinance.gov/wp-content/uploads/2011/11/EarlyWarningNotice.pdf.

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

A Little Pruning

The CFPB announced that it will ask the public to comment on which regulations it inherited from the other agencies should be updated, modified, or eliminated because they're outdated, unduly burdensome or unnecessary. There will be a 90-day comment period on the notice.

Student Loans: More Information Needed

The CFPB published a *Notice and Request for Information* seeking to collect data from students, schools, industry and other stakeholders in the private student loan market on a series of issues from origination to servicing to collection. The CFPB is interested in a complete picture of private student lending, so it is seeking a broad swath of information, including information available to shop for private student loans; the role of schools in the marketplace; underwriting criteria;

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repayment terms and behavior; impact on choice of field of study and career choice; servicing and loan modification; financial education, and default avoidance. The CFPB will use the collected input to assist with preparation of a report to Congress on private student lending, required by Dodd-Frank to be produced by July 21, 2012. The CFPB will also use the information it gathers to prioritize its own regulatory and education work. The public has 60 days to submit comments after the notice has been submitted to the Federal Register.

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

Operations Report

Who's Da Boss?

The banking agencies have issued a policy statement explaining how the total assets of an insured bank, thrift, or credit union will be measured for purposes of determining supervisory and enforcement responsibilities under Dodd-Frank. Under section 1025 of Dodd-Frank, the Consumer Financial Protection Bureau ("CFPB") has exclusive authority to examine for compliance with federal consumer financial laws and primary authority to enforce those laws for institutions with total assets of more than $10 billion, and their affiliates. Section 1026 confirms that the four prudential regulators—the Federal Reserve, the FDIC, the NCUA, and the OCC—will retain supervisory and enforcement authority for other institutions. The statement explains that a common measure of the asset size of an insured depository institution is the total assets reported in the quarterly Reports of Condition and Income ("Call Reports"), which financial institutions are required to file, and the need to establish a schedule for determining the size of an institution that avoids unwarranted uncertainty or volatility regarding the identity of an institution's primary supervisor for federal consumer financial laws.

For this purpose, the agencies are adapting criteria used for deposit insurance assessment purposes. Accordingly, after an initial asset size determination based on June 30, 2011 data, an institution will generally not be reclassified unless four consecutive quarterly reports indicate that a change in supervisor is warranted. For the reasons that the CFPB should be governed by a commission, see Roland Brandel's article in the American Banker, *History Shows Why CFPB Needs a Commission,* http://www.americanbanker.com/bankthink/federal-trade-commission-consumer-financial-protection-bureau-director-1043312-1.html.

For more information, please contact Andrew M. Smith at andrewsmith@mofo.com.

Final Rule Amending Reg. D – Reserve Requirements for Depository Institutions

The Federal Reserve announced the annual indexing of the reserve requirement exemption amount and the low reserve tranche for 2012, amounts used in the calculation of reserve requirements for depository institutions. The Federal Reserve also announced the annual indexing of nonexempt deposit cutoff levels and the reduced reporting limit used to determine deposit reporting panels effective in 2012. All depository institutions must hold a percentage of certain types of deposits as reserves in the form of vault cash, as a deposit in a Federal Reserve Bank or as a deposit in a pass-through account at a correspondent institution. Reserve requirements are assessed on the depository institution's net transaction accounts (mostly checking accounts). Depository institutions must also regularly submit deposit reports of their deposits and other reservable liabilities. For net transaction accounts in 2012, the first $11.5 million, up from $10.7 million in 2011, will be exempt from reserve requirements. A 3% reserve ratio will be assessed on net transaction accounts over $11.5 million up to and including $71.0 million, up from $58.8 million in 2011. A 10% reserve ratio will be assessed on net transaction accounts in excess of $71.0 million. These annual adjustments, known as the low reserve tranche adjustment and the reserve requirement exemption amount adjustment, are based on growth in net transaction accounts and total reservable liabilities, respectively, at all depository institutions between June 30, 2010 and June 30, 2011.

ALL DEPOSITORY INSTITUTIONS MUST HOLD A PERCENTAGE OF CERTAIN TYPES OF DEPOSITS AS RESERVES IN THE FORM OF VAULT CASH.

