

FINANCIAL SERVICES REPORT



Quarterly News, Winter 2013

IN THIS ISSUE

Beltway Report
Page 2

Bureau Report
Page 3

Privacy Report
Page 4

Mobile Payments Report
Page 5

Mortgage and Fair Lending Report
Page 5

Operations Report
Page 6

Preemption Report
Page 7

Arbitration Report
Page 8

TCPA Report
Page 8

MOFO METRICS

- 2** Pounds of insect parts each American consumes, per year
- 58** Percentage of Major League Baseball players with facial hair
- 106** Federal regulations since 2009 for which compliance costs exceed \$100 million a year
- 45** Number of turkeys slaughtered at Thanksgiving, in millions
- 36** Percent of U.S. revenue that will go toward paying interest on US debt, 2030
- 50** Same percentage, 2050
- 35** Percentage more putts made by someone who is told the golf ball is "lucky"
- 10** Fewer flights flown on Friday the 13th, versus other Fridays, in thousands

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Editor's Note

Stuff didn't happen this quarter. Lots of it. The federal government didn't happen for two weeks in October, which caused some to celebrate and others to wring their hands and clamor for a strong, tell-it-like-it-is leader to emerge and restore sanity. But Toronto Mayor Rob ("Crack") Ford was busy. The health care website created by the Affordable Care Act website also didn't happen, and we learned that more people die from meteor strikes than were able to log on and sign up. Toronto Mayor Rob ("Whacked") Ford was going to fix it, but he had other appointments. North Korea didn't launch any missiles either, and the Hermit Nation is now thinking of forming a North Korean basketball team. Funny, Toronto Mayor Rob ("Smack") Ford was spotted at a Toronto Raptors basketball game. Coincidence?

What did happen then? The Bureau was busy, apparently rested and energized by the shut-down. Subprime credit card credit has slowed since the CARD Act, the Bureau tells us, but that is just a coincidence. Disparate impact is big, and so are payroll advance and add-on products. HMDA, HAMP, HUD, and HOLA – the 4-H club – also made the news. All of this, and more, in these pages.

Until next time, have a wonderful holiday, watch for meteors, and don't Ford in public.

William Stern, Editor-in-Chief

BELTWAY

Elder Abuse Trumps Privacy Rights

Eight federal agencies issued interagency guidance to financial institutions clarifying that reporting suspected financial abuse of older adults to appropriate local, state or federal agencies does not, in general, violate the privacy provisions of the Gramm Leach Bliley Act (GLBA) or its implementing regulations. The guidance specifies the circumstances under which specific privacy provisions of the GLBA and its implementing regulations permit the sharing of this type of information without complying with notice and opt-out requirements.

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

Payment Processing Pronouncement

The Federal Deposit Insurance Corporation (FDIC) issued a Financial Institution Letter (FIL-43-2013) clarifying its policy and supervisory approach related to facilitating payment processing services for merchant customers engaged in higher-risk activities. The Letter explains that financial institutions that properly manage these relationships and risks “are neither prohibited nor discouraged from providing payment processing services to customers operating in compliance with applicable federal and state law.” Proper risk assessments, due diligence sufficient to ascertain that the merchants are operating in accordance with applicable law, and appropriate systems to monitor these relationships over time are essential, and “financial institutions need to assure themselves that they are not facilitating fraudulent or other illegal activity,” as they could be exposed to financial or legal risk should the legality of activities be challenged.

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

What’s Old Is New Again

The Office of the Comptroller of the Currency (OCC) issued new guidance

on risks presented by third-party relationships. The bulletin builds on the OCC’s previous guidance in this area, expressing concern that bank risk management practices have not kept pace with the complexity of third-party relationships. The new bulletin rescinds the previous version and provides considerably more detail on the OCC’s expectations for bank contractual relationships with, and oversight responsibilities for, third parties. The OCC’s new third-party guidance is a strong signal of the increased regulatory scrutiny in this area.

For more information, read our [Client Alert](#) or contact Andrew Smith at andrewsmith@mofo.com.

