GOODWIN

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Overview

For so many people and companies, 2020 was a year of uncertainty unlike any other in recent memory. It was no different for the financial services industry. The biggest uncertainty was COVID-19. The global pandemic had a profound effect on every segment of the industry — from credit reporting to mortgage lending — and every industry stakeholder — from financial services companies to consumers to regulators. The story for 2021 (hopefully) will be recovery and the aftereffects of the pandemic.

To contain the fallout from the crisis, federal and state policymakers moved swiftly to offer financial relief to consumers and regulatory relief to companies. Consumer finance companies, whose operations were and continue to be severely impacted by the virus, had to navigate these unchartered waters and develop new systems and adjust their business practices to shifting consumer demands and regulatory requirements. These requirements included, most notably, the mortgage forbearance and foreclosure moratorium provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), benefits for federal student loans borrowers, including interest rate reductions and the suspension of collection efforts, and changes to industry-standard credit reporting practices. Much of this relief is scheduled to expire over the coming months. The process of unwinding this relief, either immediately or, as is likely, after further extensions by the incoming Biden administration, will occupy industry and regulator attention for much of 2021 and beyond.

The 2020 event that will perhaps have the most significant long-term impact on the Consumer Financial Protection Bureau's (CFPB, or the Bureau) regulatory and enforcement agenda is the decision by the Supreme Court last summer in *Seila Law LLC v. CFPB*, No. 19-7. The Supreme Court held that the Dodd-Frank Act's for-cause removal provision for the CFPB Director violates the separation of powers, as Article II of the Constitution vests in the President the power to remove federal officials. The Court stopped short of striking down the entirety of the Dodd-Frank Act, however, holding instead that the for-cause removal provision could be severed from the rest of the statute. The Supreme Court's ruling means that Presidents have the authority to fire the CFPB Director at will, which means that going forward the CFPB's agenda will more directly mirror the current administration's. Immediately following President Biden's inauguration, Director Kraninger submitted her resignation at the President's request — meaning that President Biden will not need to test his new authority to nominate her planned successor, Rohit Chopra, to serve as Director of the CFPB. Mr. Chopra's appointment is likely to radically reshape the CFPB's regulatory and enforcement agenda, a development which we discuss in detail throughout this Review.

Yet another surprise awaited the industry in 2020: an uptick in CFPB enforcement activity reversed a years'-long decline in the number of publicly announced enforcement actions initiated by federal agencies, even as the number of actions initiated by other federal agencies remained relatively flat. The CFPB's publicly announced enforcement actions in

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2020 were consistent with Director Kathy Kraninger's more modest enforcement agenda — namely, obtaining consumer relief, restitution, and injunctive relief for what the Bureau sees as clear-cut instances of tangible consumer harm, often to vulnerable populations such as minorities, students, and military servicemembers. Director Kraninger also continued her departure from the agenda of former Director Richard Cordray by rolling back policies implemented by the Bureau during Director Cordray's tenure, including rescinding the "ability to repay" underwriting requirements of the Payday Lending Rule on the grounds that the CFPB had "re-evaluat[ed] the legal and evidentiary bases for these provisions and [found] them to be insufficient."

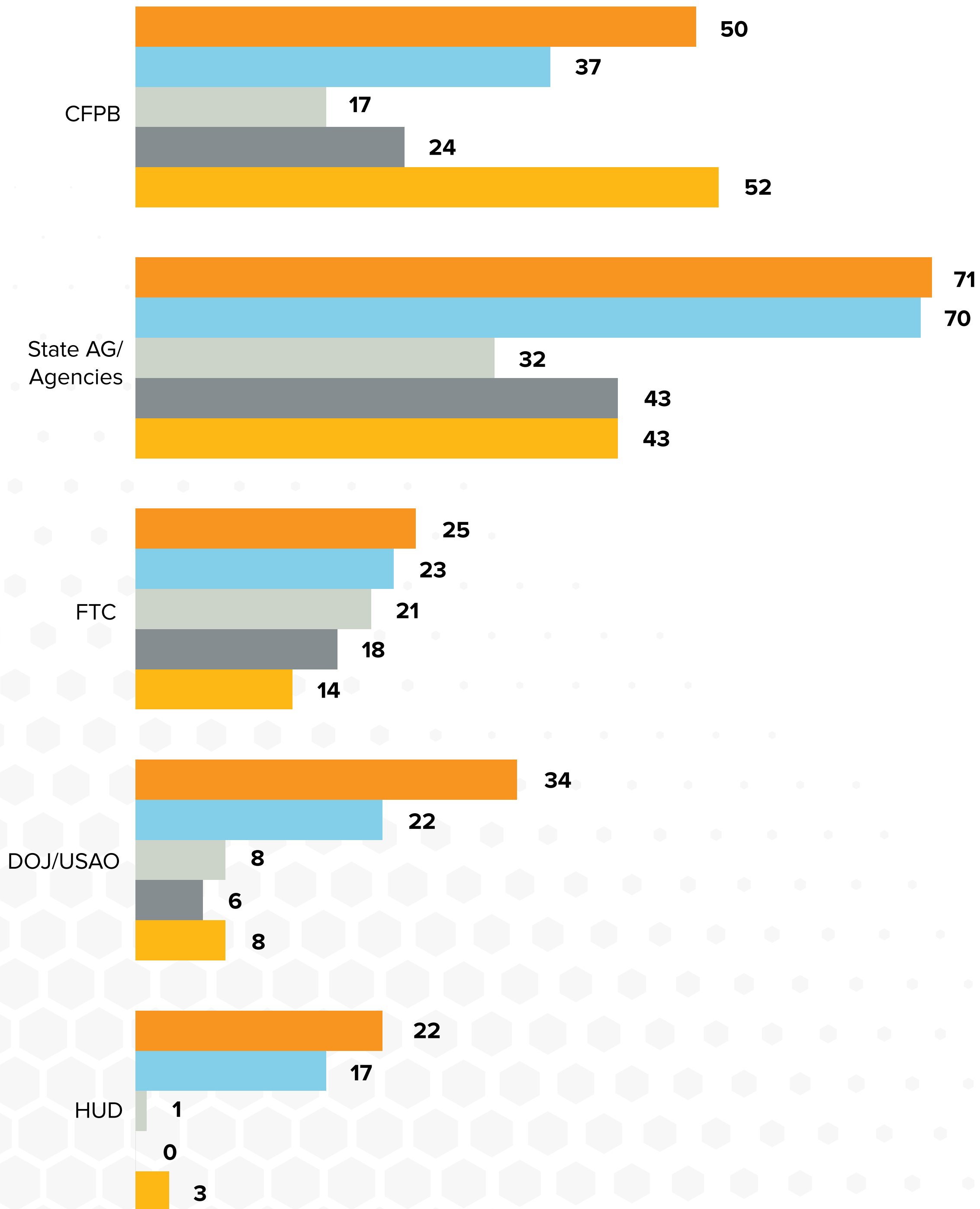
Mr. Chopra's appointment is likely to radically reshape the CFPB's regulatory and enforcement agenda.

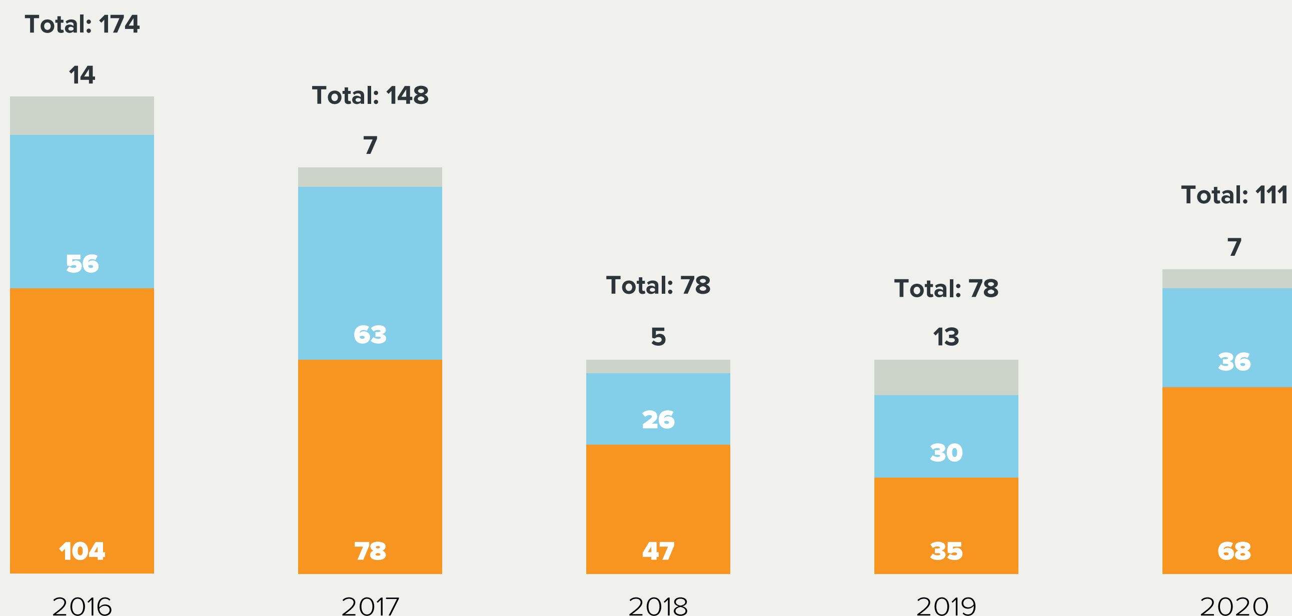
Other federal agencies remained active in the consumer finance enforcement and regulatory space in 2020, although to a much lesser degree than the CFPB. The Federal Trade Commission (FTC) targeted credit repair companies that charged up-front fees for illusory services, whereas the U.S. Department of Justice (DOJ) was particularly active in policing alleged fraud related to government-insured Home Equity Conversion Mortgages (HECMs) and closed out its years'-long investigation of Wells Fargo's opening of unauthorized accounts. The most notable federal regulatory developments outside of the CFPB were the Office of the Comptroller of the Currency's (OCC) "True Lender" Rule, and the U.S. Department of Housing and Urban Development's (HUD) final rule revising its disparate impact standards.

On the state level, the uptick in enforcement activity that we expected from Democratic takeovers of some state governments did not materialize, almost certainly because of the diversion in attention caused by the pandemic. The most significant state-level development in 2020 occurred on the regulatory side, however, as California enacted a suite of new laws that transformed the Department of Business Oversight into the Department of Financial Protection and Innovation (DFPI): a mini-CFPB with extensive rulemaking and enforcement authority over virtually every entity offering a consumer financial product or service to a California consumer.

We expect that 2021 will mark a sea change in enforcement, regulatory agendas, and rulemaking as a result of the election of President Joe Biden and the Democrats' seizing control of both houses of Congress, though the Democrats' narrow majority in the Senate may take certain aggressive consumer protection initiatives off the table — for now. It is likely, however, that the ongoing pandemic will hamper implementation of certain parts of the Biden administration's regulatory agenda in the short-term and may accelerate implementation of others, such as lengthier mortgage forbearance periods and extended foreclosure moratoriums. Nonetheless, by the end of 2021 we anticipate an increase in federal enforcement activity across the board and consumer-friendly agency guidance, proposed rules, and proposed legislation in a number of key areas, including auto lending, mortgages, payday and small-dollar lending, and student lending.

Total Actions by Agency





Key Trends

The number of publicly announced enforcement actions increased slightly in 2020, representing a change in direction from the steady decrease in activity since 2015. Though this shift is notable, enforcement activity remains only a fraction of pre-Financial Crisis era levels. In 2016, we tracked 174 federally-initiated enforcement actions, whereas we tracked 75 such actions in 2020, seven of which were joint actions conducted with the assistance of state attorneys general or agencies. The 75 actions nonetheless represent a 53% increase in the number of federal or joint actions tracked in 2019.

This year, as in years past, the CFPB took the lead on enforcement. The year-over-year increase in publicly announced enforcement activity at the CFPB is responsible for the uptick in activity overall. Goodwin commented on this emerging trend in **last year's issue**, where we attributed the increase in activity to the appointment of Director Kraninger and the CFPB's joint efforts with state attorneys general. The CFPB doubled its enforcement activity from 2019, with Goodwin tracking 52 actions in total this year. But activity by many other federal agencies, on balance, remained about the same in 2020. The FTC reported a slight decrease in activity (14 actions in 2020, as compared to 18 in 2019), while the DOJ reported a modest increase (eight actions in 2020, as compared to six in 2019). Certain agencies that were active in 2019, such as the FDIC, OCC, and Federal Reserve, did not publicly report any consumer finance actions in 2020.

On the state side, enforcement activity remained about the same as in 2019. California, Massachusetts, and New York continued to lead enforcement at the state-level, initiating almost as many publicly announced actions as all other states combined. While state agencies focused efforts on a diverse array of issues, the majority of state-led actions concerned debt collection and debt settlement (12 actions) and personal and payday lending (nine actions). Coordinated state efforts also resulted in some high-dollar settlements in 2020, most notably a $550 million settlement concerning Santander Consumer USA Inc.'s auto lending practices and a settlement securing $330 million in debt relief from the trustee of ITT Technical Institute student loans.

2020 Highlights

Significant Enforcement Actions

DOJ Settles with Wells Fargo Over Unauthorized Accounts

The largest recovery by dollar amount in 2020 was the $3 billion settlement reached between the DOJ and Wells Fargo concerning Wells Fargo's alleged opening of millions of accounts for customers without their consent between 2012 and 2016. This settlement follows Wells Fargo's 2018 settlement with attorneys general of all 50 states and the District of Columbia (for $575 million), as well as its 2016 settlement with the CFPB, OCC, and Los Angeles City Attorney (for $185 million) concerning the same alleged conduct, and appears to bring Wells Fargo's legal liability concerning this incident to a close.