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

Final Rules on Living Wills: Prepare for Your Own Demise

The Federal Reserve announced the approval of a final rule to implement the Dodd-Frank resolution plan requirement set forth in Section 165(d) (the "Final

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Rule"). The Final Rule requires bank holding companies with assets of $50 billion or more and nonbank financial firms designated by the Financial Stability Oversight Council to annually submit resolution plans to the Federal Reserve and the FDIC. The plan must describe the company's strategy for rapid and orderly resolution in bankruptcy during times of financial distress, and include a strategic analysis of its components, a description of the range of specific actions the company proposes to take in resolution, and a description of the company's organizational structure, material entities, interconnections and interdependencies, and management information systems. Companies will submit their initial resolution plans on a staggered basis: (1) July 1, 2012 for companies with $250 billion or more in non bank assets; (2) July 1, 2013 for companies with total non bank assets with $100 billion or more, but less than $250 billion; and (3) December 31, 2013 for companies with less than $100 billion in total non bank assets. The Final Rule took effect on November 30, 2011, and was developed jointly with the FDIC, which issued its final rule in September 2011.

For a detailed discussion of the FDIC's living will rule, please review our client alert available at: http://www.mofo.com/files/Uploads/Images/110916-Living-Wills-Final-Rules.pdf.

For a comprehensive understanding of the Final Rule and related plan considerations, please review our Living Wills User Guide available at: http://www.mofo.com/files/Uploads/Images/110905-Living-Wills.pdf.

For more information, please contact Dwight Smith at dsmith@mofo.com or Alexandra Barrage at abarrage@mofo.com.

Conflict of Interest Rules

On September 19, 2011, the SEC released a proposed rule ("Proposed Rule 127B") implementing the conflicts of interest provisions of section 621 of Dodd-Frank which added a new section 27B to the Securities Act of 1933, as amended (the "Securities Act"). Proposed Rule 127B was released on September 19, 2011, for a 90-day comment period, which will end on December 19, 2011. Proposed Rule 127B would generally prohibit certain persons involved in the structuring, creation, and distribution of an asset-backed security ("ABS") from engaging in transactions within one year after the date of the first closing of the sale of such ABS that would involve or result in a material conflict of interest with respect to any investor in such ABS. Because of the sweeping nature of new section 27B of the Securities Act, several industry participants and trade groups submitted in-depth pre-rulemaking comments and expressed concern that section 27B, as drafted, was broad enough to prohibit a vast range of legitimate and necessary securitization-related transaction types, such as providing credit enhancement, liquidity facilities, and warehouse lending, and exercising control rights under a securitization. Therefore, Proposed Rule 127B simply repeats the text of new section 27B of the Securities Act more or less verbatim. In the release accompanying Proposed Rule 127B, the SEC directly engaged pre-rulemaking comments, and set forth a proposed framework for identifying and dealing with conflicts of interest. The SEC indicated that application of the proposed framework would not operate to prohibit inherent securitization activities, such as providing financing to a securitization participant, conducting servicing activities, collateral management activities, and underwriting activities, employing a credit rating agency, receiving payments for performing a role in the securitization, exercising remedies in the event of a default, and contractual rights to remove servicers or appoint special servicers, providing credit enhancement through a letter of credit, and structuring the right to receive excess spreads or equity cashflows. The proposed framework laid out in the SEC's explanatory release accompanying Proposed Rule 127B sets forth (i) conditions to the application of the rule and (ii) regulatory exceptions to the rule. For an in-depth discussion of the rule, please review our client alert available at http://www.mofo.com/files/Uploads/Images/110929-SEC-Proposes-Dodd-Frank-Conflicts-of-Interest-Rules.pdf.

THE FINAL RULE REQUIRES BANK HOLDING COMPANIES WITH ASSETS OF $50 BILLION OR MORE . . . TO ANNUALLY SUBMIT RESOLUTION PLANS TO THE FEDERAL RESERVE AND THE FDIC.

For more information, please contact Jerry Marlatt at jmarlatt@mofo.com, Kenneth Kohler at kkohler@mofo.com, Anna Pinedo at apinedo@mofo.com, and Chrys A. Carey at ccarey@mofo.com.