There Is a Limit for Everything

The OCC issued a final rule amending its governing lending limits and outlining the methods that banks can use to measure credit exposures of derivative transactions and securities financing transactions. The final rule allows banks to choose from the specified methodologies, but reserves the OCC’s right to require a bank to use a particular method for safety and soundness reasons. The final rule continues to provide that loans and extensions of credit, including those that arise from derivative transactions and securities financing transactions, must be consistent with safe and sound banking practices. The final rule specifically exempts securities financing transactions relating to Type I securities (U.S. or state government obligations, etc.) from lending limit calculations.

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

What Comes Down Must Go Up

In a recently issued [Financial Institution Letter](#), the FDIC re-emphasized the importance of prudent interest rate risk oversight and risk management processes to ensure banks are prepared for a period of rising interest rates. The letter explains that asset-liability management should be an ongoing process requiring effective measurement and monitoring

systems, clear communication of modeling results, evaluation of exposures relative to established policy limitations, and consideration of risk mitigation options as appropriate, and should be revisited periodically to confirm that the institution has avoided a speculative position and reduced the likelihood of adverse outcomes. The FDIC noted that its examiners will continue to consider the amount of unrealized losses in the investment portfolio and the degree to which institutions are exposed to the risk of realizing losses from depreciated securities in assessing capital adequacy and liquidity and assigning examination ratings.

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

Foreign Exclusion

The FDIC issued a final rule excluding deposits in foreign branches of U.S. banks from the guarantee of FDIC insurance under the Federal Deposit Insurance Act, even if such deposits are expressly payable at both the foreign branch and at a branch of the bank in the United States. This rule clarifies that a deposit carried on the books and records of a foreign branch of a U.S. bank is not insured under the Federal Deposit Insurance Act (FDIA) regardless of the location at which the deposit is payable. However, deposits in a foreign branch of a U.S. bank expressly payable at a U.S. branch will be deemed a “deposit liability” for purposes of the 1993 national depositor preference statute, giving priority to holders of a deposit liability over unsecured creditors in the event of a bank failure. The rule became effective on October 15, 2013.

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

Do You Have Skin in the Game?

The Federal Reserve Bank (FRB), the Department of Housing and Urban Development (HUD), the FDIC, the OCC and the Securities and Exchange Commission (SEC) issued a notice

replacing a proposed rule, published in April 2011, requiring sponsors of securitization transactions to retain risk in the transactions. The proposal requires sponsors of asset-backed securities to retain at least 5% of the credit risk of the assets underlying the securities, and does not permit sponsors to transfer or hedge that credit risk. The new proposed rule would implement a different risk retention measurement methodology based on fair value. The rule exempts from risk retention securitizations of qualified residential mortgages (QRMs), co-extensive with the QRM safe harbor established by the Consumer Financial Protection Bureau (CFPB). The proposal also seeks comment on an alternate definition of QRM, called QM-plus, incorporating additional factors, such as borrower credit history and a 70% loan-to-value cap. As in the original proposal, securitizations of commercial loans, commercial mortgages or automobile loans of low credit risk would not be subject to risk retention.

For more information, contact Oliver Ireland at oireland@mofocom.

But You Knew That In Advance

Rather than celebrate Movember, the OCC and FDIC opted to spend their time issuing final guidance on deposit advance products. The OCC and FDIC advise banks to ensure that underwriting criteria are designed so that deposit advances can be repaid according to their terms while allowing borrowers to continue to meet their “typical” other expenses. The guidance further advises banks to provide no more than one loan per statement cycle and to impose a cooling-off period of at least one monthly statement cycle. In contrast, the OCC and FDIC refrain from advising on whether state usury laws apply to deposit advance products and instead note that the guidance does not preempt such laws.

For more information, contact Andrew Smith at andrewsmith@mofocom.

BUREAU REPORT

CFPB on a (Pay)roll

The CFPB issued a [Bulletin](#) reminding employers that Regulation E prohibits them from requiring employees to receive their wages on a payroll card of the employer’s choosing. The Bulletin reiterates the consumer protections associated with payroll cards, such as limited liability for unauthorized use and follows a [request by 16 Democratic Senators](#) for the CFPB to clarify employer responsibilities for payroll card programs. Banks and program managers that partner with employers to offer payroll card products may also want to review their practices and confirm they are compliant with the CFPB’s guidance.

