FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Winter 2019

IN THIS ISSUE

MOFO METRICS

3.5	Number of people in the world who own a toothbrush, in billions
3.7	Number of people in the world who own a cell phone, in billions
36	Percentage of smartphone owners who would choose their phone over their TV
68	Percentage of cell phone owners who have their phone near them while they sleep
150	Average number of times a cell phone user checks her/his phone per day
6	Number of texts sent per day, in millions
90	Percentage of text messages read within three minutes of receipt

EDITOR'S NOTE

The holidays came early for financial institutions when the Supreme Court agreed to hear a challenge to the constitutionality of the CFPB. We can expect fireworks in the New Year as two experienced Supreme Court practitioners square off on whether the Dodd-Frank "for cause" provision is unconstitutional and, if so, whether it can be severed. We have some insight into what Justice Kavanaugh thinks; but can he convince four of his fellow Justices?

It's too soon to let visions of a world without the CFPB dance in your head. It's also too soon to tell whether the Supreme Court will create the authority to fire the director at will just in time for a new Democratic administration to fire the current Director and put its own mark on the agency. More to look forward to in the New Year.

For now, before you settle down for a long winter's nap, on Beltway, on Mortgage, on Privacy, on Fintech; on Arbitration, on Bureau, on TCPA, on BSA/AML! And with a nod (up the chimney) to Clement Moore: Happy holidays to all and to all a good night!

BELTWAY

End to the "Mad[den]ness"?

With uncertainty regarding the "valid-when-made" doctrine still lingering from the 2015 *Madden* decision, the OCC and the FDIC recently proposed rules clarifying the validity of interest rates that have been sold or transferred. The FDIC's [Proposed Rule] would cover loans made by state-chartered banks; the OCC's [Proposed Rule] would apply to national banks and federal and state savings associations. Both proposals would reaffirm the "valid-when-made" doctrine for state and national banks, specifying that the interest rate at the time of origination remains permissible after that loan is sold or transferred. Certain interest groups have decried this model of lending as "rent-a-bank" schemes and are likely to challenge the proposed rules in court. In its proposal, the FDIC specified that it would "view unfavorably entities that partner with a [s]tate bank with the sole goal of evading a lower interest rate established under the law of the entity's licensing [s]tate(s)." Comments on the OCC's proposal are due January 21, 2020. Comments on the FDIC's proposal will be due 60 days from publication in the *Federal Register*.

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

This Is a Risky Banking Business

The FDIC issued its 2019 Risk Review that provides a summary of risks that may impact FDIC-insured institutions and the Deposit Insurance Fund. In the Risk Review, the FDIC identified several key risks to banks, including the housing market (which the FDIC noted "began to slow in 2018 as concerns about affordability intensified"), and deposit competition resulting from low interest rates, notably, lending to nonbank financial institutions (e.g., nonbank mortgage lenders, private equity funds, and REITs). With respect to nonbank financial institution lending, the FDIC noted that bank lending to such institutions has expanded "seven-fold since 2010" and exceeds $400 billion.

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

Thoughtful Insight

Consistent with its *Statement of Policy on the Development and Review of FDIC Regulations and Policies*, the FDIC issued a Notice and Request for Information seeking comment on approaches to analyze the effects of its regulatory actions; such analysis is required by federal law. For example, the Regulatory Flexibility Act requires the FDIC to review the effects of regulatory actions on small entities. The FDIC is seeking comments on examples of analytical approaches and sources of data that may assist the FDIC in its analysis of regulatory analysis. In particular, the FDIC is seeking public comment on its analysis of (1) the effects that changes in regulations have on safety and soundness of banks and (2) how to evaluate effects of changes in compliance obligations. Comments are due within 60 days of publication in the *Federal Register*, which was scheduled for November 29, 2019.

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

BUREAU

Mark Your Calendars . . .

In a brief filed in federal court in November, the CFPB indicated that it plans to release an "outline of proposals" for regulations regarding the collection of small-business lending data in approximately a year. The Dodd-Frank Act requires financial institutions to collect, report, and make public certain data regarding credit applications made for women-owned, minority-owned, and small businesses, but the CFPB has taken the position that the data collection provisions do not take effect until it has promulgated regulations. Although the CFPB has started engaging with industry about small business data collection, including in a November symposium, the CFPB has yet to take any concrete steps in the rulemaking process.