Standing Out in the Crowd

Pursuant to Section 113 of Dodd-Frank aimed at avoiding a repeat of the Lehman Brothers collapse in September 2008, the Federal Stability Oversight Council ("FSOC") issued a proposed rule establishing a three-stage analysis for identifying non bank systemically important financial institutions. The FSOC is statutorily empowered to require a non bank financial company to be supervised by the FRB if it determines that material financial distress at the company or the

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nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the company could pose a threat to the financial stability of the United States. The three-stage screening involves: (1) specific quantitative thresholds consisting of an asset test marker of $50 billion in global assets for U.S. firms or $50 billion in U.S. assets for foreign entities and one of several other quantitative thresholds: (a) $30 billion or more in gross notional credit default swaps, (b) $3.5 billion of derivative liabilities, (c) $20 billion of outstanding loans taken or bonds issued, or (d) a minimum 15 to 1 assets-to-equity leverage ratio; (2) a second stage consisting of a deeper analysis involving qualitative factors, such as consultations with primary regulators; and (3) a third stage involving a decision by the FSOC whether to designate the firm as a non bank systemically important financial institution. Designated firms could request a hearing and try to convince the FSOC to modify its decision. Comments on the proposal are due by December 19, 2011.

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

Basel Surcharge

The Basel Committee on Banking Supervision (the "Basel Committee") issued a release reaffirming its proposal to impose a capital surcharge on banks deemed to be "too big to fail." The surcharge would consist of a 1% to 2.5% additional charge for 28 unnamed banks with the charge varying with the bank's perceived systemic importance. The Basel Committee also proposes to discourage "too big to fail" banks from expanding further by means of the imposition of a 3.5% capital charge on expanding banks that, as a result of such expansion, would become even more systemically important.

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

Counterparty Credit Risk Rules

The Basel Committee on Banking Supervision issued revised draft rules under the Basel III framework specifiying capital reserve requirements for banks' exposures to central counterparties. The changes have to do with the scope of the Revised Rules, the capitalization of trade exposures, the capitalization of default fund exposures, and indirect access-related issues. The rules did not modify the risk weight for trade exposures. Comments were due by November 25, a final proposal will be issued by the end of the year, and implementation will occur by January 2013. The committee issued a list of FAQs on the counterparty credit risk sections of the Basel III rules providing guidance on default counterparty credit risk charge, credit valuation adjustment risk capital charge and asset value correlations.

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

Some Reprieve: SLHC Reporting

The Federal Reserve proposed a two-year phase-in period for most savings and loan holding companies ("SLHCs") to file Federal Reserve regulatory reports and an exemption for some SLHCs from initially filing Federal Reserve regulatory reports. Under Dodd-Frank, supervisory and rulemaking authority for SLHCs and their nondepository subsidiaries transferred from the Office of Thrift Supervision ("OTS") to the Federal Reserve on July 21, 2011. On February 3, 2011, the Federal Reserve sought comment on its notice of intent to require SLHCs to submit the same reports as bank holding companies, beginning with the March 31, 2012, reporting period. After consideration of the comments received on the notice of intent, the Federal Reserve Board proposes to exempt a limited number of SLHCs from initial regulatory reporting using the Federal Reserve's existing regulatory reports and a two-year phase-in period for regulatory reporting for all other SLHCs. Exempt SLHCs would continue to submit Schedule HC, which is currently a part of the Thrift Financial Report, and the OTS H-(b)11 Annual / Current Report. Comments on the proposal were due on November 1, 2011.

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

Privacy Report

Privacy is Hot Again

Congress continues to consider the litany of federal privacy and data security bills that have been introduced this session. Although the privacy debate and the issue of data security have seemed to receive significant scrutiny, it is not clear whether any bill is actually capable of passing. The bills tend to fall into one or more of four categories: (1) traditional privacy bills providing consumers with control over how information about them is collected, used, stored, and disclosed, such as the omnibus privacy bill introduced by Senators Kerry (D-MA) and McCain (R-AZ); (2) bills focusing on mobile privacy issues related to the collection and sharing of geolocation data such as companion bills introduced by Senators Wyden (D-OR) and Representative Chaffetz (R-UT) prohibiting the collection and sharing of geolocation data without express consent; (3) bills focusing on creating federal data security and security breach notification standards such as several bills reintroduced from prior sessions, including a bill introduced by Representative Rush (D-IL) directing the Federal Trade Commission ("FTC") to issue regulations requiring businesses to implement information security policies and procedures; and (4) bills focusing on cybersecurity and the protection of the country's communications and information networks from cyberattacks, such as a bill introduced by Senator Lieberman (D-CT) providing for the establishment of risk-

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based security performance requirements to secure covered critical infrastructure against cyber risks.