For more information, contact Obrea Poindexter at opindexter@mofocom.

Add Chase to the List

The CFPB and the OCC entered into consent orders with Chase Bank USA, N.A. and JPMorgan Chase Bank, N.A. regarding credit card add-on products. The Consent Order alleges Chase engaged in an unfair business practice by billing for credit reporting services that were not provided by third-party vendors acting on Chase’s behalf. The settlement includes restitution to customers and civil money penalties to both the CFPB and the OCC.

For more information, contact Jim McCabe at jmccabe@mofocom.

CARD Act Report Card

In accordance with CARD Act requirements, the CFPB issued its first report on the impact of the Act on the cost and availability of credit. The report acknowledges that the availability of subprime credit card credit has decreased since passage of the CARD Act, but avoids making any causal connection between the two. The report identifies four credit card features of concern: deferred interest programs, online disclosures, rewards programs and grace periods.

For more information, see our [Client Alert](#) or contact Rick Fischer at rfischer@mofocom.

CFPB Interrupts CEO’s Dinnertime with Complaint

The CFPB [announced an enforcement action](#) against Meracord LLC, and its CEO and owner, Linda Remsberg, for processing payments for several debt settlement firms which allegedly charged up-front fees in violation of the Telemarketing Sales Rule (TSR). The CFPB alleged the defendants violated the aiding and abetting provision in the TSR by “assisting and facilitating” the debt settlement firms’ allegedly illegal conduct. The CFPB also alleged the same actions violated the UDAAP provisions in Dodd-Frank. The CFPB also filed a proposed stipulated final judgment by which the defendants agreed to a permanent injunction and payment of civil money penalties without admitting or denying liability.

For more information, contact Nancy Thomas at nthomas@mofocom.

@Industry, #Precedent, #Rulemaking

In November, the CFPB [issued an advance notice of proposed rulemaking](#) (ANPR) seeking comment, data, and information about debt collection practices. The ANPR is being issued in anticipation of a proposed rule and generally follows the CFPB’s July 2013 release of two guidance bulletins for creditors and third-party debt collectors on similar topics. The questions in the ANPR suggest the CFPB is considering three new categories of requirements for the debt collection industry: (1) operational elements of debt sales and transfers; (2) debt collection activities that may involve newer forms of communication via digital and social media; and (3) disclosures to consumers regarding debt ownership and dispute rights.

For more information, see our [Client Alert](#) or contact Ryan Rogers at trogers@mofocom.

What’s Old Is Burdensome Again

The CFPB issued a [Bulletin](#) highlighting the obligation of data furnishers to investigate consumer disputes referred by credit reporting agencies. Although

these duties are not new, furnishers have begun receiving significantly more data due to updates in the e-OSCAR system. Furnishers may want to review their policies and procedures with an eye toward review of new data that may be provided through e-OSCAR and any obligations imposed by the Bulletin.

For more information, contact Jim McCabe at jmccabe@mofa.com.

PRIVACY REPORT

Cybersecurity Framework Coming into Focus

On October 29, 2013, National Institute of Standards and Technology NIST published a draft of the “preliminary” cybersecurity framework, required by President Obama’s cybersecurity Executive Order. This framework is intended to provide a uniform guide for developing cybersecurity programs at the entity level and a “common language and mechanism” for companies to, among other things, describe their current cybersecurity posture and identify and prioritize opportunities for improvement within the context of risk management. The preliminary framework includes three parts: (1) the “Framework Core,” which is a compilation of cybersecurity standards and best practices in five core functions – identify, protect, detect, respond and recover; (2) the “Framework Profile,” to enable companies to establish a roadmap for reducing cybersecurity risk that is well aligned with company and sector goals and that considers legal and regulatory requirements and best practices; and (3) the “Framework Implementation Tiers,” which describe how a company can manage its cybersecurity risk. Comments on the preliminary framework are due by December 13, 2013.