34 States Secure $550 Million Settlement with Auto Lender Santander

In May, a group of state attorneys general reached a $550 million settlement agreement with Santander Consumer USA Inc., resolving a five-year investigation into the company's auto lending practices. The states alleged that Santander's credit scoring model predicted that certain segments of borrowers had a greater than 70% chance of default, and yet Santander originated auto loans to those borrowers, failed to ensure that auto dealers had verified borrowers' qualifying information, and lacked adequate procedures to prevent false information from being used in the underwriting process. The Santander settlement represents the largest recovery at the state level in 2020.

CFPB Enters into Consent Orders with Nine Separate Lenders Following "Sweep of Investigations" into VA Loan Advertising Practices

In 2020, the CFPB entered into nine consent orders with different mortgage companies over allegedly deceptive advertisements directed toward military servicemembers and veterans. Though the specific alleged conduct differed by entity, the CFPB alleged that the lenders falsely represented an affiliation with the Veteran's Administration (VA), misrepresented the terms of credit related to VA-guaranteed mortgage loans, and failed to adequately disclose that they were a lender different from the borrower's current lender, which according to the CFPB rendered the advertisements misleading. In total, these actions resulted in the nine companies paying $4.4 million in civil money penalties.

Federal and State Regulators Attack Abusive Debt Collection Practices in "Operation Corrupt Collector"

In September, more than 50 federal and state law enforcement entities, including the CFPB and FTC, launched "Operation Corrupt Collector," an initiative to protect consumers from "phantom debt collection" and "abusive and threatening debt collection practices." Numerous lawsuits have been filed as part of Operation Corrupt Collector, including five cases filed since September by the FTC alone. In addition to an enforcement crackdown, Operation Corrupt Collector includes extensive consumer outreach by the agencies.

Significant Regulatory Developments

CFPB Rescinds Mandatory Underwriting Provisions of the Payday Lending Rule

In July, the CFPB rescinded in their entirety several key provisions of the Director Cordray-era Payday Lending Rule, including a requirement that lenders determine a borrower's ability to repay before making a covered loan, on the grounds that the Bureau had "re-evaluat[ed] the legal and evidentiary bases for these provisions and [found] them to be insufficient." The Bureau also amended the rule to eliminate certain definitions related to the underwriting provisions, such as identifying as an "unfair and abusive practice" making covered loans without first determining a borrower's ability to repay.

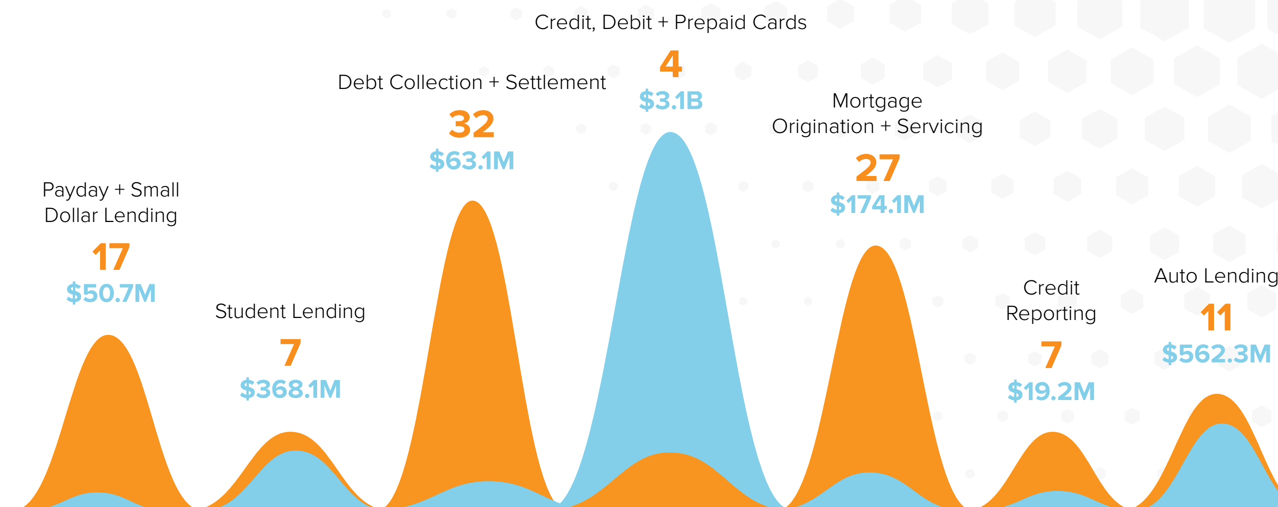
CFPB Issues Final Rules Implementing the FDCPA

In October, the CFPB announced a final rule to implement the Fair Debt Collection Practices Act (FDCPA), strengthening protections for consumers who communicate with debt collectors and clarifying the application of the FDCPA to modern technologies, including email and text messages. The new rule includes call frequency and opt-out requirements that limit debt collectors' ability to contact consumers, but offers some concessions to debt collectors, including more lenient rules for certain "limited content messages." In December, the CFPB announced an additional rule to implement the FDCPA containing requirements for debt collection disclosures. The rule creates additional requirements around the content and presentation of such disclosures, including requirements for specific steps a debt collector must take to disclose the existence of a debt to consumers before reporting information about the debt to a consumer reporting agency.

OCC Finalizes "True Lender" Rule

In October, the OCC issued a final rule establishing that a bank is the "true lender" of a loan entitled to preemption from state usury limits if, as of the date of origination, the bank either is the named lender in the loan agreement or funds the loan. This bright-line rule is intended to resolve true lender-related disputes by providing greater certainty to industry participants. In January 2021, however, New York, California and several other states sued to block implementation of the "true lender" rule, arguing that the rule exceeds the OCC's authority. This case, *New York v. OCC*, No.

Total Actions by Product (with Recoveries)



21-0057 (S.D.N.Y.), and likely other challenges to the rule, will continue to wind their way through the court system in 2021.

California Creates "Mini-CPFB"

In September, California Governor Gavin Newsom signed into law the California Consumer Financial Protection Law (CCFPL), which transformed the Department of Business Oversight into the DFPI. The DFPI is a state-analogue to the federal CFPB: it has broad rulemaking authority over unfair, deceptive, or abusive acts and practices (UDAAP), can require consumer finance companies (including Fintech companies and debt collectors) to register with the DFPI, and has enforcement authority over some 50 California and 20 federal consumer finance laws. Finally, as part of the same suite of laws, California enacted the Student Loan Borrower Bill of Rights, which gives the DFPI broad authority to regulate student loan servicers.

OCC Charters First Fintech Companies Pursuant to "Fintech Charter"

In July, the OCC granted its first special-purpose national bank charter to a Fintech company, and in October, granted the second such charter. But these "Fintech Charters" may be short-lived. In 2019, a federal district court in *Lacewell v. OCC*, No. 19-4271, agreed with the New York Department of Financial Services (DFS) that the OCC's granting of a charter to a non-depository institution exceeded its authority under the National Bank Act. That decision is currently on appeal to the Second Circuit, with arguments scheduled in early March 2021.

Appellate Highlights

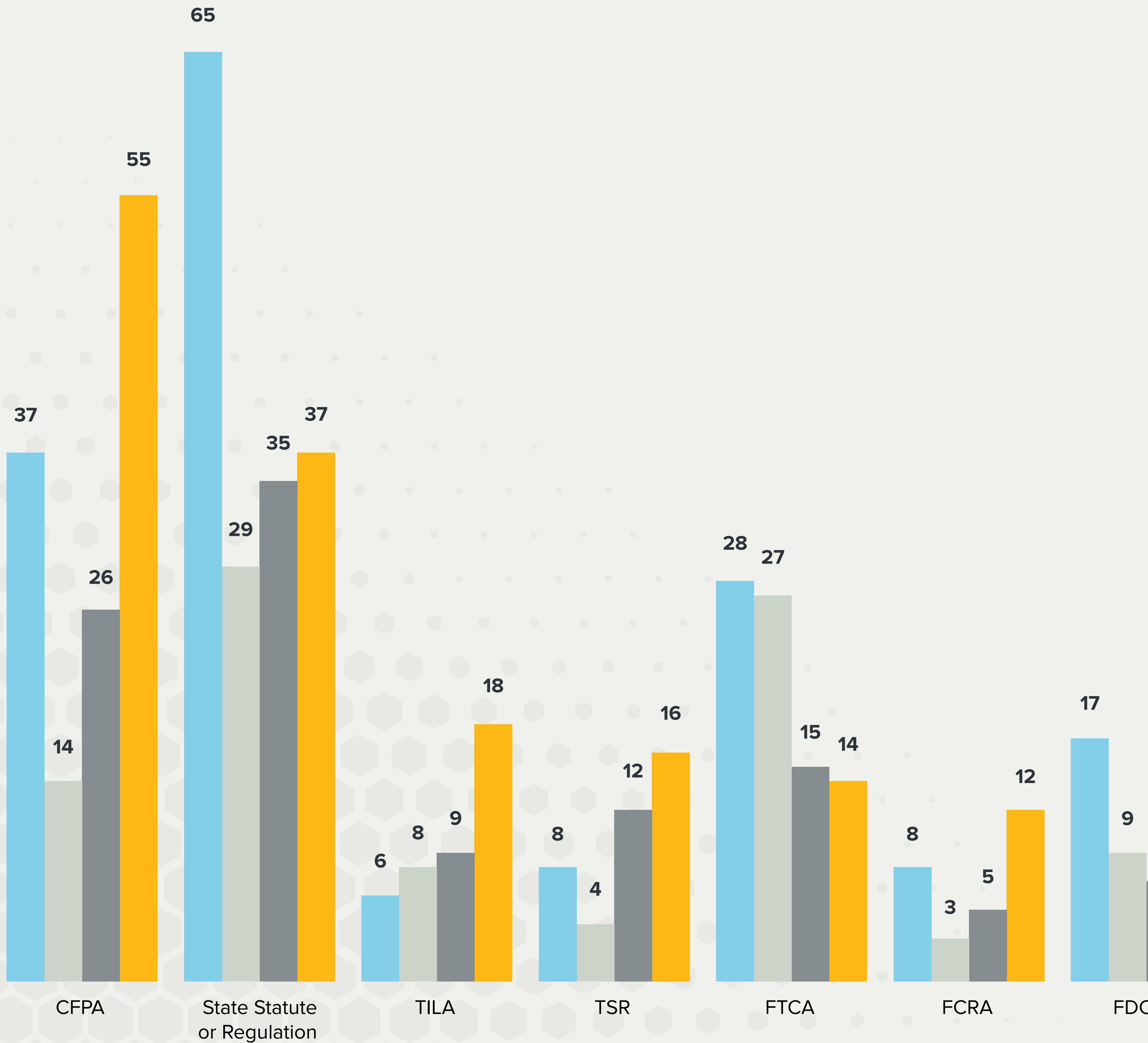
Supreme Court Rules CFPB Director Removable at Will by President, but Declines to Invalidate Entirety of Dodd-Frank Act

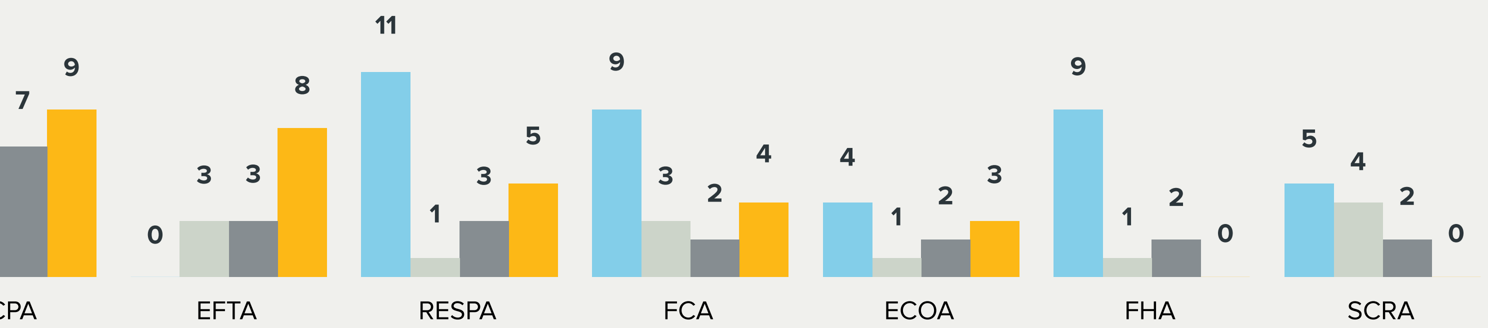
In June, the Supreme Court issued its highly anticipated decision in *Seila Law LLC v. CFPB*, No. 19-7, holding that Congress' attempt to insulate the CFPB Director from political pressure by permitting removal of the Director only for cause violates the separation of powers. The Court held that Article II of the Constitution vests in the President the power to remove federal officials. Instead of striking down the Dodd-Frank Act in its entirety, however, the Court chose a middle ground by ruling that the Act's for-cause removal provision could be severed from the rest of the statute, preserving the other provisions of the Dodd-Frank Act that establish the CFPB (and the CFPB itself).

TCPA Circuit Split Grows, Prompting Supreme Court to Grant Cert

What constitutes an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA) has bedeviled district and circuit courts in recent years. In January, the Eleventh Circuit in *Glasser v. Hilton Grand Vacations Co., LLC*, No. 18-14499, joined the Third Circuit in narrowly interpreting the term ATDS, holding that neither phone system used in the pair of consolidated cases was an ATDS because neither used a random or sequential number generator. The Seventh Circuit endorsed a similar interpretation of the ATDS in its February decision in *Ali Gadelhak v. AT&T Services, Inc*, No. 19-1738. In contrast,

Total Actions by Statute





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EFTA
RESPA
FCA
ECOA
FHA
SCRA

in April, the Second Circuit adopted an expansive interpretation of ATDS in *Duran v. La Boom Disco, Inc.*, No. 19-600. The court held that a device is an ATDS as long as it can store and dial numbers, even if those numbers are neither random nor sequential. Likewise, in July, the Sixth Circuit in *Allan v. Pa. Higher Educ. Assistance Agency*, No. 19-2043, held that an ATDS includes equipment that can automatically dial phone numbers contained on a list, rather than just phone numbers that the equipment randomly or sequentially generates. In July, the Supreme Court granted certiorari in *Facebook Inc. v. Duguid*, No. 19-511, to definitively answer the question whether the definition of an ATDS encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator." Oral arguments were heard in December.