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

CFPB Says the CFPB Is Unconstitutional; SCOTUS Will Decide

The Supreme Court granted certiorari *in Seila Law LLC v. CFPB* and will review whether the CFPB, as an independent agency led by a single director that can only be removed by the President for cause, is unconstitutional. In September, the CFPB and the DOJ filed a brief in the Supreme Court urging the Court to take up the case and hold that the agency structure is unconstitutional. On the same day the brief was filed, Director Kraninger wrote letters to the congressional leaders stating that the CFPB would no longer defend the constitutionality of the CFPB in court. The Supreme Court has appointed an amicus curiae to defend the constitutionality of the CFPB, given that the CFPB will no longer do so.

For more information, contact Joe Palmore at jpalmore@mofo.com or read our Client Alert.

Reinventing Innovation Policies

On September 10, the CFPB issued three new or updated policies to reduce regulatory uncertainty and promote innovation: (1) a No-Action Letter Policy, (2) a Trial Disclosure Program (TDP) Policy, and (3) a Compliance Assistance Sandbox (CAS) Policy. As compared to the

CFPB's prior innovation policies, the new policies streamline the review and approval processes and ongoing reporting requirements. It remains to be seen whether industry will seek to use the new policies. The TDP Policy and CAS Policy, respectively, will allow companies to conduct in-market testing of alternative disclosures and offer innovative companies safe harbor from certain regulatory liabilities. The CFPB's prior innovation policies were met with a tepid response from industry, with only one no-action letter being issued in three years under the old policy. Already, the CFPB has issued its first no-action letter under the new No-Action Letter Policy, which suggests the new innovation policies may be a step in the right direction.

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

Your Mission, Should You Choose to Accept It…

The CFPB announced that it will create a task force to study and consider ways in which federal consumer financial laws can be updated and harmonized. The Bureau solicited applications for persons with expertise in consumer financial products or services and a background in senior public service or academia to serve on the task force. The task force will have a Chair and approximately six members who will work with CFPB and other government employees to produce new research and legal analysis of consumer financial laws. They will focus on the harmonization and modernization of consumer credit laws and their implementing regulations.

For more information, contact Crystal Kaldjob at ckaldjob@mofo.com.

Accuracy in Credit Reporting

The CFPB and FTC will be hosting a public workshop on December 10 to discuss issues affecting the accuracy of credit reports and background reports. In anticipation of the workshop, the agencies have requested public comments on a wide range of topics related to the accuracy of consumer reports and the accuracy obligations of consumer reporting agencies and furnishers of credit information, including, for example, whether new technologies and data management practices can be used to improve accuracy. Notably, the agencies have requested comments on what private sector or government measures, including changes in law, could be taken to improve accuracy in credit reporting. Interested commenters will have until January 10, 2020, to submit comments.

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

MOBILE & EMERGING PAYMENTS

FinTech Charter Still in Flux

A federal court in New York ruled against the OCC in the closely watched legal fight with the NY DFS challenging the OCC's plan to provide special-purpose charters to nonbank entities that do not accept deposits. Decision and Order, *Lacewell v. OCC*, No. 18 Civ. 8377 (VM), 2019 WL 6334895 (S.D.N.Y. Oct. 21, 2019). The decision "set[s] aside" the OCC's existing regulation "with respect to all fintech applicants seeking a national bank charter that do not accept deposits." *Id.* at *1. Stay tuned, though, because the OCC "reserves its appellate rights" in the negotiated order signed by the court, and Comptroller of the Currency Joseph Otting confirmed at a recent industry conference that the OCC plans to appeal the ruling to the Second Circuit.

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

Crypto Investors, Call Your Accountants: IRS Issues Guidance on Virtual Currency

The IRS issued a revenue ruling, FAQs, and a revision to draft Schedule 1 to Form 1040 regarding various aspects of virtual currency transactions. In Revenue Ruling 2019-24, the IRS considered two situations involving what is called a cryptocurrency "hard fork," a defined protocol change on the distributed ledger supporting the legacy currency that results in a permanent diversion from the legacy distributed ledger, and potential taxpayer gross income as a result of such a fork. The FAQs address numerous questions relating to dispositions of virtual currency, including the determination of basis and holding periods and the use of virtual currency as compensation for an independent contractor or employee. The revision to draft Schedule 1 inserted a question regarding a taxpayer's involvement in the sale, exchange, acquisition, or receipt of virtual currency.