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

Examine Your Cybersecurity

On September 18, 2013, Comptroller Curry called on bank regulators to identify and address gaps in federal and state bank examination policies

related to cybersecurity and critical infrastructure. While acknowledging that he believes the banking system is “prepared” to address cybersecurity issues and that OCC examiners are focusing on IT security issues at the nation’s largest banks, the Comptroller indicated that bank regulators are particularly concerned about cybersecurity risks at smaller banks. The Comptroller also indicated that the OCC will issue guidance, working papers and other information related to cybersecurity.

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

California Takes the Lead

California Governor Brown signed the first piece of legislation in the world directly addressing “do not track” (DNT). The bill amends California’s existing Online Privacy Protection Act (CalOPPA) to require website operators to explain how they respond to DNT signals or “other mechanisms that provide consumers the ability to exercise choice regarding the collection of personally identifiable information about an individual consumer’s online activities over time and across third-party Web sites or online services, if the operator engages in that collection.” This is a disclosure law and does not create new consumer rights or impose substantive requirements on companies. That said, the bill may pressure companies to make substantive changes by responding to DNT signals. Because CalOPPA applies to any website, online service or (according to the California Attorney General) mobile application that collects personally identifiable information (defined broadly) from “consumers residing in California,” the law has a *de facto* nationwide reach and effectively sets a new nationwide disclosure standard.

For more information, contact Julie O’Neill at joneill@mofa.com.

Delete This!

California amended CalOPPA to require an online company to permit a registered user who is under 18 to remove content she has posted to the company’s website or application. The law also prohibits online companies from advertising “adult” products to minors and from collecting, using or disclosing minors’ personal information for such advertising. With these revisions, CalOPPA moves from being purely a disclosure law to a law that imposes substantive obligations. Like DNT, the revised law has nationwide reach because it applies to any “Internet Web site, online service, online application, or mobile application” that collects personal information about California minors and is “directed to minors” or has “actual knowledge” that a minor is using the site. The revised law will become effective on January 1, 2015.

For more information, contact Julie O’Neill at joneill@mofa.com.

’Cause a West Coast Party Don’t Stop

California also amended its data breach law, making California the first state to require notice to consumers of breaches involving the types of information that consumers use to access online accounts. Historically, the focus of the state breach laws has been on the types of personal information that could be used to commit identity theft or fraud, such as Social Security numbers. California has now tailored its law to recognize the significance and sensitivity of the information that consumers use to access their online accounts, amending the definition of “personal information” to cover “[a] user name or email address, in combination with a password or security question and answer that would permit access to an online account.” The amended law will become effective on January 1, 2014.

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

Oh Behave!

The Better Business Bureau's Online Interest-Based Advertising Accountability Program ("the Accountability Program") has issued its first compliance warning, which is intended to clarify the obligations of websites gathering data for Online Behavioral Advertising (OBA) purposes. The warning requires these website operators to ensure that consumers receive "enhanced notice" under the Digital Advertising Alliance Self-Regulatory Principles for Online Behavioral Advertising ("Principles"), and explains that relying on third parties, such as ad networks, to display notice within OBA ads appearing on the operators' websites may not be sufficient. Operators who do not comply with the warning requirements may face an enforcement action beginning on January 1, 2014.

For more information, contact Reed Freeman at rfreeman@mofocom.

Google Gets Its Cookies

A federal court rejected a suit filed against Google alleging violations of a number of privacy laws, including the Electronic Communications Privacy Act (ECPA), the Computer Fraud and Abuse Act, the Stored Communication Act and the Wiretap Act. *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, MDL Civ. No. 12-2358-SLR, 2013 U.S. Dist. LEXIS 145727 (D. Del. Oct. 9, 2013). Plaintiffs alleged Google circumvented the privacy settings on consumer computer browsers in order to track their browsing activities. The court held that plaintiffs lacked Article III standing because they did not sufficiently allege any harm caused by Google's information collection.

For more information, contact Nathan Taylor at ndtaylor@mofocom.

MOBILE PAYMENTS REPORT

Thanksgiving Turkeys and Phone Bills

Because turkeys weren't the only thing getting stuffed this holiday season, the Federal Communications Commission (FCC) published a request for comment

to refresh the record for its ongoing review of "cramming" (a.k.a. carrier billing), including requiring consumer opt-in for third-party charges to consumer phone bills. According to the FCC, "developments, studies, and information have come to light" since April 2012 when the FCC last looked at the issue. The FCC sought comment on whether additional measures to combat cramming are necessary or appropriate, and whether consumers can successfully resolve disputes regarding unauthorized third-party charges.