Supreme Court Rules on Constitutionality of Debt Collection Exemption
In July, the Supreme Court held in *Barr v. American Association of Political Consultants, Inc.*, No. 19-631, that an exemption to the TCPA that allows for automated calls to be made to collect federally backed debts violates the First Amendment. The Court held that the exemption was a content-based restriction on speech that failed strict scrutiny. Instead of striking down the entirety of the statute, however, the Court, as in *Seila Law LLC v. CFPB*, No. 19-7, held that the appropriate constitutional remedy was to sever that provision of the TCPA from the rest of the statute, leaving the federal ban on certain automated calls in place.

COVID-19 Highlights

Mortgage Foreclosure and Eviction Moratoriums
In March, President Trump signed into law the CARES Act, which imposed a moratorium on foreclosures and evictions for all loans insured by the federal government. That moratorium was subsequently extended through March 31, 2021. The Federal Housing Finance Agency (FHFA) imposed a similar moratorium on foreclosures and evictions for borrowers with mortgage backed by Fannie Mae and Freddie Mac, which is currently scheduled to lapse on February 28, 2021. Further extensions of these moratoria are likely.

Mandatory Mortgage Forbearances
The CARES Act also requires that all mortgage loan servicers provide mandatory 180-day payment forbearances on federally-backed mortgage loans for borrowers experiencing financial hardship due to the pandemic. The current deadline to request a forbearance as to some types of federally backed loans is February 28, 2021, although we expect there to be further extensions of this deadline.

Federal Student Loans
The CARES Act also automatically placed federally-backed student loans into forbearance. Through the President's Executive Order, that forbearance is effective until at least September 30, 2021. Servicers of such loans also must apply any payments made by borrowers between March 13, 2020 and September 30, 2021 to the principal balance of the loan.

Credit Reporting
The CARES Act amended the Fair Credit Reporting Act (FCRA) to require furnishers of credit information who provide any type of consumer accommodation to report the consumer's account as "current," or as the status reported prior to the accommodation if not previously current, for the duration of the accommodation. These reporting requirements apply until 120 days after the President terminates the COVID-19 national emergency declaration. In addition, the Bureau indicated that it would provide some flexibility in its approach to enforcing deadlines for furnishers to investigate credit reporting disputes, announcing that it "will consider a consumer reporting agency's or furnisher's individual circumstances and does not intend to cite in an examination or bring an enforcement action against a consumer reporting agency or furnisher making good faith efforts to investigate disputes as quickly as possible, even if dispute investigations take longer than the statutory timeframe."

Looking Ahead to 2021: Our Predictions

2021 will be shaped by two forces: the COVID-19 pandemic and the incoming Biden administration. The first order of business for the incoming Biden administration will be extending existing pandemic relief requirements, including mandatory mortgage loan forbearances and foreclosure moratoriums, and suspension of collection activity on student loans. These immediate actions will buy the administration time to implement additional pandemic relief measures, and will avoid the turmoil caused by the unwinding of these consumer protection measures in the midst of an ongoing pandemic.

Once the urgency of the pandemic fades, we expect the Biden administration to advance a number of consumer-friendly policies through executive order, statute, agency rule, or informal guidance. The payday lending industry likely will be one early target of regulatory activity, following Director Kraninger's roll-back of the mandatory underwriting provisions of the Obama-era Payday Lending Rule. Indirect auto lending is another likely target, after Congress

invalidated the Obama-era indirect auto lending bulletin that sought to hold lenders responsible for disparate impact resulting from the discretionary pricing practices of auto dealers. Finally, the Biden administration is keen to implement student loan reform, which could take the form of at least partial debt forgiveness, further collection suspensions on federal student loans, and/or income-based repayment ceilings.

Rohit Chopra, President Biden's nominee for CFPB Director, is likely to play a key role in both shaping and implementing these policies. Mr. Chopra previously served as an assistant director of CFPB under Director Cordray, as student loan ombudsperson, and comes most recently from the FTC, where he has served as a Commissioner since 2018. Mr. Chopra will have a profound impact on the CFPB's regulatory and enforcement agenda. He has been a zealous advocate of more aggressive enforcement of consumer finance laws, particularly in the student lending and servicing and indirect auto lending spaces. We further expect Mr. Chopra to reinvigorate enforcement of fair lending laws, which is an area that many believe to have been de-prioritized by Director Kraninger. The size and scope of the CFPB's investigations and enforcement initiatives is also likely to change. During Director Kraninger's tenure, the CFPB focused on pursuing what it viewed as clear-cut instances of direct and tangible consumer harm, and prioritized restitution and consumer redress over civil money penalties. In fact, in many instances, the CFPB secured only nominal penalties (e.g., $1), although in some cases, this was due to companies' inability to pay. Mr. Chopra's record and public statements reflect a much different agenda, however. Where consumer harm is identified, we expect a Chopra-led CFPB to pursue all relevant actors who benefited from the alleged harm — including third-party service providers, investors, and other actors targeted less often by the CFPB. During his FTC tenure, Mr. Chopra criticized what he believed to be settlement terms that were too favorable to the industry. Thus, we also anticipate that the terms by which industry participants seek to resolve any resulting enforcement actions will be more costly, onerous, and heavily publicized by the CFPB. Given these dynamics, it would be unsurprising to see more contested litigation matters involving the CFPB going forward. Finally, we expect to see more collaboration and joint enforcement initiatives between the CFPB and other federal and state agencies, given Mr. Chopra's past tenure as the CFPB's student loan ombudsperson.

State enforcement is likely to remain relatively stable in 2021 across the majority of states. In 2020, the anticipated "Blue Wave" never materialized at the state level: only one governorship and four state legislative chambers changed hands, and no attorney general offices changed party control as a result of the 2020 elections. Yet, once the pandemic is in the rear-view mirror, a more aggressive federal enforcement partner may spur state action, either individually or jointly with the federal government. How companies treated consumers during the pandemic may also provide state enforcement agencies reason to launch investigations and enforcement actions, particularly in states known for aggressive enforcement such as California and New York. Finally, the new California DFPI has likely assumed the mantle as the most powerful and prominent state-level enforcement actor going forward, and all indications are that the enforcement arm of the DFPI intends to hit the ground running.

We also expect that the number of private lawsuits will increase, particularly class action litigation related to the pandemic. So far, the number of pandemic-related class action lawsuits filed against consumer finance companies has been small. The industry should expect more litigation as the pandemic fades and companies begin unwinding both voluntary and mandatory relief provided to consumers because of the pandemic.

Finally, the industry awaits the outcome of several important appellate matters. The Second Circuit is likely to issue its decision in *Lacefield v. OCC*, No. 19-4271, a case that will determine the fate of the OCC's "Fintech Charter." In addition, in 2021 the Supreme Court will issue its decisions in *Facebook v. Duguid*, No. 19-511, and *Collins v. Mnuchin*, No. 19-422. *Facebook* is likely to resolve a circuit split on the issue of what constitutes an ATDS under the TCPA. If the Court interprets the term narrowly, as the industry has urged, that could severely limit class-action plaintiffs' ability to use the TCPA against the consumer finance industry. Following on the heels of *Selila Law LLC v. CFPB*, No. 19-7, the Court will decide in *Collins* whether the FHFA's structure violates the separation of powers, and, if so, the impact that has on the validity of a 2012 agreement through which the Treasury Department acquired shares of Fannie Mae and Freddie Mac. Decisions in both cases are expected by early summer.

Mortgage Origination + Servicing

In 2020, Goodwin tracked mortgage origination and servicing enforcement actions at the state and federal levels resulting in total recoveries of approximately $174 million, an increase from the approximately $99.6 million recovered in 2019. Goodwin tracked 27 publicly announced enforcement actions in 2020, more than doubling the 13 actions tracked in 2019. Federal agencies, predominantly the CFPB, DOJ, and HUD, were responsible for a majority of enforcement actions in the mortgage origination and servicing space. State attorneys general, led by New York and Massachusetts, initiated only six publicly announced actions (including one action in coordination with the CFPB).

Key Trends

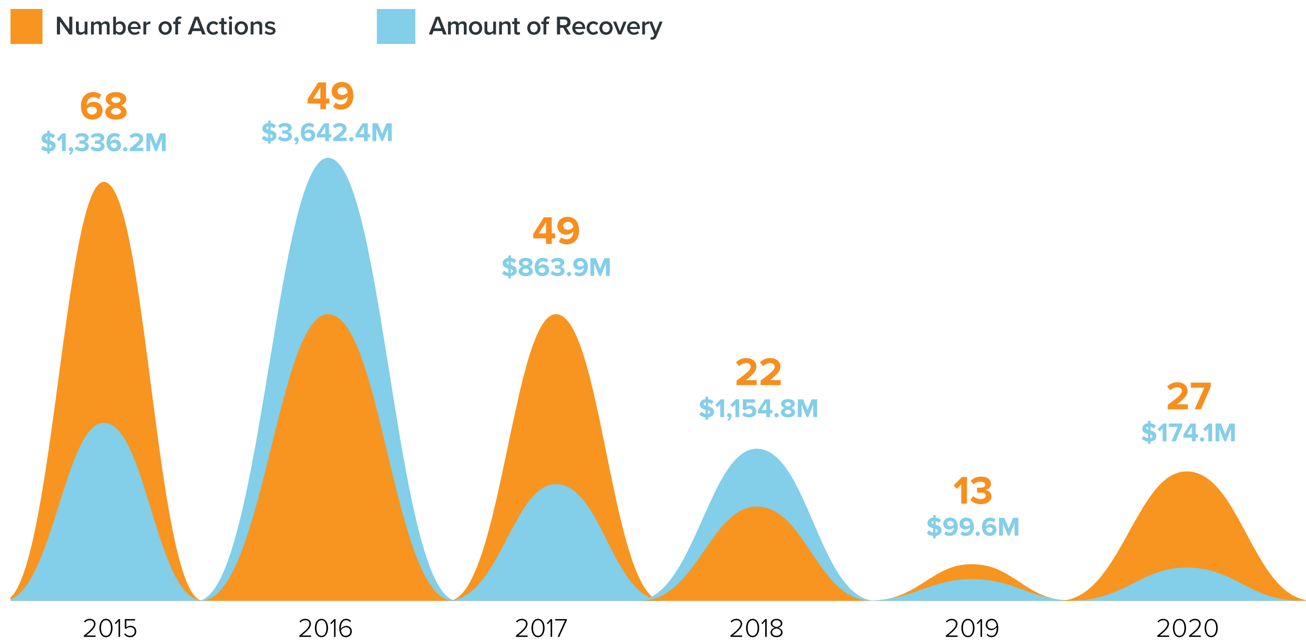
The CFPB's enforcement campaign targeting deceptive and misleading advertisements made to military servicemembers and veterans, discussed in more detail below, is largely responsible for the year-over-year increase in the number of enforcement actions. These actions constituted over one-third of the mortgage-related enforcement actions that Goodwin tracked this year, but only yielded approximately $4.4 million in recovery for the Bureau. This is representative of the Bureau's more lenient approach to civil money penalties under Director Kraninger.

Over half of the $174 million in total "recoveries" is attributable to one joint federal-state settlement with Nationstar Mortgage, LLC concerning certain alleged legacy servicing practices discovered in 2014 and 2015 regulatory examinations. And approximately $62 million of the $90 million attributed to the Nationstar settlements, discussed in more detail below, was for past remediation that was voluntarily provided by Nationstar following those exams.

The CFPB's Summer 2020 edition of ***Supervisory Highlights*** detailed its most recent findings from mortgage servicing examinations conducted in the months immediately preceding the COVID-19 crisis. The CFPB identified six areas of noncompliance:

- Failing to provide periodic statements to borrowers who had closed-end mortgages and were in bankruptcy;
- Imposing forced-place insurance policies and related fees on borrowers without a "reasonable basis" to believe the borrower had failed to maintain required insurance;
- Failing to cancel and refund forced-placed insurance charges within 15 days of receiving evidence of a consumer's existing coverage;
- Providing consumers with options to repay escrow account shortages and deficiencies that are not specifically enumerated in Regulation X;
- Failing to comply with servicing transfer obligations, including failures to exercise reasonable diligence, provide an accurate effective date of transfer, and properly credit periodic payments as of the day of receipt; and
- Failing to provide notices to borrowers in connection with the transfer of loan ownership.

Last year, Goodwin reported on the **Memorandum of Understanding** (MOU) between HUD and the DOJ announcing that HUD's administrative enforcement mechanisms would be the primary mode for enforcing False Claims Act (FCA) claims. Goodwin predicted that, as a result of the MOU, lenders would see few (if any) new FCA actions based on alleged Federal Housing Administration (FHA) guideline violations. That prediction proved largely true, except for one new lawsuit filed by the DOJ related to Nutter Home Loans' origination of HECMs. This lawsuit likely stemmed from an investigation launched before the MOU and should not be taken to suggest the DOJ is launching new FCA investigations of FHA and VA lenders. The remaining active FCA lawsuits concerning violations of FHA



guidelines are all *qui tam* suits where the government declined to intervene.

State enforcement actions also continued to decline, with only six publicly reported actions in 2020 (one of which was a joint effort with the CFPB). The continued winding-down of Great Recession-era litigation likely contributed to this decline, with only one action relating back to that period. The majority of state actions reflected an increasing focus on debt collection practices. Of the six actions, the majority focused on mortgage servicer compliance with state debt collection statutes.