For more information, please contact Ed Froelich efroelich@mofo.com or read our Client Alert.

MORTGAGE & FAIR LENDING

Help Me, HMDA!

Some good news for some mortgage lenders. The CFPB issued a final rule adopting two parts of a May 2019 proposal by: (1) increasing the threshold for HMDA reporting of HELOCs to 200 or more lines of credit in each of the previous two calendar years and (2) increasing the threshold for HMDA reporting of mortgage loans to 50 or more loans originated in each of the previous two calendar years (up from 25). In addition, the CFPB extended for another two years a temporary threshold for HMDA reporting of HELOCs to 500 or more lines of credit in each of the previous two calendar years and asked for comment about doubling the mortgage loan threshold to 100 or more loans.

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

OCC OREO Order

The OCC entered into a consent order with a mortgage lender for alleged violations of the rules on how long banks can hold foreclosed property (OREO). Banks generally cannot hold OREO for more than five years. The OCC had alleged that the mortgage lender had deficient policies, procedures, and internal controls around monitoring the OREO hold period and had failed to implement agreed-upon corrective actions. The OCC acknowledged, though, that the bank had "significantly reduced its inventory of OREO assets" over the last 12 months. The consent order requires the bank to pay $30 million in civil money penalties.

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

Advance Fees a No-Go

A federal court in Wisconsin found in favor of the CFPB in its long-running case against two mortgage relief law firms and the attorneys who own the firms. *CFPB v. Mortg. Law Grp., LP*, No. 14-cv-513-wmc, 2019 WL 5698701 (W.D. Wis. Nov. 4, 2019). The law firm and attorneys were ordered to pay $59 million in restitution and civil money penalties for taking up-front payments to help borrowers avoid foreclosure and obtain loan modifications and for not providing the promised services. Generally, lawyers providing mortgage assistance as part of their legal services practice are exempt from the prohibition on advance fees for mortgage relief services. The court ruled that the defendants did not qualify for this exception. The court found in favor of the CFPB, but in assessing the monetary judgment, the court rejected the CFPB's (1) proposed date for calculating the number of violations, (2) method for determining the number of violations, and (3) request to keep any restitution not paid to former customers. On the last point, the court found the CFPB's proposal would amount to exemplary or punitive damages that are prohibited under the CFPA.

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

Co-Marketing Complications Consent Order

The FDIC took an enforcement action with a state-chartered bank for alleged RESPA violations in connection with the bank's co-marketing arrangements and desk rental agreements with real estate agents and homebuilders using an online platform. In particular, the FDIC alleged that the arrangements and agreements resulted in the payment of fees for referrals of mortgage loan business. The FDIC did not allege that the arrangements were illegal per se, and instead alleged that the fees paid exceeded fair market value such that the excess is for referrals of mortgage business. Under the consent order, the bank must pay $1.35 million in civil money penalties. The FDIC recognized that the activities were conducted under a discontinued business line.

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

OPERATIONS

Tailored Living Will Requirements

The Federal Reserve and the FDIC finalized a Rule that modifies the living will requirements for large firms. The Final Rule retains the resolution plan requirements for the largest firms, while reducing requirements for smaller firms. The Final Rule is substantially the same as the agencies' proposed rule. For the largest firms, the Final Rule continues the current practice of requiring resolution plans on a two-year cycle; but, for smaller firms, living wills will be submitted on a three-year cycle. Moreover, firms with less than $250 billion in total consolidated assets that do not meet certain risk criteria would no longer be subject to the living will requirement. The Final Rule is effective December 31, 2019.

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

Let's Revamp Ratings

The Federal Reserve and the FDIC jointly published a Request for Information (RFI) as part of the agencies' review of their bank ratings methodology. Specifically, the agencies requested information on the CAMELS ratings, which measure banks' health and risk tolerance. CAMELS ratings includes six measures of a bank's (1) capital, (2) asset quality, (3) management, (4) earnings, (5) liquidity, and (6) sensitivity to market risk. The RFI seeks information responses to 10 questions, including questions about the consistency of CAMELS ratings, the way in which ratings are used by regulators, and the effect of ratings on the issuance of enforcement actions. Comments are due December 30, 2019.

For more information, contact Jiang Liu at jiangliu@mofo.com.