For more information, contact Obrea Poindexter at opindexter@mofocom.

FTC Made Sure They Received the Message

The Federal Trade Commission (FTC) announced settlements with operators of an Atlanta-based company to resolve allegations that they crammed charges on consumers' cell phone bills without their consent. The FTC's complaint alleged that the company billed consumers for so-called "premium services" that sent text messages with horoscopes, flirting and love tips and other information. The settlements permanently ban two individuals associated with the company from placing any charges on consumers' telephone bills or assisting anyone else in doing so. In announcing the settlement, the FTC said that it was part of "ongoing efforts" to ensure that consumer protections keep pace with developing mobile technologies.

For more information, contact Obrea Poindexter at opindexter@mofocom.

"App"etite for Consistency

On August 14, 2013, the California Attorney General's office sent a letter to the Department of Commerce to "commend" the National Telecommunications and Information Administration (NTIA) for its work on the app privacy multi-stakeholder process. The letter states that the code of conduct on mobile app transparency being developed by the NTIA multi-stakeholder process is "consistent with" recommended best practices developed by the California

Attorney General. Notwithstanding the California Attorney General's letter to the NTIA, the existence of different, and potentially conflicting, guidance will continue to raise challenges for companies that develop apps or offer them as part of a customer-facing product.

For more information, contact Obrea Poindexter at opindexter@mofocom.

MORTGAGE AND FAIR LENDING REPORT

HMDA is Hot

The CFPB has stepped up its regulation and enforcement of the Home Mortgage Disclosure Act (HMDA) with the announcement of two consent orders alleging violations of HMDA reporting obligations. The companies agreed to pay civil penalties, resubmit HMDA data, and implement various compliance and monitoring requirements. The same day, the CFPB issued [Bulletin 2013-11](#), which provides HMDA Resubmission Schedule and Guidelines and the first CFPB guidance on the factors it will consider in taking action on HMDA violations. Key takeaways are: (1) the strong nexus between CFPB examinations and enforcement; (2) the importance of compliance with consumer protection laws that are often considered to be outside of the "core" of a risk-based compliance program; and (3) the importance of accurate data reporting, especially in relation to fair lending and anti-discrimination.

For more information, read our [Client Alert](#) or contact Don Lampe at dlampe@mofocom.

Another One Bites the Dust

The settlement in *Mount Holly v. Mount Holly Gardens Citizens in Action* is official. The Supreme Court was set to decide whether the Fair Housing Act (FHA) allows for claims based on disparate impact, despite a lack of any such language in the statute. But less than a month before oral argument, the Supreme Court dismissed the appeal in

light of the parties' settlement. House Republicans sent a letter to the entity named as the new redeveloper of the Mount Holly project, announcing an investigation into whether there was any *quid pro quo* or other hanky-panky, in light of the previous disparate impact settlement that the DOJ and the City of St. Paul engineered in *Magner v. Gallagher*. There is another case ready to test disparate impact, though, with plaintiffs who are far less likely to roll over. In June, the American Insurance Association and the National Association of Mutual Insurance Companies sued HUD, arguing that HUD's new disparate impact rule violates the Administrative Procedures Act and the FHA. The case had been stayed pending the outcome of *Mount Holly*.

For more information, contact Tom Noto at tnoto@mof.com.

New Mortgage Rules Finally Finalized

In September, the CFPB finalized its latest amendments to the new mortgage rules taking effect in January 2014. According to Director Cordray, the final rule "clarifies parts of [the] mortgage rules to ensure a smoother implementation process." The modifications: a) clarify servicers' obligations under the Fair Debt Collections Practices Act (FDCPA), primarily relating to loss mitigation and contact with borrowers in default and/or bankruptcy; b) clarify the definition of "loan originator," which the CFPB expects will lower the regulatory burden for affected entities; and c) provide additional guidance on loan originator points and fee thresholds for retailers of manufactured homes and their employees.