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

FTC Proposes Amendments to COPPA Rule

On September 15, 2011, the FTC released its long-awaited proposed amendments to its rule implementing the Children's Online Privacy Protection Act ("COPPA Rule"). While the FTC normally reviews its trade regulation rules about every 10 years, it accelerated its review of the COPPA Rule—which it last reviewed in 2005—in light of the perceived children's privacy concerns associated with rapid technological changes, including explosive growth in children's use of mobile devices and the proliferation of social networking and interactive gaming. The FTC's proposal would modify the COPPA Rule in three key areas: (1) greatly expand the definition of "personal information" and therefore the scope of the COPPA Rule, including to the use of cookies for purposes other than support for the internal operations of the site or service; (2) alter the parental notice provisions and eliminate one commonly used consent mechanism (the so-called "email plus" consent when an operator uses a child's information only internally); and (3) impose new data security requirements, including pass-through obligations to service providers and limits on data retention. The deadline for submitting comments was recently extended to December 23, 2011.

For more information, please contact Reed Freeman, at rfreeman@mofo.com, or Julie O'Neill at joneill@mofo.com.

Right to Financial Privacy Act Litigation

The Right to Financial Privacy Act ("RFPA") has been the subject of recent bank class action litigation. Under the RFPA, a financial institution is prohibited from giving the government access to financial records of a customer except under the specific provisions of the Act. One recent class action involves claims related to the offshore outsourcing of customer service call center and data center services and the related movement of customer information outside of the U.S. Plaintiffs have alleged that defendant banks violated the RFPA by providing the U.S. government with access to financial records when such financial records are transmitted to locations where the U.S. government is unconstrained by U.S. law. The plaintiffs have also brought claims or separate actions under state law based on allegations that routing calls to offshore call centers violates a customer's constitutional and statutory rights to be protected against U.S. government interception and, therefore, misrepresents, among other things, the characteristics and standards of the services that the defendant banks provide to its customers. Plaintiffs have brought these claims against Bank of America and American Express, and we expect additional cases to be filed against other banks.

UNDER THE RFPA, A FINANCIAL INSTITUTION IS PROHIBITED FROM GIVING THE GOVERNMENT ACCESS TO FINANCIAL RECORDS OF A CUSTOMER EXCEPT UNDER THE SPECIFIC PROVISIONS OF THE ACT.

For more information, please contact Michael Miller at mbmiller@mofo.com, Nathan Taylor at ndtaylor@mofo.com, or Jessica Kaufman at jkaufman@mofo.com.

Senators Call for Final FTC and Commerce Privacy Reports

On November 8, 2011,Senators Kerry (D-MA) and McCain (R-AZ) called on the FTC and the Department of Commerce to finalize their much anticipated reports on consumer privacy. In December 2010, both the FTC and Commerce separately had prepared draft reports regarding new consumer privacy "frameworks" for the U.S. The Senators indicated that they had relied heavily on these draft reports in developing their omnibus privacy bill (S. 799).

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

Online Privacy "Bill of Rights"

On November 14, 2011, an Obama Administration adviser indicated that the Administration would soon release an online privacy "bill of rights." Reportedly, the online privacy bill of rights would be based on self-imposed industry rules that would be enforced by the FTC. Specifically, based on the belief that the traditional rulemaking process lacks "agility," the Administration's proposal would reportedly include broad, high-level statements of principle, relying on the private sector to develop and implement codes of conduct that would be enforced by the FTC.

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

Pump Privacy

On October 9, 2011,California Governor Brown signed into law an amendment (A.B. 1219) to the state's Song-Beverly

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Credit Card Act to create a limited exception for retail gas stations. The Act prohibits businesses from requesting that cardholders provide "personal identification information" during credit card transactions and then recording that information. In February 2011, the California Supreme Court held in *Pineda v. Williams-Sonoma Stores, Inc.* that a retailer who requests and records a customer's ZIP code during a credit card transaction violates the Act. A.B. 1219 provides an exception to the Act for credit card sales transactions at a "retail motor fuel dispenser" or "retail motor fuel payment island automated cashier" when the ZIP code information is used "solely for prevention of fraud, theft, or identity theft." Despite being classified as an urgency statute necessary to "prevent potential disruption of gasoline station services throughout the state," the amendment does little more than officially sanction a relatively unchallenged practice. Indeed, the post-*Pineda* litigation climate corroborates this observation—only one lawsuit has been filed after *Pineda* against retail gas stations, as compared to the over 200 lawsuits filed against brick and mortar businesses and online retailers.