Risk-Based Capital and Liquidity Requirements

The OCC, the Federal Reserve, and the FDIC adopted a [Final Rule] revising the criteria to determine the applicability of regulatory capital and liquidity requirements for large U.S. banking organizations and the U.S. intermediate holding companies of certain foreign banking organizations. The agencies' Final Rule establishes four risk-based categories for determining the applicability of requirements under the agencies' regulatory capital rule and liquidity coverage ratio rule. Under the Final Rule, these requirements will increase in stringency based on risk factors including size, cross-jurisdictional activity, weighted short-term wholesale funding, nonbank assets, and off-balance sheet exposure. The Final Rule is effective December 31, 2019.

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

PREEMPTION

On the Interest Bandwagon

Joining the Ninth Circuit's conclusion in *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018), a federal district court in New York concluded that neither the NBA nor OCC regulations preempt the application to a national bank of state laws requiring payment of interest on mortgage escrow accounts. *Hymes v. Bank of America, N.A.*, No. 18-CV-2352 RRM, 2019 WL 4888123 (E.D.N.Y. Sept. 30, 2019). The district court held that Dodd-Frank's amendments to the Truth in Lending Act required payment of such interest under state law, that OCC regulations purporting to preempt such state laws were not entitled to even reduced deference, and that compliance with such statutes did not prevent or significantly interfere with the national bank's exercise of its authorized powers.

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

We Don't Care How They Do It in New York

A bankruptcy court in Colorado has weighed in on the "valid-when-made" rule. In *In re Rent-Rite Superkegs West, Ltd.*, 603 B.R. 41 (D. Colo. 2019), a Colorado corporation borrowed money from a Wisconsin bank at a 121% interest rate. The interest rate was lawful under Wisconsin law, and the bank was permitted to "export" it under DIDA. The bank assigned its interest in the loan to a non-bank entity. In bankruptcy, the debtor argued that the assignment rendered the loan usurious under Colorado law. The bankruptcy court rejected the debtor's argument, finding that the loan was valid when it was made, and describing the "hot mess that results from focusing on the current holder rather than the originating lender." The bankruptcy court also noted that the "'valid-when-made' rule, which focuses on the originating entity . . . has withstood the test of time.'" *Id.* at 67.

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

PRIVACY

California Is Not Done Yet – Part 1

The California Consumer Privacy Act continues to be the dominant privacy issue of 2019. Financial institutions are in a mad dash to finish preparations to comply with the CCPA as the Act's operative date of January 1, 2020, draws ever closer. On October 11, the California governor signed into law five bills that amend the CCPA, including Assembly Bill 25, which includes an exception for personal information pertaining to, for example, job applicants, employees, and contractors of a business. This exception has a one-year sunset and also does not apply to the private right of action under the CCPA. The same is true for a partial one-year exception for personal information collected in the context of certain business-to-business transactions (Assembly Bill 1355).

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

California Is Not Done Yet – Part 2

California's attorney general issued proposed regulations to implement the CCPA. The proposed regulations address several CCPA provisions that explicitly call for AG rules, as well as several other areas of interest and concern. For example, the proposed regulations include provisions relating to the content of disclosures to consumers, the handling of California resident rights requests, verifying consumers' identities, protecting data relating to minors, and antidiscrimination and financial incentives. Comments to the proposed regulations are due by December 6. The CCPA becomes operative on January 1, 2020, but the AG cannot bring an enforcement action until either July 1, 2020, *or* six months after the final regulations are issued, whichever comes first.

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

California Is Not Done Yet – Part 3

A new privacy ballot initiative that would significantly amend the CCPA is brewing. Initiative 19-0019, the California Privacy Rights and Enforcement Act of 2020, would appear on the November 2020 California ballot if its sponsor obtains sufficient signatures or strikes a deal with the California legislature. If the initiative were enacted, it would once again radically shift the privacy landscape in California, including by: expanding the scope of the current notice, access, and deletion rights under the CCPA; and adding new rights and obligations, such as a right to correction and requirements that business adhere to data protection principles including data minimization and data accuracy. The initiative's backers have indicated that their intent is to prevent changes to the CCPA that would undermine its consumer protections.

For more information, contact Purvi Patel at [ppatel@mofo.com]() or read our [Client Alert]().