Several key policy changes also occurred in 2020, including the CFPB's rescission of the 2015 Real Estate Settlement Procedures Act (RESPA) Marketing Services Agreement (MSA) Bulletin. The rescission was welcome news to the industry, as the 2015 Bulletin viewed MSAs with disfavor, but the CFPB provided little additional guidance as to how to structure a compliant MSA. Instead, the CFPB outlined its primary concerns with MSAs, and emphasized that the legality of an MSA is case-specific. Nonetheless, the Bureau's change in tone is a welcome development for the industry.

The COVID-19 pandemic has also shaped federal and state agency priorities this year, at least in the regulatory space. Under the CARES Act, signed into law by President Trump in March and extended by President Biden, borrowers are protected from foreclosure on federally backed loans until March 2021 and on GSE-backed loans until February 2021. A number of states and localities issued similar directives, among them California, Massachusetts, New York and the District of Columbia, who passed laws or executive orders providing geographic-based moratoriums on foreclosures and evictions. The CARES Act also provides that borrowers have the right to request and obtain a forbearance for up to 180 days. The CFPB also published an Interim Final Rule releasing servicers from certain Regulation X requirements when providing loss mitigation services to borrowers under the CARES Act. The CFPB and the Conference of State Bank Supervisors (CSBS) also issued a joint statement about mortgage loan forbearances issued under the CARES Act. The statement indicated that during upcoming examinations the CFPB and state bank regulators would likely focus on issues relating to servicer and originator communications with borrowers about their rights. The handling and unwinding of forbearance relief and foreclosures will likely draw the scrutiny of regulators and enforcers alike in 2021; to date, however, there have been no publicly announced enforcement actions related to mortgage servicers' compliance with COVID-19 relief provisions.

2020 Highlights

CFPB Enters into Consent Orders with Nine Separate Lenders Following "Sweep of Investigations" into VA Loan Advertising Practices

From July to October, the CFPB **entered** into nine consent orders with different Florida, California, Utah, Maryland, and Delaware-based mortgage companies over allegedly deceptive advertisements directed at military servicemembers and veterans. In each instance, the CFPB alleged that the lender falsely represented an affiliation with the VA. The CFPB also alleged that some of the lenders misrepresented the terms of credit related to VA-guaranteed mortgage loans, including by failing to disclose credit terms, describing their loans as fixed rate when the interest rate was in fact adjustable, misrepresenting the existence and amount of fees, and listing credit terms that the lenders were not prepared to offer. Finally, several of the lenders failed to adequately disclose that they were a lender different from the borrower's current lender, which, according to the CFPB, rendered the advertisements misleading. These practices allegedly violated Regulation Z, the Mortgage Acts and Practices — Advertising Rule (MAP Rule or Regulation N), and the Consumer Financial Protection Act's (CFPA) UDAAP provisions. In total, these actions resulted in the nine companies paying $4.4 million in civil money penalties to the Bureau. According to the CFPB, its campaign to protect military servicemembers and veterans from deceptive advertisements is "ongoing," so we expect to see additional enforcement actions in this area during the coming year.

CFPB and All 50 States Settle with Nationstar Over Alleged Servicing Violations

In December, the CFPB, the multistate committee of mortgage regulator (MMC), and attorneys general from all 50 states and the District of Columbia entered into coordinated settlement agreements with Nationstar Mortgage, LLC (Nationstar) to resolve allegations concerning legacy servicing practices identified during 2014 and 2015 examinations of Nationstar. The government entities alleged that these practices violated various consumer statutes, including the Homeowners' Protection Act (HPA), RESPA, CFPA, and state UDAAP laws. Collectively, Nationstar agreed to pay approximately $28.5 million to settle these allegations, including approximately $22 million in consumer redress, $3.8 million in attorneys' fees and costs to the state attorneys general, $1.5 million in civil penalties payable to the CFPB, and $1.2 million in other administrative penalties and costs to certain members of the MMC and participating state mortgage regulators. The settlements also credited Nationstar with over $62 million of consumer redress that Nationstar voluntarily provided to borrowers prior to the agreements. Additionally, the orders include compliance and servicing standards, and require periodic compliance testing and annual auditing by Nationstar to confirm compliance.

CFPB Files First Ever Redlining Complaint Against a Non-Bank Mortgage Lender

In July, the CFPB **filed** suit against Chicago-based non-bank correspondent lender and broker Townstone Financial, Inc. for allegedly engaging in practices that discouraged Black borrowers from applying for a mortgage loan through Townstone. Specifically, the CFPB alleged that during its weekly marketing radio shows and podcasts, Townstone made statements about Black borrowers and predominantly Black neighborhoods that discouraged prospective Black applicants from applying to Townstone for mortgage loans. The complaint cited several examples of such statements, including the CEO's statement that one particular Chicago grocery store was a "jungle" and "scary place" because "[t]here were people from all over the world going into [it]," and that the South Side of Chicago was where "hoodlum[s]" lived. The CFPB alleged that these and other similar statements "would discourage prospective applicants living in the South Side from applying to Townstone for mortgage loans," "would discourage prospective applicants living in other areas from applying to Townstone for mortgage loans for properties in" predominantly Black neighborhoods, and that prospective Black applicants "would also be discouraged from applying for mortgage loans" "because the[se] statement[s] [are] disparaging toward a majority-[Black] area." The CFPB seeks injunctive relief, consumer relief, and civil money penalties for these purported violations of the Equal Credit Opportunity Act (ECOA) (and its implementing regulation, Regulation B), and the CFPA. The lawsuit, which is currently pending, marks the first redlining complaint filed by the CFPB against a non-bank lender.

Sixth Circuit Rules that Lender Violated TILA's "Ability to Repay" Requirement by Failing to Properly Verify Borrower's Income

In July, the Sixth Circuit issued its decision in *Elliott v. First Fed. Comm. Bank,* No. 19-3690, holding that First Federal Community Bank violated the Truth in Lending Act's (TILA) "Ability to Repay" provision. That provision, Section 1639c(a)(1), requires that to approve a loan a lender must make "a reasonable and good faith determination based on verified and documented information" that the consumer has a "reasonable ability to repay" at the time the loan is consummated. The Sixth Circuit held that First Federal Community Bank violated Section 1639c(a)(1) because in approving the borrower it "consider[ed] spousal support and rental income that were not properly verified and documented" "using reasonably reliable third-party

records." Notably, the Sixth Circuit explained that even though the borrower may have made fraudulent misrepresentations in obtaining the credit, that did not preclude a cause of action under TILA. Though the "Ability to Repay" requirement has engendered less litigation than the industry anticipated, the Sixth Circuit's decision could inspire more plaintiffs to bring claims under this provision, at least in the Sixth Circuit.

CFPB Issues Final Rules Revising General Qualified Mortgage Requirements and Creating New "Seasoned Qualified Mortgage"

In December, the CFPB announced two final rules relating to qualified mortgage (QM) loans as part of its effort to increase access to affordable mortgage credit, the **General QM Final Rule** and the **Seasoned QM Final Rule**. QM loans are loans which presumptively satisfy ability-to-repay requirements. The new rules will increase the number of loans that meet the legal standard for a QM loan. The General QM Final Rule replaces the prior QM standard, which was based on a consumer's debt-to-income ratio, with a standard based on the price of the loan. The rule provides that a loan is presumptively affordable so long as the loan's APR does not exceed the average prime offer rate for a comparable loan by more than 1.5 points. The Seasoned QM Final Rule creates a new category of Seasoned QMs for first-lien, fixed-rate transactions that "season" by meeting certain performance criteria, including limitations on the number of delinquencies within the seasoning period. The purpose of the Seasoned QM Final Rule is to promote responsible innovation in the mortgage market and to provide lenders flexibility in responding to economic changes.

DOJ Settles Two More FCA Cases Concerning Alleged Breaches of FHA Loan Program Guidelines

Since 2012, the DOJ and HUD have brought over 30 FCA actions against lenders alleging that they falsely certified compliance with FHA and VA guidelines for FHA- and VA-insured mortgage loans. As we discussed **last year**, in October 2019, HUD and the DOJ entered into a MOU agreeing that HUD's administrative enforcement mechanism will be the primary tool used to enforce HUD's lender guidelines rather than DOJ FCA actions. We predicted that the industry would see a continued winddown in existing FCA actions as a result.

That prediction proved true as the DOJ resolved two such existing actions in 2020, and filed no new publicly announced actions. In April, the DOJ and Guaranteed Rate, Inc. **reached** a settlement agreement resolving disputed allegations that Guaranteed Rate had violated the FCA and Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) by falsely certifying compliance with FHA and VA program guidelines for loans beginning in 2008. To resolve the DOJ's claims, Guaranteed Rate agreed to pay $15 million in civil money penalties. The DOJ acknowledged that the settlement amount reflected the significant measures that Guaranteed Rate had taken, both before and after it knew of the investigation, to rectify the alleged noncompliance with program guidelines.

In October, the DOJ also **settled** claims with Guild Mortgage, resolving an extensively litigated 2016 lawsuit filed in California federal court by a whistleblower, in which the DOJ later intervened. In the lawsuit, the DOJ alleged that Guild Mortgage violated the FCA by knowingly violating material underwriting guidelines in its origination of FHA-insured mortgage loans, as well as by maintaining a non-compliant quality control program and failing to self-report known underwriting violations. Guild Mortgage agreed to pay $24.9 million to resolve these claims. The settlement with Guild Mortgage resolves all of the DOJ's publicly announced FCA actions concerning alleged violations of FHA program guidelines.

DOJ Files FCA Lawsuit Against One HECM Lender, Resolves Another

In September, the DOJ **filed** a complaint against Nutter Home Loans, alleging that the company had forged underwriters' signatures on FHA mortgage insurance certificates and used unqualified underwriters when originating HECMs, insured by the FHA, resulting in loans that should not have been approved. The complaint alleged that these practices violate the FCA and FIRREA. In announcing the lawsuit, the DOJ said that the complaint "sends a clear message we will not tolerate fraud against programs designed to financially help our nation's seniors." The emphasis on protecting seniors aligns with the DOJ's recent enforcement patterns and indicate a continued focus on actions designed to protect vulnerable populations.

The lawsuit filed against Nutter Home Loans came on the heels of a March **settlement** between the DOJ and Finance of America Reverse, which resolved allegations that the reverse mortgage lender's predecessor entity violated material underwriting guidelines in its pre-May 2010 origination of FHA-insured HECMs. Until May 2010, the lender's appraisal order forms included the loan amount, which the DOJ alleged was an improper attempt to influence the property's appraised value. Finance of America Reverse agreed to pay $1.97 million to resolve the FCA allegations, and $500,000 to resolve HUD's administrative claims.

New York Attorney General Reaches $17 Million Settlement with Caliber Home Loans over Loss Mitigation Practices

In June, the New York Attorney General **secured** an approximately $17 million settlement with Caliber Home Loans, which services loans owned or guaranteed

by Fannie Mae, Freddie Mac, Ginnie Mae, the FHA, and VA. The New York Attorney General alleged that Caliber Home Loans' loss mitigation practices violated New York state law by prioritizing interest-only and short-term modifications that created an unacceptable risk of re-default, sending modification offers to borrowers stating that the modifications would lower their monthly payments but failing to mention that those payment reductions would be temporary, and representing that borrowers' payments "may increase" or "adjust" after the introductory trial modification period but did not affirmatively state that the borrower's payments would in fact increase. Caliber Home Loans agreed to revised loan modification waterfall provisions that include fee waivers, interest rate reductions to 3.75%, term extensions of up to 40 years, principal deferment, and partial loan forgiveness. The New York Attorney General estimated the full amount of loan forgiveness offered by the company to be approximately $17 million.

Florida Attorney General Reaches $11 Million Dollar Settlement with Ocwen over Mortgage Servicing Practices

In October, Ocwen Financial Corporation and several affiliated entities agreed to settle claims brought by the Florida Attorney General concerning Ocwen's mortgage servicing practices. The lawsuit, filed in Florida federal court, alleged that Ocwen had violated various state and federal laws, including the CFPA, RESPA, HPA and the Florida Deceptive and Unfair Trade Practices Act, through making untimely payments of borrowers' insurance premiums, improperly imposing lender-placed insurance, and overcharging for property preservation inspections. To resolve the lawsuit, Ocwen agreed to a total settlement amount of approximately $11 million, which includes $2.15 million in relief to Florida borrowers, $2 million in civil penalties, $10,000 in administrative fines, $2 million in attorneys' fees and costs, $5.55 million in late fee waivers, and at least $1 million in debt forgiveness. The consent judgment resolved the Florida Attorney General's 2017 lawsuit, but does not resolve a similar CFPB-filed lawsuit, which remains pending.

Fourth Circuit Rules that Bare Statutory Violation of RESPA Insufficient to Confer Standing Under *Spokeo*

In the wake of the 2016 landmark Supreme Court ruling in *Spokeo, Inc. v. Robins,* No. 13-1339, courts continue to consider what constitutes an injury sufficient to confer Article III standing in federal court. In March, the Fourth Circuit in *Baehr v. The Creig Northrop Team*, No. 19-1024, reaffirmed that a mere statutory violation is insufficient to confer Article III standing. The plaintiffs in *Baehr* alleged that they were "deprived of an impartial and fair competition between settlement service providers in violation of RESPA" because their real estate agent had a marketing services agreement with their title agent, which the plaintiffs alleged was a "kickback" in violation of Section 8 of RESPA. However, the Fourth Circuit held that the purpose of RESPA Section 8 was to protect consumers from practices "that tend to increase unnecessarily the cost of certain settlement services." Plaintiffs had not alleged that the cost of their settlement services had been inflated as a result of the relationship, and though the deprivation of "impartial and fair competition between settlement service providers" could in certain cases be a tangible injury, that "was not the harm that congress enacted [Section 8(a)] of RESPA to prevent."