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

California Restricts Credit Reports for Employment

On October 9, 2011, the California Governor signed into law a bill (A.B. 22) limiting the circumstances under which an employer may use consumer reports in connection with hiring and employment decisions in California. Specifically, effective January 1, 2012, A.B. 22 will prohibit employers and prospective employers from using a consumer report for employment purposes, unless the position of the person for whom the report is sought meets certain criteria, including, for example: (1) a "managerial" position or (2) a position involving "regular access" to the Social Security number, bank or credit card account information, or the date of birth of any person. Nonetheless, financial institutions subject to the Gramm-Leach-Bliley Act are exempt from A.B. 22. Former California Governor Schwarzenegger had vetoed legislation similar to A.B. 22 in 2008, 2009, and 2010. Now, however, California joins Connecticut, Illinois, Hawaii, Maryland, Oregon, and Washington, all of which restrict the use of consumer reports for employment purposes.

EFFECTIVE JANUARY 1, 2012, A.B. 22 WILL PROHIBIT EMPLOYERS AND PROSPECTIVE EMPLOYERS FROM USING A CONSUMER REPORT FOR EMPLOYMENT PURPOSES.

For more information, please contact Christine Lyon at clyon@mofo.com.

SEC Guidance on Cybersecurity-Related Disclosure Obligations

On October 13, 2011, the SEC issued guidance relating to the obligations of public companies to make disclosures to their shareholders regarding cybersecurity. The SEC stated its belief that this guidance does not create new public disclosure requirements, but clarifies the SEC's long-standing requirement that public companies disclose "material" events to their shareholders. The SEC guidance indicates that a cyberattack or a cybersecurity vulnerability can impact the operations of a public company and, as a result, may warrant disclosure. Nonetheless, the guidance indicates that, while companies should provide disclosures tailored to the particular circumstances and avoid "boilerplate" language, the guidance does not require disclosure that, itself, would compromise a company's cybersecurity. Instead, companies "should provide sufficient disclosure to allow investors to appreciate the nature of the risks faced by the particular registrant in a manner that would not have that consequence."

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

California is Finally Able to Amend Breach Law

On August 31, 2011, California Governor Brown signed into law S.B. 24 amending the state's security breach notification law. The bill, effective January 1, 2012, amends the existing breach notification law to require that consumer notices include specific content, including, for example, a description of the breach incident and a list of the type of personal information compromised. In addition, S.B. 24 will require notice to the California Attorney General regarding any incident where notice will be provided to more than 500 California residents. Before the passage of SB 24, the bill's sponsor, Senator Simitian, had introduced similar legislation in 2008, 2009, and 2010. Each time, the legislature approved the measure, but former Governor Arnold Schwarzenegger vetoed it.

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

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Hannaford Breach Litigation Back in Business

In 2008, the supermarket chain Hannaford Bros. Co. announced that information relating to more than 4 million credit and debit card accounts had been intercepted while the information was being transmitted to the company's central computer systems. Ultimately, more than 25 class action complaints were filed against Hannaford, with most being consolidated and transferred to a district court in Maine. In May 2009, the Maine district court dismissed most of the class action claims based on a variety of theories, including that there was no breach of implied warranty, no breach of a confidential relationship or failure to advise customers of a data breach. In October of 2009, the district court stayed its dismissal order so it could ask the Maine Supreme Judicial Court to address whether, under Maine law, "time and effort spent mitigating or averting harm . . . is alone sufficient to recover damages." In September 2010, the Maine Supreme Judicial Court ruled that, under Maine law, negligence claims do not provide a basis to "compensate individuals for the typical annoyances or inconveniences that are part of everyday life," such as expending time and effort to mitigate against risks related to the Hannaford breach. On October 20, 2011, however, the First Circuit reversed the trial court's dismissal of the plaintiffs' negligence and breach of implied contract claims with respect to costs incurred by the plaintiffs in purchasing identity theft insurance and paying replacement card fees. The First Circuit held that the plaintiffs' reasonably foreseeable mitigation costs "constitute a cognizable harm under Maine law" sufficient to support negligence and breach of implied contract claims. In this regard, the court indicated that, unlike other cases involving a fear of potential identity theft without a showing of actual damages, the Hannaford breach involved instances of unauthorized use of financial information.

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

Connecticut Data Security Task Force

On September 14, the Connecticut Attorney General announced the creation of a Privacy Task Force. The Task Force will be responsible for the Attorney General's investigation of security breaches. In addition, the Task Force will attempt to educate the public and businesses about their responsibilities, including the protection of sensitive data and prompt notification of affected individuals when breaches occur.