Note: In early November 2019, the proponents of this "CCPA" initiative submitted an [amended version](), which is now designated as Initiative 19-0021A1 and titled "The California Privacy Rights Act of 2020." Check back soon at our [CCPA Resource Center]() for our forthcoming client alert on this new development.

California Is Not Done Yet – Part 4

Meanwhile, in non-CCPA news, two other privacy bills were enacted in California as the legislative session drew to a close. [Assembly Bill 1130]() expands the California data breach law's definition of "personal information" that triggers notice requirements to include certain biometric information, as well as other information, such as passport numbers. This expanded definition is relevant to the CCPA because under the CCPA, California residents may sue a company for certain types of breaches involving personal information as defined under the breach notification law. Separately, [Assembly Bill 1202]() requires registration for a business that knowingly collects and sells to third parties the personal information of a California resident with whom it does not have a direct relationship. The law's key terms (e.g., "business" and "sell") use the corresponding definitions in the CCPA.
For more information, contact Chris Lyon at [clyon@mofo.com]() or read our [Client Alert]().

Nevada Joins the Party

Nevada recently became the first state to follow California's lead and enact legislation that includes privacy obligations similar to those that will be imposed by the CCPA. [Senate Bill 220](), which was signed into law in May, amends Nevada's privacy policy law effective October 1, 2019, to create a right for consumers to opt out of the "sale" of personal information collected over a website or online service. SB 220 includes a far broader GLBA exception than the CCPA. SB 220 amends the Nevada online privacy policy law's definition of "operator" to exclude GLBA financial institutions such that financial institutions subject to the GLBA will not be considered an "operator" and, as a result, the Nevada "sales" limitation will not apply to such a financial institution.

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

Enjoy Your Stay

A hotel chain has succeeded in dismissing (again) plaintiffs' claims arising out of alleged failures by the hotel chain to appropriately safeguard personal information in connection with a data breach in 2016 and 2017 involving Kimpton's reservation service provider, Sabre. *Thomas v. Kimpton Hotel & Rest. Grp., LLC*, No. 19-cv-01860, 2019 WL 5684538 (N.D. Cal. Nov. 1, 2019). The court ruled that while "plaintiffs have added allegations generally identifying the nature of the safeguards not taken" by Sabre, no facts alleged this time around show that the hotel chain can be held responsible for the alleged acts or omissions of Sabre. *Id.* at *1. The court did, however, allow leave to amend to add factual allegations to support a finding that Sabre was acting as an agent of the hotel chain.

For more information, contact Dave McDowell at [dmcdowell@mofo.com]().

ARBITRATION

More Arbitration Disclosures Coming

The Ninth Circuit vacated an arbitration award, finding that even though the arbitrator had disclosed he had an "economic interest in the success of JAMS," his failure to also disclose that he was a part-owner of JAMS mandated vacatur, in light of the "non-trivial business relations" between JAMS and one of the parties in the arbitration. *Monster Energy Co. v. City Beverages LLC*, 940 F.3d 1130 (9th Cir. 2019). The absence of this additional disclosure, the Ninth Circuit held, "creates a reasonable impression of bias and supports vacatur of the arbitration award." *Id.* at 1138. Unless rehearing is granted, this decision may impact both pending and recently concluded arbitrations and likely will mandate additional disclosures by both arbitrators and arbitration firms, including whether a particular arbitrator has an ownership interest in the arbitral forum, the nature and extent of that interest, and the volume of business conducted with the arbitration firm by both the parties and their law firms. Morrison & Foerster is assisting with the petition for rehearing.

For more information, please contact Dan Marmalefsky at [dmarmalefsky@mofo.com]().

Nothing Illusory Here

A federal court in Massachusetts enforced an arbitration provision in a privacy action brought by a purported class of cable and internet subscribers. *Wainblat v. Comcast Cable Commc'ns, LLC*, No. 19-10976-FDS, 2019 U.S. Dist. LEXIS 190650 (D. Mass. Nov. 4, 2019). The plaintiff had argued that the company's arbitration was "illusory" because the company had the ability to unilaterally change the contractual terms and terms of arbitration. The court disagreed, finding that the company's obligations were not "illusory," in part because subscribers were given a 30-day window to reject any unilateral changes to the agreement. The court ultimately found the arbitration provision to be valid and enforceable.