For more information, contact Leonard Chanin at lchanin@mof.com.

HUD Adds Another QM Flavor

On September 30, 2013, HUD issued a proposed rule defining "qualified mortgage" (QM) for loans insured under the National Housing Act. HUD's definition differs from the CFPB's definition of QM in two key ways: (1) it eliminates the CFPB's mandate of a DTI of 43% or less, as HUD already has its

own ability-to-repay requirements; and (2) HUD's safe harbor is less restrictive regarding discount points, allowing up to 2.5, rather than 1.5, percentage points. Both the HUD QM rule and the CFPB QM rule will become effective on January 10, 2014.

For more information, contact Don Lampe at dllampe@mof.com.

HAMP Update

Loan servicers emerged victorious at class certification in two of the three pending HAMP MDLs this fall. Courts in the Central District of California and the District of Massachusetts both held that putative class plaintiffs, who alleged that HAMP trial payment plans (TPPs) were contracts for a permanent mortgage modification, failed to meet predominance and typicality requirements under Rule 23, among other problems. A motion for preliminary approval of the settlement of the third HAMP MDL, pending in the District of Massachusetts, is pending.

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

Fair Lending/QM Tango

In October, five federal regulators, with HUD noticeably absent, issued the first interagency guidance on the much-debated intersection of fair lending enforcement and the Ability-to-Repay and Qualified Mortgage Rule taking effect in January 2014. In an Interagency Statement, the CFPB, OCC, FRB, FDIC and National Credit Union Administration responded to industry concerns about whether the decision to offer only QMs will put lenders at risk for fair lending claims. The agencies advised that they "do not anticipate that a creditor's decision to offer only qualified mortgages would, *absent other factors*, elevate a supervised institution's fair lending risk" under the Equal Credit Opportunity Act. They stopped short of providing any definitive guidance, let alone making any guarantees.

For more information, read our [Client Alert](#), or contact Leonard Chanin at lchanin@mof.com.

OPERATIONS REPORT

Prudential Relents

The Federal Stability Oversight Council (FSOC) issued a final determination designating Prudential Financial Inc. (Prudential) a systemically important financial institution (a SIFI) subject to FRB supervision and prudential regulatory standards. Prudential had challenged its proposed designation, and FSOC held a hearing in July. Prudential could have brought an action in federal court seeking an order rescinding the final determination, but chose not to do so.

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

Leverage Requirements Ratchet Upward

The OCC, the FRB and the FDIC issued a notice of proposed rulemaking to further increase the leverage capital requirements for the largest, most systemically significant U.S. bank holding companies and certain of their subsidiaries. The proposed rule would establish a "well-capitalized" threshold of 6% for the supplementary leverage ratio for any covered subsidiary, and a leverage buffer for covered bank holding companies. The proposal would take effect on January 1, 2018, concurrently with the 3% minimum supplementary leverage ratio requirement in the new capital rule.

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

Just Add Basel (III) and Simmer Until 2014/2015

The OCC and the FRB published a joint final rule rewriting the risk-based and leverage capital requirements imposed on banking organizations. The final rule is consistent with an earlier FDIC rulemaking and results in a broadly harmonized regulatory capital framework across the banking agencies. It replaces the banking agencies' general risk-based capital rules, advanced approaches rule,

market risk rule and leverage rules. Subject to detailed transition provisions, the rule is effective for advanced approaches banks on January 1, 2014, and for all other banks on January 1, 2015.

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

Basel III American Style

The FRB issued two interim final rules incorporating Basel III regulatory capital reforms into covered banks' capital and business projections used in their capital plan and stress tests during the next reporting cycle. The first interim final rule applies to bank holding companies with \$50 billion or more in total consolidated assets, which must incorporate the revised regulatory capital framework into their capital planning projections and stress tests using the transition paths available under the Basel III Rule. The second interim final rule provides for a one-year transition period for intermediate-sized banking organizations, with total consolidated assets of more than \$10 billion but less than \$50 billion, during which they may conduct stress tests using the FRB's current capital rules without reflecting the changes in the Basel III Rule. State member banks with more than \$10 billion in assets that are subsidiaries of bank holding companies with \$50 billion or more of total consolidated assets are required to use the same Basel III Rule requirements as their parent bank holding companies and cannot take advantage of the one-year transition period. The interim final rules were effective immediately.