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

Arbitration Report

Since our last update, *Concepcion* continues to dominate the world of arbitration. Although the majority of courts have enforced class action waivers, a handful have narrowed the scope of *Concepcion*'s broad mandate upholding those waivers. Not surprisingly, the bulk of those decisions have emanated from California—where the pre-*Concepcion* hostility to class action waivers was born. Read on.

California Courts Declare Independence from Concepcion

In *Sanchez v. Valencia Holding Co.*, 2011 Cal. App. LEXIS 1467 (Nov. 23, 2011), a California appellate court upheld a lower court order denying a motion to compel arbitration in a putative class action that alleged violations of various California consumer protection statutes. Although the trial court had denied the dealer's motion on the grounds that the class action waiver was unenforceable because it violated a statutory right to bring a class action under at least one of those statutes, the appellate court instead affirmed on the ground that the arbitration agreement itself was unconscionable: "We do not address whether the class action waiver is unenforceable. Rather, we conclude the arbitration provision as a whole is unconscionable." *Id.* at *17. The court held that *Concepcion* "does not preclude" application of unconscionability principles to determine whether an arbitration provision as a whole is unconscionable because *Concepcion* merely struck down the *Discover Bank* rule which applied the doctrine of unconscionability to class action waivers. *Id.* at *19-20. "With the exception of the *Discover Bank* rule, the court acknowledged in *Concepcion* that the doctrine of unconscionability remains a basis for invalidating arbitration provisions. . . . Thus, *Concepcion* is inapplicable where, as here, we are not addressing the enforceability of a class action waiver or a judicially imposed procedure that is inconsistent with the arbitration provision and the purposes of the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1–16)." *Id.* at *21-22.

For more information, please contact Rebekah Kaufman at rkaufman@mofo.com.

Magnuson-Moss Bars Pre-Dispute Mandatory Arbitration

The Ninth Circuit recently held that the federal Magnuson-Moss Warranty Act ("Magnuson-Moss") bars pre-dispute mandatory arbitration. *Kolev v. Porsche Cars North America*, 658 F.3d 1024 (9th Cir. 2011). The plaintiff in *Kolev* filed suit against a dealership after the car she purchased developed mechanical problems during the warranty period and the dealer refused to honor her warranty claims. The dealership then successfully moved to compel arbitration based on a mandatory arbitration provision in the sales contract. On appeal, the plaintiff

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argued that Magnuson-Moss barred the provision mandating arbitration of her warranty claims. Although Magnuson-Moss does not specifically address the validity of pre-dispute mandatory arbitration provisions, the plaintiff argued that the FTC, pursuant to its rulemaking authority under Magnuson-Moss, had issued a rule prohibiting judicial enforcement of such provisions with respect to consumer claims brought under the Act. The Ninth Circuit agreed, rejecting the argument that the FTC's rule is unreasonable in light of the Federal Arbitration Act's ("FAA") "liberal policy favoring arbitration agreements." *Id.* at *13. "[T]he FAA's mandate to enforce arbitration agreements, '[l]ike any statutory directive, may be overridden by a contrary congressional command.'" *Id.* (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

The decision creates a circuit split that may ultimately be resolved by the Supreme Court. *See Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 278 (5th Cir. 2002) (holding that Magnuson-Moss does not overcome the FAA's presumption that courts should enforce arbitration agreements); *Davis v. Southern Energy Home, Inc.*, 305 F.3d 1268, 1280 (11th Cir. 2002) (same). The Supreme Court's decision in *CompuCredit* (see below) may also bear on this issue.

Though *Kolev* did not involve the enforceability of class action waivers in arbitration provisions, the decision will no doubt be cited by plaintiffs as barring the enforceability of class action waivers for claims under Magnuson-Moss.

For more information, please contact Rebekah Kaufman at rkaufman@mofo.com.

Wait and See Approach Doesn't Fly in California

You might have thought it would make sense to see how the Supreme Court decided *Concepcion* before enforcing a class action waiver through a motion to compel. A California appellate court, however, recently rejected that argument, upholding an order denying a motion to compel arbitration. *Roberts v. El Cajon Motors, Inc.*, 2011 Cal. App. LEXIS 1399 (Nov. 8, 2011). The defendant car dealer waited five months to invoke arbitration, had not indicated in its answer that it would seek to arbitrate, and responded to extensive written discovery involving the class allegations in the complaint. "[B]ecause the record shows El Cajon waited months after Roberts propounded extensive written discovery (undoubtedly at great expense) to notify Roberts of its intent to arbitrate and because most, if not all, of this discovery would—under El Cajon's own analysis of *Concepcion*—be useless in arbitration, we conclude there is ample evidence in the record showing El Cajon's conduct (including in responding to this discovery) was inconsistent with the intent to arbitrate and that Roberts was prejudiced by that conduct." *Id.* at 27-28.