Looking Ahead to 2021

We expect that the Biden administration and a Chopra-led CFPB will re-invigorate federal enforcement activity in the mortgage lending and servicing space. Over the past four years, federal enforcement has largely focused on closing out financial crisis-era investigations, lawsuits, and administrative actions initiated during the Obama administration. Under the Trump administration, federal agencies appeared reticent to bring new enforcement actions related to mortgage origination and servicing, except in the areas of protecting specific groups such as the elderly, military servicemembers and veterans, and minorities, and the expected uptick in state activity did not fully materialize, especially in the areas of mortgage originations and servicing.

During the early days of the Biden administration, federal agencies may focus on extending CARES Act moratoriums on foreclosures, lengthening forbearance periods, and launching investigations and enforcement actions related to compliance with COVID-19-related measures. So far, the CFPB has announced no public COVID-19-related enforcement actions in the mortgage lending space, though we expect that at least some COVID-19-related investigations or exams have been initiated. Democrats on the Hill have criticized the Trump administration and federal agencies for not sufficiently protecting homeowners from foreclosure or ensuring that homeowners understand mortgage relief options. One likely priority of federal agencies during the first months of the Biden administration will be ensuring that the largest segment of consumer debt (mortgage loans) is no roadblock to economic recovery, either through an expansion of mortgage relief options, continuation of foreclosure forbearance relief, enforcement actions against large mortgage servicers, or both.

States may follow a similar approach: several states and the District of Columbia have issued guidelines they expect financial institutions to follow when providing borrowers with mortgage loan forbearances or other hardship-related relief. The New York

Attorney General has instructed mortgage companies to provide confirmation that they have implemented those guidelines, advising that the state intends to use companies' responses in evaluating potential enforcement activity.

Once COVID-19 is behind us, we anticipate more federal and joint federal-state investigations and enforcement actions of major financial institutions' mortgage practices. Though over the past four years agencies have focused on clear-cut instances of consumer harm (e.g., mortgage modification scams), enforcement under the Biden administration may focus on allegedly unfair, deceptive, or abusive practices where the consumer harm is more speculative, attenuated, or difficult to measure. We also expect that, under Mr. Chopra's leadership, the CFPB may restore enforcement powers to its Office of Fair Lending, resulting in an uptick in actions aimed at protecting racial and ethnic minorities, women, and other protected groups. Though enforcement activity is unlikely to match Financial Crisis-era levels, due in large part to the industry adjusting its practices in the years since, there is likely to be a notable increase in both the number of mortgage-related enforcement actions and associated settlement amounts and fines in the coming years.

What to Watch

- New investigations of large mortgage originators and servicers under the Biden administration, especially for fair lending practices.
- Enforcement actions stemming from investigations of mortgage servicers' compliance with COVID-19 regulatory guidance.

Fintech

In 2020, Goodwin continued to monitor and analyze developments in the Fintech industry. The COVID-19 pandemic expedited the shift from traditional, in-person banking and financial services to an online, cashless society.

Key Trends

In 2020, many Fintech companies continued leveraging their existing technology and quickly adapted to the shifting financial landscape. Historically, Fintech companies were able to obtain their first bank charters in 2020. However, as Fintech companies sustained or surpassed the industry expansion seen in previous years, federal and state regulators have tried to keep up. The result has been a series of new and proposed rules and regulations, as well as guidelines, aimed at regulating this ever-evolving industry that continues to grow in importance.

2020 Highlights

Guidance

Fair Lending and AI Guidance

In its **Fair Lending Report** released in April, the CFPB stated it is monitoring "artificial intelligence (AI), and more specifically, machine learning, a subset of AI" for fair lending and credit access issues. The CFPB specifically identified the issue of how complex AI models address the adverse action notice requirements in the ECOA and the FCRA, which require creditors to explain to consumers the main reason or reasons for a denial of credit or other adverse action. The Fair Lending Report notes that, while there may be questions about how institutions can comply with the adverse action notice requirements if AI decisions are based on complex interrelationships, the CFPB expects that more methods of accurately explaining complex AI decisions will emerge. Thus, institutions, including Fintechs, should continue to develop tools to enhance the "explainability" of AI and facilitate use of AI for credit underwriting that is compliant with adverse action notice requirements.

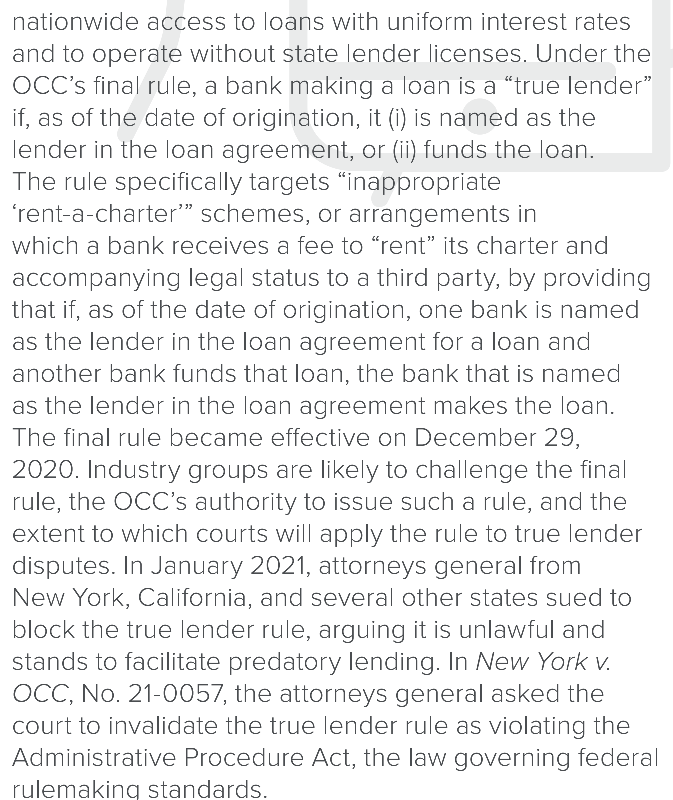
CFPB Issues Advisory Opinion on Earned Wage Access Programs

In November, the CFPB **issued** an advisory opinion regarding certain earned wage access (EWA) products. Generally, EWA products offer an option for employees to meet short-term liquidity needs by receiving an advance on earned but unpaid wages, thereby avoiding higher cost alternatives such as traditional payday or installment loans. The CFPB's advisory opinion lists seven criteria that an EWA program must meet in order to qualify as a "Covered EWA Program" exempt from Regulation Z, including that the program provider contracts with the employer to provide the benefit to employees, the provider does not advance more than the accrued cash value of wages earned at any given point in time, the employee receiving the benefit incurs no charges and makes no payments (including fees), and the program provider does not assess the credit risk of the employee. Even EWA programs that do not meet the exclusion for a "Covered EWA Program" need not comply with Regulation Z, however, if the program is structured in such a way that it does not meet the definition of "credit" — i.e., if no finance charge applies to the transaction or the funds will be repaid in four or fewer installments.

Laws, Rules and Regulations

California's "Mini-CFPB"

In January, three new California **consumer finance laws** that have the potential to significantly affect Fintech companies became effective — the California Consumer Financial Protection Law (CCFPL), Debt Collection Licensing Law (DCLL), and Student Loan Borrower Bill of Rights. The CCFPL expands the scope of the Department of Business Oversight's current powers and will rename the Department of Business Oversight as the DFPI. The DCLL now requires, in relevant part, that persons engaged in the collection of consumer debts obtain a license from the DFPI. Finally, the Student Loan Borrower Bill of Rights gives the DFPI broader authority to regulate student loan servicers. With respect to the "new" DFPI, which has been dubbed a "mini-CFPB," the DFPI will have jurisdiction



over most consumer-facing Fintech companies, as well as Fintech companies that provide services to such companies. The DFPI has enforcement authority over more than 50 California consumer finance laws as well as 20 federal consumer protection laws, and its regulator has the power to seek rescission of contracts, restitution for consumers, disgorgement, injunctive relief, and monetary penalties. This includes rulemaking authority over UDAAP that covers virtually every entity offering a consumer financial product or service to a California consumer. Fintech companies in particular should expect increased attention from the DFPI, although rulemaking and licensing efforts may take some time to ramp up.

The Madden Fix

In June, the OCC and FDIC each issued a final rule in an effort to address the legal confusion regarding the impact of the permissible interest when a bank transfers a loan to a third party. The rules were in response to uncertainty created by the Second Circuit's decision in *Madden v. Midland Funding, LLC*, No. 14- 2131, which held that assignees of a national bank were not allowed to charge interest at the rate permitted by the assignor national bank's state. This ruling called into question the longstanding "Valid When Made" principle — that a transaction valid when made remain valid upon transfer. In early June, the OCC issued a **final rule** clarifying that "as a matter of Federal law, banks may transfer their loans without impacting the permissibility or enforceability of the interest term." Shortly thereafter, the FDIC issued its own **rule** adopting the "Valid When Made" principle.

The OCC's Final "True Lender" Rule

In October, on the heels of the *Madden* fix, the OCC issued its **final rule** regarding the "true lender" standard, to address the question of which entity makes a loan when the "loan is originated as part of a lending partnership involving a bank and a third party." The OCC's final rule is thus especially relevant to Fintech entities that provide access to loans, which often rely on partnerships with banks. When properly structured, these arrangements allow nonbank entities to provide nationwide access to loans with uniform interest rates and to operate without state lender licenses. Under the OCC's final rule, a bank making a loan is a "true lender" if, as of the date of origination, it (i) is named as the lender in the loan agreement, or (ii) funds the loan. The rule specifically targets "inappropriate 'rent-a-charter'" schemes, or arrangements in which a bank receives a fee to "rent" its charter and accompanying legal status to a third party, by providing that if, as of the date of origination, one bank is named as the lender in the loan agreement for a loan and another bank funds that loan, the bank that is named as the lender in the loan agreement makes the loan. The final rule became effective on December 29, 2020. Industry groups are likely to challenge the final rule, the OCC's authority to issue such a rule, and the extent to which courts will apply the rule to true lender disputes. In January 2021, attorneys general from New York, California, and several other states sued to block the true lender rule, arguing it is unlawful and stands to facilitate predatory lending. In *New York v. OCC*, No. 21-0057, the attorneys general asked the court to invalidate the true lender rule as violating the Administrative Procedure Act, the law governing federal rulemaking standards.

NY Senate Bill 5470

In July, the New York Senate and Assembly passed Senate Bill **S5470B**, which adds a new Article (Article 8) to the New York Financial Services Law. Article 8 imposes a number of consumer credit-like disclosure requirements on providers of commercial financing, including non-loan commercial financing. Additionally, S5470B authorizes the Superintendent of the New York DFS to issue regulations governing such disclosures. Although Article 8 does not apply to financial institutions, it does apply to persons that solicit and present specific offers of commercial financing on behalf of a third party. Fintech companies participating in a bank partnership agreement should therefore be aware of the disclosure requirements set forth in Article 8. Article 8 does not require factors, merchant cash providers, or Fintech companies to obtain lender licenses, but does require these companies

to deliver comprehensive disclosures to commercial financing recipients regarding the amount, pricing, and other transaction terms. S5470B was signed by Governor Cuomo on December 23, 2020, and Article 8 will become effective on or around June 21, 2021. Each violation of Article 8 could result in civil monetary penalties of up to $10,000.

FDIC Proposed Rule: Parent Companies of Industrial Banks and Industrial Loan Companies

In March, the Federal Deposit Insurance Corporation (FDIC) issued a **notice of proposed rulemaking** that would require certain conditions and commitments for each deposit insurance application approval, non-objection to a change in control notice, and merger application approval that would result in an insured industrial bank or industrial loan company (each, an ILC) becoming, after the effective date of any final rule, a subsidiary of a company that is not subject to consolidated supervision by the Federal Reserve Board (each, a Covered Parent Company). The proposed rule would prohibit any ILC from becoming a subsidiary of a Covered Parent Company unless the Covered Parent Company enters into one or more written agreements with the FDIC and its subsidiary ILC. The parent company would need to agree to a variety of requirements, including (i) furnishing an initial listing, with annual updates, of the parent company's subsidiaries, (ii) consenting to the examination of the parent company and its subsidiaries, (iii) submitting an annual report on the parent company and its subsidiaries, (iv) limiting the parent company's representation on the ILC's board of directors to 25%, and (v) subjecting each ILC to an independent audit. Additionally, the proposed rule would require the FDIC's prior written approval before an ILC subsidiary of a parent company may make a number of changes to its corporate structure or business plan. The proposed rule would allow the FDIC to impose additional restrictions on the parent company on a case-by-case basis.

CFPB's Advance Notice of Proposed Rulemaking: Access to Financial Records

In October, the CFPB issued an **advance notice of proposed rulemaking** (ANPR) related to consumer access to financial records. The ANPR solicited comments and information to assist the CFPB in developing regulations to implement section 1033 of the Dodd-Frank Act, which provides, in relevant part, that a consumer financial services provider must make available to a consumer information in the control or possession of the provider concerning the consumer financial product or service that the consumer obtained from the provider. Specifically, the ANPR seeks comments and information on costs and benefits of consumer data access, competitive incentives, standard-setting, access scope, consumer control and privacy, and data security and accuracy. The CFPB identifies Fintech firms as companies that have been accessing consumer data with authorization and providing services to consumers using data from the consumers' financial accounts. Although it

acknowledges that consumer-authorized data access and use “holds the promise of improved and innovative consumer financial products and services, enhanced control for consumers over their financial lives, and increased competition in the provision of financial services to consumers,” the CFPB states that “consumers still face certain potential risks if they authorize access to consumer data, including some risks relating to the methods by which they authorize such access and by which the records are collected and used by authorized entities.” Comments to the proposed rulemaking were due by February 4, 2021.