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

Regulators Throw into Double Coverage

The FDIC and the OCC joined the FRB in proposing a liquidity coverage ratio (LCR) requirement, similar to the LCR standard issued by the Basel Committee. The proposal would generally apply to internationally-active banking organizations with \$250 billion or more

in total consolidated assets or \$10 billion or more in on-balance sheet foreign exposure, as well as designated nonbank SIFIs that do not have substantial insurance operations. A less stringent requirement would also be imposed on depository institution holding companies that are not internationally active, but have more than \$50 billion in total consolidated assets. Covered companies would be required to hold high-quality, liquid assets of at least 100% of the company's total net cash outflows over a prospective 30-calendar-day period. The rule would be phased-in beginning January 1, 2015, and reach the 100% ratio requirement as of January 1, 2017. Comments on the proposal are due to the agencies by January 31, 2014. For additional information, read our Client Alerts [here](#) and [here](#).

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

PREEMPTION REPORT

HOLA HBOR Preemption on a Roll

Add three more decisions to the growing chorus of federal district courts finding the significant state-law obligations imposed on mortgage servicers under California's Homeowner Bill of Rights (HBOR) are preempted by HOLA and OTS regulations. *Walsh v. Wells Fargo Home Mortg.*, No. SACV 13-01526, 2013 U.S. Dist. LEXIS 155960 (C.D. Cal. Oct. 29, 2013) (provisions requiring initial contact and certain disclosures upon default and consideration for loan modification preempted); *Marquez v. Wells Fargo Bank, N.A.*, No. C 13-2819, 2013 U.S. Dist. LEXIS 131364 (N.D. Cal. Sept. 13, 2013); *Aguirre v. Wells Fargo Bank N.A.*, CV 13-05432, 2013 U.S. Dist. LEXIS 131556 (C.D. Cal. Sept. 11, 2013). All three courts found the contact and disclosure obligations as well as the loss mitigation provisions in HBOR imposed the kind of state-law requirements that are expressly preempted by the OTS regulations. No state appellate court has ruled on the issue yet.

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

In Preemption Rock, Paper, Scissors, FDIA Beats UCL

A federal court in San Francisco found that under the parity provision of the FDIA, laws that would be preempted as applied to national banks also are preempted as applied to interstate branches of state-chartered banks. *Hawthorne v. Umpqua Bank*, 11-cv-06700, 2013 U.S. Dist. LEXIS 153697 (N.D. Cal. Oct. 25, 2013). The court applied the Ninth Circuit's analysis of national bank preemption in *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712 (9th Cir. 2012), to hold common law claims and a claim under the unfair prong of the California Unfair Competition Law (UCL) challenging that a state-chartered bank's payment posting procedures were preempted by the FDIA. Consistent with the Ninth Circuit's ruling, the court allowed claims of alleged misrepresentations under the UCL fraudulent prong to proceed.

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

Who's at the Table? Part Two

Loyal readers will recall our report on the decision of a Massachusetts bankruptcy court that a debtor's claim for violation of a Massachusetts statute requiring certain disclosures for "high cost" loans was preempted as applied to the federal thrift that table-funded the debtor's loan. A Massachusetts federal court has affirmed that decision, agreeing with the bankruptcy court's conclusions that the statute, as applied to federal thrifts, is expressly preempted by OTS regulations, that the entity that table funds a loan should be treated as the original lender and that the federal thrift had table funded the debtor's loan. *Thomas v. CitiMortgage, Inc.*, No. 12-40122, 2013 U.S. Dist. LEXIS 126769 (D. Mass. Sept. 5, 2013).

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

OCC Regulations Add (on) to Preemption Claims

A federal court in New Mexico held certain state-law UDAP claims challenging a national bank's payment protection products were preempted by OCC regulations. *New Mexico ex rel. v. Capital One Bank (USA), N.A.*, No. 13cv00513, 2013 U.S. Dist. LEXIS 157252 (D.N.M. Oct. 29, 2013). The court found the OCC intended to occupy the field of debt cancellation and suspension agreements, so state UDAP claims alleging improper targeting of ineligible customers, a gross disparity between product costs and benefits, nondisclosure of certain information, and misrepresentations of essential terms were expressly preempted by federal law.