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

It's Settled

One plaintiffs' firm, on behalf of four separate named plaintiffs and purported class actions, brought data privacy claims against each of the four major cellular phone carriers. All four carriers moved to compel arbitration pursuant to arbitration provisions in subscriber agreements. A district court in Maryland, in one consolidated order, granted all four motions to compel arbitration. *Baron v. Sprint Corp.*, No. 1:19-cv-01257, 2019 WL 5456796 (D. Md. Oct. 24, 2019). The court rejected as foreclosed by Supreme Court and Fourth Circuit law, plaintiffs' argument that arbitration was not of value to cell phone subscribers, noting that courts could not treat arbitration as inferior to litigation.

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

TCPA

No Direct Trace

The Eleventh Circuit vacated class certification in a TCPA case alleging that defendant failed to maintain a do-not-call list, because many class members never requested to be placed on such a list. *Cordoba v. DIRECTV, LLC*, No. 19-12077, 2019 WL 6044305, at *7 (11th Cir. Nov. 15, 2019). The court agreed with defendant's argument that class members who did not ask to be placed on a do-not-call list did not have Article III standing, as their injuries could not be traced to defendant's challenged action. *Id.* The court held that there is "no remotely plausible causal chain linking the failure to maintain an internal do-not-call list to the phone calls received by class members who never said to [defendant's contractor] they didn't want to be called again." *Id.*

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

These Soundboard Calls Never Had a Chance

The Western District of Oklahoma held that soundboard calls can qualify as "prerecorded voice" calls for purposes of 47 U.S.C. § 227(b)(1)(B) where such calls "never interact with the customer except in preprogrammed and meaningless ways." *Braver v. NorthStar Alarm Servs.*, No. CIV-17-0383-F, 2019 WL 5722207, at *3 (W.D. Okla. Nov. 5, 2019). The court denied defendant's motion for reconsideration of its earlier summary judgment motion and motion for class decertification, rejecting the argument that its soundboard agents "utilize[d] the technology to have human-driven conversations." *Id.* at *4. Because each call began with the soundboard agent playing a prerecorded message, the court concluded that a violation was established regardless of the level of human interaction taking place later in the calls.

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

Professional TCPA Standing

The District of Massachusetts found that the standing of a "professional plaintiff" "boil[ed] down to" whether the plaintiff maintained the number at which he received the allegedly infringing call "for any purpose other than attracting telemarketing calls to support his TCPA lawsuits." *Rhodes v. Liberty Power Holdings, LLC*, No. 18-10506, 2019 WL 4645524, at *10 (D. Mass. Sept. 24, 2019). Defendant argued that plaintiff did not suffer harm within the TCPA's zone of interest because he "proactively embraces telemarketing calls" and "simply makes money from the statute because he sends TCPA demand letters and files TCPA lawsuits." *Id.* The court, however, credited plaintiff's explanation that he maintained the landline number for emergencies and denied defendant's summary judgment motion.

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

BSA/AML

Don't Forget About AML/CFT Obligations for Digital Assets

The SEC, the CFTC, and FinCEN published a Joint Statement emphasizing that "persons engaged in activities involving digital assets" may have AML/CFT obligations under the BSA. The agencies stressed that the label or terminology used to describe a digital asset, or a person involved in activities involving digital assets, may not necessarily align with how such asset or activity is defined under the BSA and its implementing regulations, and that it is the facts and circumstances underlying an asset or activity (including its economic reality and use) that determine its categorization and treatment under the BSA. The joint statement included separate comments from each of the three agencies.

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

The FinCEN Director Speaks

In prepared remarks at the Chainanalysis Blockchain Symposium on November 15, FinCEN Director Kenneth A. Blanco addressed several topics related to convertible virtual currency, including: (1) regulatory clarity, (2) the value of BSA data, (3) the Funds Travel Rule, (4) stablecoins and anonymity-enhanced cryptocurrencies, and (5) the dialogue between FinCEN and the private sector. Among other things, Director Blanco emphasized that FinCEN uses the information from financial institutions "to save lives and protect people and our national security"; that FinCEN expects financial institutions to comply with the Funds Travel Rule when engaging in activities related to CVC; and that FinCEN encourages companies to attend its "innovation hours" events or use the FinCEN regulatory helpline for CVC-related compliance questions. Director Blanco further pointed out that, since the issuance of FinCEN's CVC Guidance and Advisory in May 2019, over 10,000 SARs related to CVC have been filed.

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

This newsletter addresses recent financial services developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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