Other Developments

Fintech Bank Charters

In July, the OCC granted preliminary approval for a national bank charter to the first consumer Fintech company. By October 2020, a second Fintech company received preliminary, conditional approval from the OCC for its application for a national bank charter. A national bank charter would enable these Fintech companies to hold customer deposits and make loans without having to rely on a bank partner. However, it remains to be seen whether these “Fintech Charters” will be allowed to operate for the long-term. In 2019, a federal district court in *Lacewell v. OCC*, No. 19-4271, agreed with the New York DFS that the OCC’s granting of a charter to a non-depository institution exceeded its authority under the National Bank Act. That decision is currently on appeal to the Second Circuit.

Fintech PPP Loans

In April, the Small Business Administration (SBA) launched the Paycheck Protection Program (PPP), a loan program designed to assist small businesses in keeping their employees employed during the COVID-19 pandemic. The SBA initially sought applications only from certain lenders, including federally insured depository institutions and federally insured credit unions, effectively excluding Fintech entities from participating. Many Fintech companies were, however, eventually approved as nonbank PPP lenders.

Looking Ahead to 2021

In 2020, Goodwin released its inaugural **Global Survey** on the State of Financial Technology. The Survey reviews major Fintech trends, including the prioritization of Fintech adoption and investment, Fintech potential for digital disruption, challenges facing Fintech companies, and drivers of capital investment in Fintech companies. We expect these trends to continue through 2021. Additionally, the new administration could present both opportunities and challenges for Fintech companies seeking to further expand their business capabilities and consumer products. A renewed emphasis on closing access gaps and promoting inclusion in financial services should benefit the Fintech industry. However, the new administration’s expected shift toward more aggressive enforcement and rulemaking by the CFPB and other agencies may create new challenges for Fintech companies in 2021.

What to Watch

- Continued regulatory expansion and enforcement activity by federal and state agencies, with California’s “mini-CFPB” — the DFPI — likely leading the way.
- Emerging litigation challenging regulatory expansion.

Telephone Consumer Protection Act

Throughout 2020, Goodwin has continued to actively monitor and analyze litigation and regulatory developments affected by the TCPA. Of note this year were several decisions from the circuit courts that impacted the potential for liability under the statute. The U.S. Supreme Court also agreed to review the proper interpretation of an important element of a TCPA cellphone provision claim, which will resolve the circuit split that continued to deepen in 2020.

Key Trends

TCPA litigation has remained a favorite vehicle for suit among the plaintiffs' bar, with the number of TCPA complaints filed in 2020 increasing by about 6% over those filed in 2019.[1] Consistent with the increased litigation, the FCC has continued its trend of enhancing consumer protection against unlawful robocalls. In May 2020, the FCC issued an **Order** amending Section 1.80 of its TCPA rules (47 C.F.R. § 1.80), expanding its ability to enforce TCPA violations through elimination of the TCPA's initial warning requirement prior to issuing penalties, extending the statute of limitations period, and increasing the maximum fine for violations.

Additionally, as predicted in **Goodwin's 2019 Review**, the definition of what constitutes an ATDS under the TCPA remained a hotly contested issue among the courts in 2020. Following the landmark TCPA ruling by the D.C. Circuit in *ACA International v. FCC*, No. 15-1211, in 2018 — in which the court found that the FCC's definition of an ATDS was overly broad, but stopped short of actually defining ATDS — several circuit courts weighed in on the issue of the definition of the ATDS. The Ninth Circuit's 2019 decision in *Duguid v. Facebook, Inc.*, No. 17-15320, set the stage for a circuit split when it held that a device that sent text messages to cellphones was an ATDS because it stored numbers to be automatically dialed. That decision, which contrasted with the Third Circuit's ruling in *Dominguez v. Yahoo, Inc.*, No. 17-1243, has since been bolstered by similar decisions from the Second and Sixth Circuits. Support has grown for a more limited construction of the TCPA, however, widening the circuit split on the question. The issue is set to be resolved in 2021, as the *Duguid* decision was certified for review before the U.S. Supreme Court in July 2020. *Facebook, Inc. v. Duguid*, No. 19-0511. As **reported** by Goodwin, the Court heard arguments on December 2020, and a decision is expected in the first half of 2021.

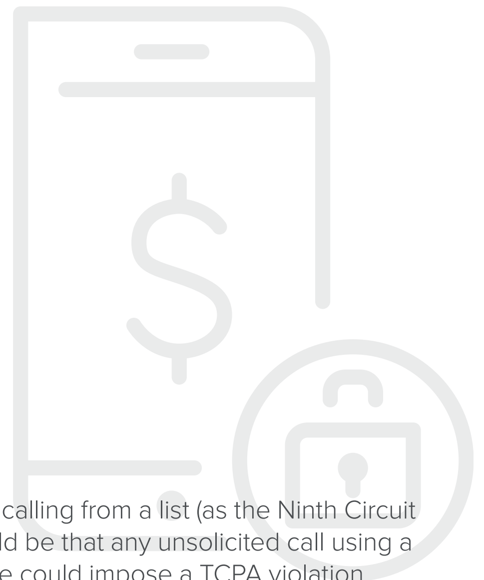
2020 Highlights

Supreme Court Rules on Constitutionality of Debt Collection Exemption

In July, the Supreme Court decided that an exemption to the TCPA that allows for automated calls (those placed with an ATDS or prerecorded or artificial voice message) to be made to collect federally backed debts violates the First Amendment because the exemption is a content-based restriction on speech that cannot satisfy strict constitutional scrutiny. *Barr v. American Association of Political Consultants, Inc*, No. 19-0631. The *Barr* decision arose out of an appeal from the Fourth Circuit, in a case where the defendant argued that the unconstitutionality of the debt collection exemption renders the entirety of the restrictions on automated calls unconstitutional. As reported in Goodwin's 2019 Review, a similar challenge to the exemption provision was also made in the Ninth Circuit in 2019. Ultimately, however, the Supreme Court in *Barr* took the middle ground, concluding that the appropriate remedy was to sever the constitutionally deficient provision from the statute, and allow the remainder of the statute to stand.

In September, in the wake of the Supreme Court's decision in *Barr,* the Eastern District of Louisiana held that the TCPA provision banning automated calls — to which the debt-collection exemption was appended in November 2015 — was unconstitutional in its entirety

1 This data is as of September 2020, per **WebRecon**.



during the roughly five-year period beginning when Congress amended the TCPA to create the exemption through the Supreme Court's decision in *Barr. Creasy v. Charter Commc'ns, Inc.*, No. 20-1199. The district court's **holding** meant that the court lacked subject matter jurisdiction in all of the plaintiff's alleged TCPA violations that occurred before the date of the decision in *Barr*, because "federal courts lack authority to enforce violations of unconstitutional laws." Accordingly, the court granted the defendant's motion to dismiss with respect to those TCPA violations alleged to have occurred prior to July 6, 2020. While other courts have since followed *Creasy* (i.e., *Lindenbaum v. Realgy*, No. 19-2862; *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.*, No. 20-0038), it remains to be seen if its rationale will take hold. At least two district courts have expressly rejected *Creasy's* reasoning. *See Shen v. Tricolor California Auto Group, LLC*, No. 20-7419; *Stoutt v. Travis Credit Union*, No. 20-1280.

Circuit Split Widens on ATDS Definition

2020 started with support mounting for a more limited construction of the TCPA's ATDS definition. In January, the Eleventh Circuit joined the Third Circuit in issuing **an opinion** that significantly narrowed the meaning of an ATDS. *Glasser v. Hilton Grand Vacations Co., LLC*, No. 18-14499. In addressing a pair of consolidated appeals, the three-judge panel held that the phone systems at issue did not meet the statutory definition of an ATDS because the systems did not randomly or sequentially generate numbers. Utilizing a grammar-focused and common sense approach in its reading of the TCPA's statutory language, the panel concluded that the clause "using a random or sequential number generator" modifies both subsequent verbs — "to store" and "[to] produce." The panel thus concluded that random or sequential number generation was a requisite component of any ATDS. The panel further reasoned that, in the age of smartphones, nearly all phones have the capacity to automatically dial telephone numbers in a stored list. Given this, the practical result of reading the statute to create liability when calling from a list (as the Ninth Circuit held in *Duguid*) would be that any unsolicited call using a common smartphone could impose a TCPA violation.

Then, in February, the Seventh Circuit — in an opinion authored by new Supreme Court Justice Amy Coney Barrett — followed the Eleventh Circuit's reasoning with its decision in *Ali Gadelhak v. AT&T Services, Inc.*, No. 19-1738. There, the Seventh Circuit held that the most reasonable interpretation of the phrase "using a random or sequential number generator" modifies both "store" and "produce," such that a device must be capable of performing at least one of those functions using a random or sequential number generator to qualify as an ATDS.

However, not all circuit courts adopted the plain text definition of what constitutes an ATDS. In April 2020 the Second Circuit concluded that there are two different ways that a device can qualify as an ATDS. *Duran v. La Boom Disco, Inc.*, No. 19-0600. A device qualifies as an ATDS first if it can produce numbers using a random or sequential number generator, or second, if it can store and dial numbers, such as dialing a number from a prepopulated list. In July, the Sixth Circuit similarly concluded that an ATDS includes equipment that can automatically dial phone numbers stored in a list, rather than just phone numbers that the equipment randomly or sequentially generates. *Allan v. Pa. Higher Educ. Assistance Agency*, No. 19-2043.

Eleventh Circuit Joins Second Circuit in Prohibiting Unilateral Revocation of Consent Provided in Bargained-for Exchange

In May, the Eleventh Circuit ruled that the TCPA does not allow a consumer to unilaterally revoke consent to receive automated calls when such consent is given as part of a bargained-for exchange. *Medley v. DISH Network, LLC,* No. 18-13841. In *Medley*, the Eleventh Circuit noted that there was no dispute that the plaintiff had expressly consented to be contacted on her cell phone in her contract with the defendant to receive television service, and that she unilaterally attempted

to revoke that consent through a fax her attorneys sent to the defendant after she fell behind in her payments. The Eleventh Circuit was unpersuaded by the argument that unilateral revocation of consent given in a legally binding agreement is permissible because it comports with the consumer-protection purposes of the TCPA. It held that the TCPA's silence regarding the means of providing or revoking consent reflects Congress' intent to incorporate the common law concept that consent becomes irrevocable when it is integrated into a binding contract. The Eleventh Circuit's decision was consistent with that of the Second Circuit in *Reyes v. Lincoln Auto. Fin. Servs.*, No. 16-2104, which also held that the TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent.

Ninth Circuit Holds that Prior Express Consent Must Come from Current Cellphone Subscriber

In June, the Ninth Circuit issued its decision in *N.L. v. Credit One Bank, N.A.*, No. 19-15399, holding that the "prior express consent" required by the TCPA for autodialed calls to cellular phones must come from the current cellphone subscriber, and not merely the intended recipient of the call. The decision stemmed from a bank's placement of automated calls to a phone number that had at one point been assigned to a bank customer who had provided consent to be called. However the phone number was subsequently reassigned, and when the bank called the number to collect past-due payments, it reached an unintended recipient. Notwithstanding that the previous cellphone subscriber had authorized calls to that number, the Ninth Circuit found that the consent of the third-party debtor could not immunize the defendant from liability under the TCPA for its unauthorized calls to the plaintiff. The Ninth Circuit's decision was consistent with prior decisions from the Third, Seventh, Eleventh, and D.C. Circuits.

FCC's Year-End Orders Place New Limitations on Automated and Prerecorded Calls

In December, the FCC issued two orders, **FCC 20-186** and **FCC 20-187**, to implement certain restrictions on existing exemptions to the provisions of the TCPA relating to automated calls and text messages and certain calls to residential landlines, and to expand its efforts to allow telephone carriers to block what the FCC describes as "illegal robocalls." Pursuant to the new orders, callers relying on the TCPA exemptions to place automated or prerecorded calls or texts without prior consent will now be restricted in how many exempt calls they can make to consumers. Those frequency limitations depend on the particular exemption relied upon — the number of permissible calls may be different depending on the purpose of the call, and whether the phone number called is a landline or a cellphone. Callers relying on the TCPA exemptions must implement appropriate opt-out mechanisms for consumers. Like the frequency requirements, the particular opt-out requirements depend on whether the subject calls are placed to landlines or wireless phones. For example, callers placing exempt calls to landlines must adopt sufficient internal do-not-call procedures that were previously required only for telemarketing calls. Financial institutions placing exempt calls to cellphones must honor opt-out requests for such calls immediately. The FCC's orders also provide guidance for callers who believe that their calls have been erroneously blocked to challenge that determination.

Circuits Continue to Split Regarding the Number of Texts or Calls Sufficient to Confer Article III Standing

In March, a federal district court in the Eleventh Circuit joined the discourse regarding how many unsolicited text messages or phone calls must be received by a TCPA plaintiff to confer standing, when it held that a plaintiff's allegations of "loss of privacy from receiving one unwanted text message per month over a three-month period" were not sufficient to confer the plaintiff with a concrete injury-in-fact, a requirement for Article III standing. *Eldridge v. Pet Supermarket, Inc.*, No. 18-22531. The *Eldridge* court's decision was consistent with the Eleventh Circuit's 2019 ruling in *Salcedo v. Hanna*, No. 17-14077, in which it held that the recipient of a single text message did not have standing to sue in federal court because he had not suffered an injury-in-fact, thereby creating a circuit split between the Eleventh and Ninth Circuits. The single text message the plaintiff received, the *Salcedo* court had reasoned, did not injure him because it did not cost him any money, or deprive him of the full use of and access to his cell phone. The Ninth Circuit in *Van Patten v. Vertical Fitness Group, LLC*, No. 14-55980, had reached the opposite conclusion earlier in 2019 when it found that two unsolicited text messages constituted an injury in fact. In addition to the *Eldridge* court, several other federal district courts in 2020 have come down on the side of either *Salcedo* or *Van Patten*, reinforcing the circuit split between the Ninth and Eleventh Circuits. *See Trim v. Mayvenn, Inc.,* No. 20-3917; *Avedyan v. CMR Constr. & Roofing, LLC*, No. 20-81362.