For more information, please contact Rebekah Kaufman at rkaufman@mofo.com.

Arbitrability of Claims Under Credit Repair Organizations Act

The Supreme Court recently heard oral argument in *CompuCredit Corp. v. Greenwood*, U.S. No. 10-948, and will decide whether claims under the Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679 *et seq.*, are subject to arbitration in light of the language in the Act providing that consumers have a "right to sue" credit repair organizations and that waivers by consumers "may not be enforced by any Federal or State court or any other person." 15 U.S.C. § 1679f(a). The case involves subprime credit cards that were allegedly marketed as a way to improve credit scores. Before receiving their cards, consumers received an acceptance certificate that included a mandatory arbitration clause with a class action waiver. The trial court found the arbitration clause invalid under the CROA, and the Ninth Circuit affirmed, creating a circuit split. *See Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007); *Picard v. Credit Solutions Inc.*, 564 F.3d 1249 (11th Cir. 2009). The issue the Court will decide is what language Congress must use in a statute in order to indicate that statutory claims cannot be arbitrated under the FAA.

For more information, please contact Rebekah Kaufman at rkaufman@mofo.com.

Mortgage Report

MERS as a "Sham" Rebuffed by the Ninth Circuit

The Ninth Circuit rejected a putative class action alleging lenders conspired to defraud borrowers through the Mortgage Electronic Registration System ("MERS")—a private electronic database tracking the transfer of interests in loans. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011). In affirming dismissal, the Ninth Circuit held plaintiffs failed to state a claim for any underlying fraud. Their allegations missed key elements: that plaintiffs were misinformed about MERS, reliance, and injury. The Ninth Circuit also held that because the standard deeds of trust disclosed MERS's role and right to foreclose, plaintiffs had agreed to those terms and were on notice. The Ninth Circuit rejected plaintiffs' core theory that no entity could foreclose because MERS splits the deed from the note. It held that "the notes and deeds are not irreparably split: the split only renders the mortgage unenforceable if MERS or the trustee, as nominal holders of the deeds, are not agents of the lenders."

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For more information, please contact Greg Dresser at gdresser@mofo.com.

Class Settlement for Servicemembers is Fair

In *Rowles v. Chase Home Finance, LLC*, on November 15, 2011, the parties attended a Fairness Hearing before the federal district court to discuss final class certification and plaintiffs' petition for final approval of the class settlement. The District of South Carolina found that: (1) the class was properly certified for settlement purposes; (2) the class notice met due process requirements; and (3) the settlement is fair, reasonable, and adequate. Entry of final judgment will be deferred until January 2012, when certain court documents are due. The class action settlement seeks to resolve allegations that Chase violated the Servicemembers Civil Relief Act by failing to give certain protections to servicemembers' mortgage loans, home equity loans, and lines of credit while they were on active duty or for some period following active duty.

For more information, please contact Michael Agoglia at magoglia@mofo.com.

Loan-Modification Litigation Gets Organized

Federal courts continue to yield different outcomes on whether the HAMP Trial Period Plan is a contract for loan modification. Most trial courts have held it is not. Appeals move forward, with one case, *Wigod v. Wells Fargo*, now submitted and awaiting decision by the Seventh Circuit. Other appeals are in the Ninth, Tenth, and Eleventh Circuits. Appellate rulings should offer guidance about the viability of the core contract theory and key issues, such as federal preemption and the lack of a private right of action under

THE PANOPLY OF HAMP LAWSUITS HAS NOW SPROUTED THREE MDLS AGAINST MAJOR SERVICERS.

HAMP. The panoply of HAMP lawsuits has now sprouted three MDLs against major servicers: one against Bank of America, pending since October 2010 (D. Mass.) and two newer MDLs against Chase (D. Mass.) and CitiMortgage (C.D. Cal.). Of interest is how courts will handle copycat actions based on non-HAMP modification programs, especially given plaintiffs' espoused position that their claims are governed by the specific terms of the particular modification program documents.

For more information, please contact Michael Agoglia at magoglia@mofo.com.