For more information, contact Jim McCabe at jmccabe@mofocom.

ARBITRATION REPORT

No Ch-Ch-Changes Allowed

The Sixth Circuit recently held that an arbitration provision that could be modified at any time upon issuance of notice was void and unenforceable. *Day v. Fortune Hi-Tech Marketing, Inc.*, Nos. 12-6304, 12-6305, 2013 U.S. App. LEXIS 19060 (6th Cir. Sept. 12, 2013). Applying Kentucky contract law, the court concluded that because the company retained the power to modify the contract with immediate effect, its promises were illusory and the contract lacked consideration. The court observed that if the contract had permitted changes upon thirty days' notice, for example, there might have been consideration because the altering party would have been bound to the original terms for the notice period.

For more information, contact Rita Lin at rlin@mofocom.

We Decide, Not You!

In *Reed Elsevier, Inc. v. Crockett*, the Sixth Circuit held that whether an arbitration agreement permits classwide arbitrability is a question for the court, not

the arbitrator, "unless the parties clearly and unmistakably provide otherwise." 734 F.3d 594 (6th Cir. 2013). While the court noted that a Supreme Court plurality had reached the opposite conclusion, it also pointed to the Supreme Court's more recent statement that it cannot be presumed that parties consented to classwide arbitration by simply agreeing to arbitrate. Unlike questions growing out of a dispute, the availability of classwide arbitration is fundamental to how parties resolve their disputes, and thus must be reserved for judicial determination unless the parties explicitly state otherwise. Turning to the arbitration agreement before it, which did not mention classwide arbitration, the court found that such silence could not be the basis for the "momentous consequence" of classwide arbitration. *Id.* at *12.

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Closing One More Loophole

In *Ferguson v. Corinthian Colleges, Inc.*, the Ninth Circuit required arbitration of plaintiffs' requests for injunctive relief under various California statutes. 733 F.3d 928 (9th Cir. 2013). The district court had refused to compel arbitration based on California's *Broughton-Cruz* rule, which prohibits arbitration of claims seeking public injunctive relief. Although the Ninth Circuit had previously applied the *Broughton-Cruz* rule, it explained that subsequent Supreme Court authority, including *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), rendered the rule incompatible with the FAA.

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TCPA REPORT

Consent Is Not Trivial

A California district court denied plaintiffs' attempt to certify a class in a TCPA case against Hilton Grand Vacations Company, LLC. *Connelly*

v. Hilton Grand Vacations Co., No. 12CV599, 2013 WL 5835414 (S.D. Cal. Oct. 29, 2013). Plaintiffs acknowledged that potential class members may have provided their information to Hilton in a number of different ways but argued that "[s]uch trivial details do not defeat commonality." *Id.*, at *3. The court, however, held that Hilton "set forth a fairly strong argument that the differing circumstances under which putative class members provided their cell phone numbers to [it] are, at the very least, relevant to a determination of prior express consent." *Id.* Because express consent would need to be evaluated on an individual basis, "the individualized issues in this suit are at least as important as the common issues," and the absence of predominant common issues precluded certification of the class. *Id.* at *4.

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Lack of Predominance Is a Showstopper

Plaintiffs' motion to certify a nationwide TCPA class was denied because plaintiffs failed to show predominance of common issues and such a failure is a "showstopper." *Fields v. Mobile Messengers Am., Inc.*, No. C 12-05160, 2013 WL 6073426, at *2 (N.D. Cal. Nov. 18, 2013). The court first stated that the burden to show a lack of prior express consent, a necessary element of a TCPA claim, falls upon the plaintiffs. The court then held that the plaintiffs failed to meet their burden to show that this element could be proven with common proof on a classwide basis. The defendants presented evidence that more than 1.5 million people consented to their subscription service. While plaintiffs argued that these records of consent were the result of mass fraud, they offered no actual evidence of fraud. Thus, "individualized inquiries regarding consent remain[ed]," and the court denied class certification. *Id.* at *4.

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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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