In the second half of 2020, federal district courts in the Fourth and Fifth Circuits issued decisions that tended to provide support for the Ninth Circuit's view. In November, the court in *Williams v. Myler Disability, LLC*, No. 20-0275, found that a TCPA plaintiff's allegations of receiving two unsolicited text messages were enough to establish standing. Likewise, the court in *Cunningham v. Radius Global Sols., LLC*, No. 20-0294, found that the plaintiff's receipt of a single missed call constituted a sufficient injury-in-fact.

Looking Ahead to 2021

The Supreme Court heard oral argument in *Facebook, Inc. v. Duguid,* No. 19-0511, in December 2020. Accordingly, in early 2021 we can expect to hear the Supreme Court's decision, which will resolve the growing circuit split and uncertainty among federal district courts surrounding one of the most confusing aspects affecting TCPA liability — what equipment is an ATDS. If the Supreme Court reverses the holding in *Duguid*, we could see the Democrats wield their control of Congress and amend the TCPA consistent with the Ninth Circuit's expansive protections for call recipients. We also expect to see the trend of increasing TCPA litigation continue, especially following the FCC's Order amending Section 1.80 of its TCPA rules, which extended the applicable statute of limitations period. It is also possible that in the coming year additional circuit courts will join the Eleventh and Second Circuits in ruling on whether the TCPA allows for unilateral revocation of consent for automated calls provided in a bargained-for exchange. Further, the Supreme Court is poised to decide in *TransUnion LLC v. Ramirez*, No. 20-0297, whether Article III of the U.S. Constitution authorizes damages in a class action where the majority of the class was not actually injured — such as could be the case in TCPA cases. Article III standing under the TCPA may be further affected in the coming year given the growing circuit split regarding the number of text messages or calls that suffice to confer standing.

What to Watch

- Supreme Court's decision clarifying definition of an ATDS.
- Potential decisions from other circuit courts on issue of whether the TCPA allows for unilateral revocation of consent for automated calls provided in a bargained-for exchange.
- Growth in the circuit split regarding the number of text messages or calls that suffice to confer Article III standing in TCPA cases.
- Increased TCPA litigation flowing from FCC's Order amending Section 1.80 of its TCPA rules.

Credit, Debit + Prepaid Cards

During 2020, Goodwin tracked four enforcement actions related to credit and debit cards, a slight increase from the three such actions Goodwin tracked in 2019. Though the number of enforcement actions remained low, total recoveries jumped substantially, from $15 million recovered in 2019, to over $3.1 billion in combined consumer relief and civil penalties collected in 2020. The bulk of that recovery ($3 billion) is attributable to a single settlement between Wells Fargo and CFPB. The remaining $122 million was recovered from a single settlement between T.D. Bank and the CFPB, and on its own represents an 87% year-over-year increase in total recovery.

The few enforcement actions we saw align with our prediction last year that there would be continued reluctance by the CFPB to regulate and enforce in this space. Not only has there been limited enforcement this past year, but the CFPB and other regulators also relaxed some of their regulations over banks and credit card issuers as a result of the significant operational impact caused by COVID-19.

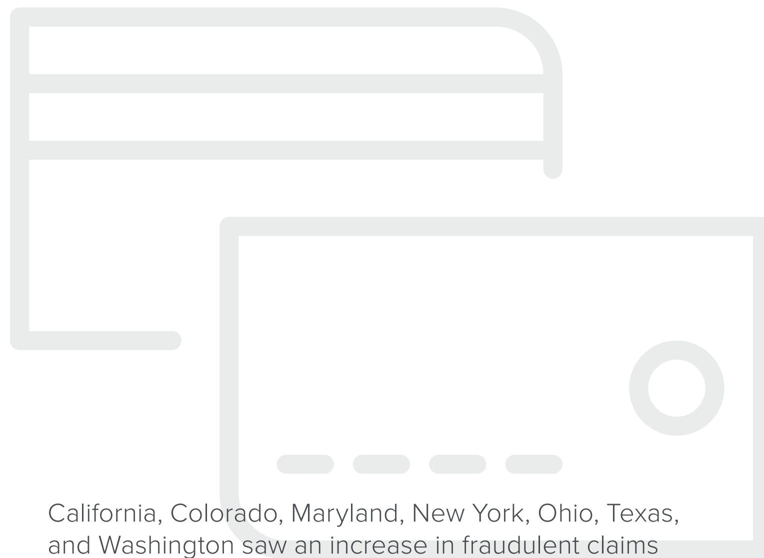
Key Trends

In recognition of the operational disruptions and delays caused by COVID-19, the CFPB enacted measures relaxing regulatory requirements and providing financial institutions with flexibility. The CFPB presented its guidance — which remains in effect at the time of this publication — as a change in approach "during the pandemic," without clarifying the circumstances under which they would rescind these changes.

For example, in May, the CFPB issued a **statement** announcing that it would relax enforcement of Regulation Z's timeline for creditors to investigate and respond to consumer billing error notices. The CFPB acknowledged that, as a result of COVID-19, some creditors and merchants faced significant operational disruptions and delays in responding to customers' billing error notices within 30 days, as required by Regulation Z. The CFPB announced that it "does not intend to cite a violation in an examination or bring an enforcement action against a creditor that takes longer than required" to respond to these error notices so long as the creditor makes good faith efforts to comply, and instead "intends to consider the creditor's circumstances." The CFPB cautioned that creditors must continue to comply with other Regulation Z requirements while a billing error remains unresolved — for example, a creditor may not attempt to collect the disputed payment.

Also in its May statement, the CFPB encouraged (but did not require) creditors more generally to consider whether they want to offer consumers assistance such as late fee waivers, refunds and repayment forbearance, or deferral during the pandemic.

In June, the CFPB issued another **statement** announcing that it would provide temporary flexibility to credit card issuers in connection with Regulation Z's written disclosure requirements. Regulation Z requires that credit card issuers provide certain written disclosures to consumers. Under the E-Sign Act, credit card issuers are permitted to make these disclosures electronically, if the consumer provides sufficient consent (E-Sign consent). Recognizing that it can be time consuming and difficult to obtain E-Sign consent — and that a delay in obtaining the requisite consent can negatively impact consumers seeking relief — the CFPB announced that during the COVID-19 pandemic it will take "a flexible supervisory and enforcement approach" with respect to written account-opening disclosures and temporary rate or fee reduction disclosures required by Regulation Z, and that it does not intend to bring an enforcement action against a credit card issuer who obtains a consumer's E-Sign consent during an oral telephone interaction. A credit card issuer who obtains such consent orally must still obtain both the consumer's oral consent to electronic delivery of the written disclosures and oral affirmation of the consumer's ability to access and review the electronic written disclosures.



Other federal and state regulators likewise encouraged financial institutions to provide concessions to consumers struggling due to COVID-19. For example, the **OCC** encouraged consumer credit providers to, among other things, waive certain fees and increase credit limits for some borrowers. California's **Commissioner of Business Oversight** issued guidance encouraging financial institutions to waive credit card late payment fees, increase credit card limits for creditworthy borrowers and offer payment accommodations. As another example, Illinois' **Department of Financial and Professional Regulation** issued a statement release "strongly urg[ing] banks and credit unions to respond to borrowers affected by the current economic environment" by offering payment accommodations and increases in credit card limits.

As the impacts of the COVID-19 pandemic carry into 2021, financial institutions should be mindful of the end-date of such guidance. As the COVID-19 threat lessens — or, alternatively, as financial institutions and regulators become more comfortable operating within the economic environment brought on by the pandemic — the industry should prepare for these relaxed measures to tighten back up again.

2020 also saw an increase in the use of prepaid debit cards to deliver unemployment benefits and other relief to consumers from the COVID-19 pandemic. This increase in prepaid card activity also came with an increase in related fraud. States including Arizona, California, Colorado, Maryland, New York, Ohio, Texas, and Washington saw an increase in fraudulent claims for unemployment benefits and have reported billions of dollars in fraud, leaving some financial institutions at risk of litigation. In many instances, fraudsters not only withdrew initial funds from these cards but also sought and received additional temporary credit from the issuing financial institution. Financial institutions should pay careful attention to the use (and misuse) of prepaid cards containing government-issued benefits, and be aware of the increased risk of litigation and potential regulatory inquiry or action.

2020 Highlights

DOJ Reaches $3 Billion Settlement with Wells Fargo Over Unauthorized Accounts

In February, the DOJ announced a $3 billion settlement and deferred prosecution of Wells Fargo & Company and Wells Fargo Bank, N.A. (Wells Fargo), resolving claims that, as a result of Wells Fargo's "cross selling" sales strategy, the bank employees provided millions of new accounts or products to existing customers without consent between 2002 and 2016. The settlement resolves a criminal investigation concerning false bank records and identity theft; civil allegations that Wells Fargo violated the FIRREA by creating false bank records; and a cease-and-desist proceeding by the Securities Exchange Commission (SEC). This settlement followed Wells Fargo's $575 million settlement with attorneys general of all 50 states and the District of Columbia in 2018, as well as its $185 million settlement with the CFPB, OCC, and Los Angeles City Attorney in 2016, concerning the same alleged conduct.

The DOJ stated that it considered a number of factors in agreeing to a deferred criminal prosecution and civil settlement, including the bank's cooperation in the investigation and admission of wrongdoing, among other things. The deferred prosecution agreement will be in effect for three years.

CFPB Files Suit Against Fifth Third Bank Concerning Unauthorized Accounts

In another unauthorized account action, the CFPB **filed** a lawsuit against Fifth Third Bank, N.A. (Fifth Third) in March alleging that the bank engaged in unfair and abusive acts and practices under the CFPA when it allegedly opened unauthorized accounts and enrolled consumers in products and services without their knowledge or consent. From 2008 through at least 2016, the CFPB alleged that Fifth Third employees opened deposit and credit-card accounts in consumers' names without their consent, transferred funds from consumers' existing accounts to these new, unauthorized accounts, enrolled consumers in unauthorized online-banking services, and activated unauthorized lines of credits on consumers' accounts. Fifth Third **denies** these allegations and maintains that its compensation and employee incentive structure does not reward employees for opening unauthorized accounts and that it has controls in place designed to prevent and detect unauthorized account openings. This case remains pending in the Northern District of Illinois.

CFPB Settles with T.D. Bank Over Alleged EFTA Violations for $122 Million

In August, the CFPB announced that it **reached** a $122 million settlement with TD Bank, N.A. (T.D. Bank), resolving allegations that the company's overdraft services violated the Electronic Fund Transfer Act (EFTA) and CFPA by charging overdraft fees for ATM and one-time debit card transactions without consumers' affirmative consent. The CFPB also alleged that T.D. Bank deceptively told consumers that its overdraft services were a "free" benefit that came with new consumer checking accounts, while actually charging customers $35 for each overdraft transaction. Under the consent order, T.D. Bank is required to provide approximately $97 million in restitution to about 1.42 million consumers, and to pay a $25 million civil money penalty to the CFPB.

CFPB Files Action Against Citizens Bank, N.A. over Its Credit Card Program

In January, the CFPB **filed** a complaint against Citizens Bank, N.A. (Citizens Bank) alleging that the bank violated TILA and the CFPA through its servicing of credit cards. According to the CFPB, the bank failed to reasonably investigate and appropriately resolve billing error notices and consumers' claims of unauthorized use. Specifically, Citizens Bank is alleged to have automatically denied billing error claims or claims of unauthorized use if consumers failed to sign "fraud affidavits." These affidavits required consumers to sign under the penalty of perjury and with a provision agreeing to testify as witnesses. Additionally, Citizens Bank is alleged to have mishandled consumers' billing error notices and unauthorized account claims by failing to refund finance charges and fees when it resolved these claims in consumers' favor. Finally, the CFPB alleged that the bank failed to provide credit counseling referrals to consumers who called the bank's toll-free credit counseling referral number. In addition to injunctive relief, the CFPB is also seeking restitution, consumer refunds, and civil money penalties. This case remains pending in the District of Rhode Island.

Looking Ahead to 2021

In 2021, now that Wells Fargo has entered settlements resolving allegations concerning its account-opening practices with all the major federal and state players, we expect to see a smaller total recovery in credit and debit card enforcement actions. To date, there is no indication that federal or state regulators have alleged that institutions other than Wells Fargo and Fifth Third have engaged in similar conduct, though it is possible that additional account-opening investigations will come to light.

The Biden administration has not taken a firm policy position on credit card reform, but regulating debit and prepaid card overdraft fees was a focus for the Obama administration. For example, in 2009, the Federal Reserve Board **announced** a rule prohibiting financial institutions from charging overdraft fees without first providing disclosures and receiving consumer consent. We anticipate that the Biden administration may renew this focus, particularly given the continued litigation on overdraft fees. This may include, for example, measures to lower the amount of overdraft fees, preventing banks from charging more than one overdraft fee per day, requiring banks waive overdraft fees if a consumer was waiting for a deposit to clear, and requiring banks to process transactions in a way that would minimize overdraft fees. Lenders should watch for new guidance that signals renewed regulatory attention in this area.

We also anticipate that the CFPB's relaxed approach regarding Regulation Z enforcement during the pandemic might not comport with the priorities of a Biden-led CFPB, particularly as the COVID-19 crisis wanes in 2021, and so banks should not count on this flexibility for much longer.

What to Watch

- New guidance regarding overdraft fees.
- Rollback of CFPB-enacted measures relaxing regulatory requirements due to COVID-19.

Debt Collection + Settlement

During 2020, Goodwin tracked 32 federal and state enforcement actions related to debt collection and debt settlement services. This number represents a significant increase from 2019, during which Goodwin tracked 14 actions, and represents a marked change from the 2016-2019 trend of declining enforcement actions in this space. In total, federal and state agencies secured over $63 million in civil money penalties, restitution, and consumer relief as a result of settlements and court judgments (excluding suspended judgments). This represents a significant decrease in total recoveries from 2019 ($129.5 million).