Preemption Report

Shazam

The U.S. District Court for the Southern District of Iowa held that the National Bank Act and OCC regulations preempt Iowa payment processing rules. In *U.S. Bank, N.A. v. Schipper*, 10-cv-00064, 2011 U.S. Dist. LEXIS 105390 (S.D. Iowa Aug. 29, 2011), a national bank challenged an Iowa law requiring state banks to use state-approved and state-regulated "central routing units" to authorize ATM transactions with ATM units not owned or operated by the bank. U.S. Bank argued that this state law impermissibly interfered with its authority to provide these services to state banks, and the district court agreed. Joining the Eleventh Circuit, the district court also found that Dodd-Frank "did not materially alter" the standard for National Bank Act preemption. *Id*. at *12 n.1.

For more information, please contact James McGuire at jmcguire@mofo.com. Mr. McGuire represented U.S. Bank in this case.

West Virginia Goes Way Out There

You would think two express provisions indicating Congress did not intend the Dodd Frank preemption provisions to apply retroactively would do the trick. Apparently not in West Virginia. A district court there applied the Dodd-Frank provisions and the amended OCC regulations to a case brought after their respective effective dates, reasoning the amendments were "better understood as clarifications of the law as opposed to substantive changes." *Cline v. Bank of America*, No. 2:10-1295, 2011 U.S. Dist. LEXIS 118337, at *22 (S.D. W. Va. Oct. 13, 2011). The court recognized that a state debt collection statute was not a "state consumer financial law" governed by Dodd-Frank, and concluded *only* state consumer financial laws can be preempted by the National Bank Act. *Id.* at *26-*27. The court found the state-law limitations on debt collection methods did not interfere with the purposes of federal law, so the statute was not preempted by the amended OCC regulations either. Another West Virginia district court also concluded the state debt collection statute was not preempted as applied to national banks, refusing to follow two prior decisions from the same district concluding otherwise. *O'Neal v. Capital One Auto Finance, Inc.*, No. 3:10-CV-40, 2011 U.S. Dist. LEXIS 112259 (N.D. W. Va. Sept. 29, 2011). This court, though, didn't consider the application of the Dodd-Frank

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preemption provisions or the amended OCC regulations.

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

Other Courts Find Congress Means What it Says

Other district courts that have considered the issue have found the Dodd-Frank preemption provisions do not apply to cases brought before the statute's July 21, 2011 effective date or to contracts entered into before that date. *See, e.g., Williams v. Wells Fargo Bank N.A.*, No. 11-21233, 2011 U.S. Dist. LEXIS 119136 (S.D. Fl. Oct. 13, 2011); *Copeland Turner v. Wells Fargo Bank, N.A.*, No. CV-11-37-HZ, 2011 U.S. Dist. LEXIS 72509 (D. Or. July 6, 2011). These courts analyzed the cases before them under the preemption rules in effect before the Dodd-Frank amendments because the Act "specifically and expressly stated" the relevant provisions do not apply retroactively to contracts entered into before the effective date. *Copeland-Turner*, 2011 U.S. Dist. LEXIS 72509, at *14.

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

NBA Line Drawing

Does the National Bank Act require that national banks comply with their home state's definition of interest or only with the interest rate set by their home state? According to one district court, a national bank's home state law governs the maximum interest rate a national bank can charge, but the definition of interest is governed solely by federal law. *Taft v. Wells Fargo Bank, N.A.*, No. 10-2084, 2011 U.S. Dist. LEXIS 126112 (D. Minn. Nov. 1, 2011). The court concluded that a national bank's home state law defining certain origination and servicing fees as interest was preempted, relying on congressional intent to authorize the broadest possible preemption scope and OCC regulations providing that limits on charges that comprise rates of interest are determined by federal law. The court dismissed plaintiff's state law claims as preempted as well as her National Bank Act claim.

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

Laws Include Common Law Under FCRA

The Seventh Circuit weighed in on the debate over the scope of FCRA preemption, siding with those courts refusing to distinguish between state common law and statutory claims. *Purcell v. Bank of America*, No. 10-3975, 2011 U.S. App. LEXIS 20035 (7th Cir. Oct. 3, 2011). The court reasoned that FCRA's preemption of "the laws of any State" included both federal statutes and common law, relying on the Supreme Court's conclusion that a reference to state laws includes "all sources of legal rules, including judicial opinions." *Id.* at *3. Rejecting the district court's conclusion that the earlier, less inclusive preemption provision was more specific than the later more inclusive preemption, the court explained it must enforce the more recent enactment.

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

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