The most important regulatory development in the space in 2020 was the CFPB's issuance of its final rule under the FDCPA modernizing the regulation of debt collectors. The final rule was intended to bring the FDCPA in to the modern age, although certain provisions, such as the numerical limits for telephone calls, have the effect of increasing protections for consumers.

Key Trends

Like last year, the CFPB was more active than any other federal or state agency in initiating and settling actions related to debt collection and debt settlement services. The 13 CFPB actions tracked in 2020 (including one action brought jointly with the New York Attorney General) represent an increase from the six actions tracked in 2019, and the five such actions tracked in 2018. The CFPB also finalized new regulations implementing the FDCPA, demonstrating a commitment to continued regulation of debt collection as well.

The FTC remains the second most dominant federal actor in this space. In 2020, Goodwin tracked six FTC actions, nearly equal to the five such actions tracked last year. Like 2019, the FTC actions primarily relied on alleged violations of the FTC Act, whereas the CFPB-initiated actions often alleged unfair or deceptive acts in violation of the CFPA. Continuing a new development first observed in 2019, Goodwin also tracked many enforcement actions this year under the Telemarketing Sales Rule (TSR) — a statute not previously a common enforcement mechanism for regulators in this space.

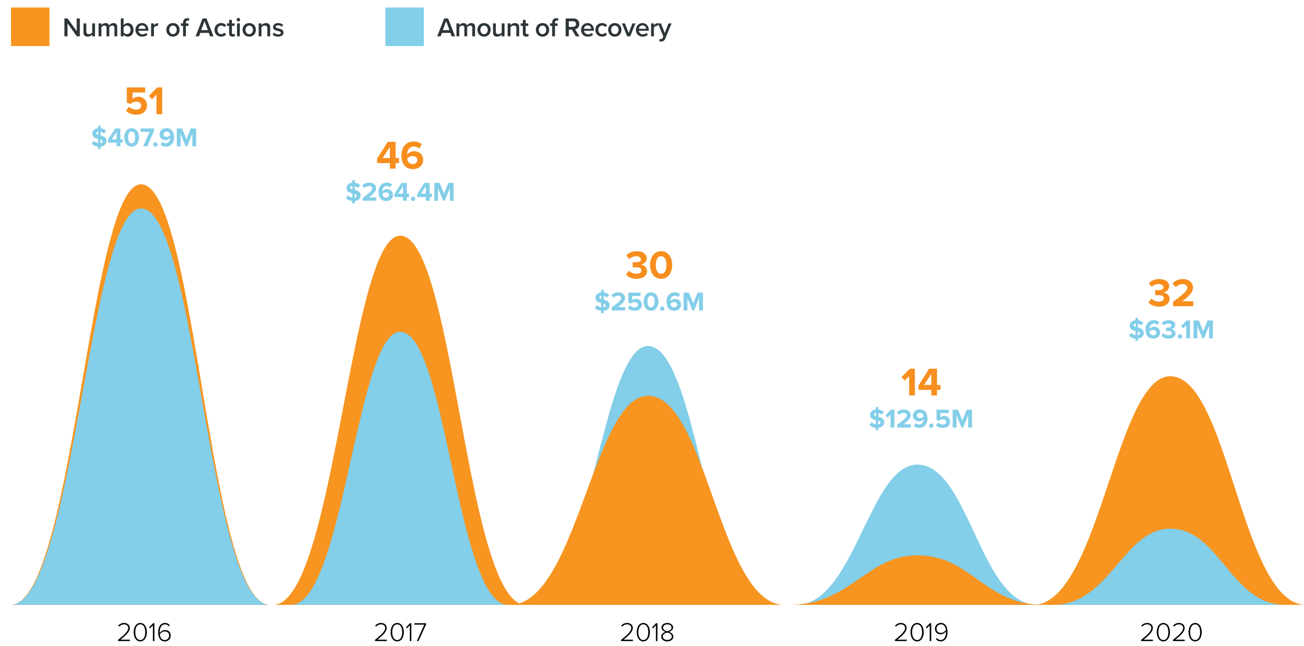
State attorneys general from Arizona, Massachusetts, Maryland, Minnesota, North Dakota, New York, and Pennsylvania, as well as the New York DFS, all also initiated or resolved enforcement actions in the debt collection and settlement space this year — collectively accounting for 12 enforcement actions tracked by Goodwin (including one action brought jointly with the CFPB). State attorneys general and agencies most frequently invoked state consumer protection statutes. As in 2019, however, Goodwin also tracked enforcement actions by state entities alleging violations of the FDCPA and CFPA. New in 2020, Goodwin also tracked a state enforcement action alleging violation of TILA, a statute which had not been implicated in this space in 2019. Similar to actions brought under other statutes in the debt collection arena, that action alleged defendant violated TILA through misrepresentations as to the nature of the relief provided and of consumers' obligations. In addition, TILA-specific disclosure requirements were alleged to be violated.

2020 Highlights

CFPB Issues New Final Rule Modernizing the FDCPA

In October, the CFPB **announced** a final rule implementing the FDCPA. The CFPB's revisions to Regulation F strengthen protections for consumers who communicate with debt collectors and clarify the application of the FDCPA (first passed in 1977) to modern technologies, including email and text messages. The new rule includes call frequency requirements, clarifying that a debt collector presumptively violates the FDCPA's prohibition on repeated or continuous telephone calls if the debt collector places a telephone call to a person more than seven times within a seven-day period or within seven days after engaging in a telephone conversation with the consumer. Conversely, if a debt collector does not call a consumer that frequently, the debt

Debt Collection + Settlement Actions by Year (with Recoveries)



collector's compliance with the communication caps is presumed. Moreover, the final rule clarifies that voicemails, including ringless voicemails, count toward the numerical limit. To address modern communication methods, the rule also clarifies how consumers may set limits on debt collection communications to reflect their preferences. Overall, the rule further restricts debt collectors' communications with consumers.

In addition to increased consumer protections, the new rule provides additional guidance for debt collectors on how to ensure compliance with the FDCPA. For instance, the rule defines a new term related to debt collection communications: limited-content message. This definition identifies what information a debt collector must and may include in a voicemail message for consumers for the message to be deemed an "attempt to communicate," rather than a "communication" restricted by the FDCPA. To qualify as a limited-content message, a voicemail may identify the caller (without indicating that it is a debt collector) and request that the consumer reply. In general, no other information can be included in a limited-content message for the message to retain its status as a non-collection communication, except for a small number of additional items enumerated in the rule. The final rule's restriction of limited-content messages just to voicemails departs from the Notice of Proposed Rulemaking, which proposed application of the term to voicemails, live calls, and text messages.

CFPB Issues Final Rule Concerning Consumer Disclosures Related to Debt Collection

In December, the CFPB announced another **final rule** to implement the FDCPA — this time concerning the FDCPA's requirements on disclosures for consumers. The final rule, according to CFPB Director Kraninger, "provides clear rules of the road for debt collectors on how to disclose details about a consumer's debt and informs consumers how they may respond to the collector, if they choose to do so." The rule requires debt collectors to provide certain easily understandable disclosures at the outset of collection communications and to take specific steps to disclose the existence of a debt to consumers before reporting information about the debt to a consumer reporting agency (CRA). With respect to contacting consumers about a debt before furnishing information to a CRA, the final rule requires debt collectors to contact consumers by, for example, phone, electronic message, or mail. If a debt collector chooses not to speak with the consumer over the telephone, they must wait a "reasonable period of time to receive a notice of undeliverability" before furnishing

information to a CRA. If a notice of undeliverability is received, the rule prohibits the debt collector from furnishing information to a CRA unless certain additional steps are taken. The rule also prohibits debt collectors from making threats to sue, or from suing, consumers on time-barred debt.

"Operation Corrupt Collector"

In September, the CFPB along with the FTC and more than 50 federal and state law enforcement entities **announced** "Operation Corrupt Collector," which regulators described as "a nationwide law enforcement and outreach initiative to protect consumers from phantom debt collection and abusive and threatening debt collection practices." In 2020, Operation Corrupt Collector included five cases filed by the FTC; two cases filed by the CFPB; three criminal cases filed by the DOJ and U.S. Postal Inspection Service; and actions brought by Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Massachusetts, New Mexico, North Carolina, North Dakota, New York, Ohio, South Carolina, and Washington.

The FTC has taken the enforcement lead in Operation Corrupt Collector. For example, in September, the FTC **filed** two cases alleging "phantom debt collection" — a deceptive practice where companies attempt to collect on debts they legally have no right to collect or which the consumer does not owe. In one case, the FTC alleged: (1) that the defendants used robocalls to leave deceptive debt collection messages for consumers, falsely stating that the consumers would be subject to legal action concerning these debts; and (2) that when the consumers returned the calls, the defendants falsely claimed to be from a mediation or law firm, continuing their threat of legal action by using the consumer's personal information to persuade them the threat was sincere. In the other case, the FTC alleged the defendants used similar unlawful tactics — the use of deceptive robocalls threatening consumers with arrest if they failed to immediately pay the "phantom debt." With former Commissioner Chopra now tapped to lead the CFPB, we may see even greater collaboration between agencies as part of Operation Corrupt Collector.

In addition to an enforcement crackdown, Operation Corrupt Collector includes plans to increase the information available to consumers to understand their rights when it comes to debt collection, including providing consumers with steps to take in response to receiving a debt collection call for a debt they do not recognize. A central aspect of the information initiative is an FTC-created **online dashboard** with information about consumer reports concerning debts not owed and abusive and threatening collection practices.

CFPB Settles With Nation's Largest Debt Collector for over $15 Million, Resolving Alleged Violations of Prior Consent Order

In October, the CFPB announced that it **reached** a proposed settlement with Encore Capital Group, Inc. (Encore), and its subsidiaries, Midland Funding, LLC; Midland Credit Management, Inc. and Asset Acceptance Capital Corp, which together comprise the nation's largest debt collector and debt buyer. In 2015, the CFPB had entered into a **consent order** with Encore and its subsidiaries, resolving allegations that the companies violated the CFPA, FDCPA, and FCRA in connection with their purchase of charged-off consumer debts and subsequent efforts to collect those debts. In September, the CFPB filed a new lawsuit against Encore, alleging violations of the 2015 consent order and the FDCPA and CFPA. Specifically, the September suit alleged that defendants violated the consent order by suing consumers in the absence of required documentation, using attorneys to engage in collection activity without providing required disclosures, and failing to provide consumers with required loan documentation upon request. The Bureau additionally alleged that the companies initiated legal action to collect debts notwithstanding that the statutes of limitations had run on these debts and without providing necessary disclosures required by the 2015 consent order. Under the settlement, the companies agreed to pay $15 million in civil money penalties and over $79 thousand in consumer redress. In addition to monetary relief, the proposed settlement extends the terms of the 2015 consent order for an additional five years.

CFPB Sides with Debt Collector in Third Circuit FDCPA Case

In *Hopkins v. Collecto, Inc.*, No. 20-1955, an appeal pending in the U.S. Court of Appeals for the Third Circuit, the CFPB filed an **amicus brief** supporting the debt collector's position that it did not violate the FDCPA by sending the plaintiff a letter with an itemization of plaintiff's debt indicating $0.00 was owed in interest and collection fees. According to the plaintiff, the debt collector (Collecto, Inc.) violated FDCPA's prohibitions on using "any false, deceptive, or misleading representation or means in connection with the collection of any debt" or "unfair or unconscionable means to collect or attempt to collect any debt" because the itemization of interest and collection fees falsely implied to the least sophisticated consumer that such fees could begin to accrue, increasing the amount of consumer's debt. The District of New Jersey dismissed the complaint, and the plaintiff appealed. In the CFPB's amicus brief, it asserts that itemization "discloses what has already happened, not what will happen or may happen in the future." Thus, according

to the CFPB, the itemization of the $0.00 in interest and collection fees presently owed says nothing about the future of such charges. CFPB argues that “it would be unreasonable for an unsophisticated consumer to interpret an itemization showing that no interest and fees had been assessed on her account as raising the prospect that she would be charged fees or interest in the future.”

Looking Ahead to 2021

Goodwin’s **2019 Year in Review** predicted that in 2020, enforcement in the debt collection market would continue to focus on representations made to consumers. That prediction has proved true and is likely to continue into 2021. Goodwin also predicted that the CFPB would provide clarity and certainty through implementation of “bright-line” rules in its FDCPA final rule. CFPB’s final rule provided the anticipated clarity and “bright-line” rules — both for consumers and companies seeking to ensure compliance. With Operation Corrupt Collector underway, and the likely shift to a more active CFPB under the Biden Administration, Goodwin predicts increased federal and state enforcement actions in this space as well.

What to Watch

- Continued collaborative enforcement activity — including collective action pursuant to Operation Corrupt Collector.
- Implementation of the CFPB’s FDCPA final rule and related compliance investigations.

Payday + Small Dollar Lending

In 2020, Goodwin monitored 17 publicly announced federal and state enforcement actions concerning payday, installment, or small dollar lending. 2020 levels were slightly up from recent enforcement activity in the sector, as Goodwin reported on 13 actions in both 2018 and 2019, but represents a continued decline from earlier years, such as the 26 actions monitored in 2017. In another year of relatively consistent levels of enforcement, regulators primarily targeted the usual alleged practices: predatory lending or collection practices, illegal or usurious interest rates, and misleading or deceptive advertisements. Several notable regulatory developments occurred during 2020 as well, including the CFPB's decision to rescind key underwriting provisions of the Payday Lending Rule and the OCC's promulgation of its "True Lender" Rule.

Key Trends

Though we predicted last year that the CFPB's proposed changes to the Payday Lending Rule signaled a more relaxed enforcement environment in the near term, in 2020 the CFPB continued to take the lead on initiating payday lending enforcement actions. The CFPB brought seven of the 17 publicly announced actions across the year (including one action in coordination with South Carolina and Arkansas state agencies), compared with only one action initiated by the FTC. State regulators were also an active enforcement presence, initiating nine actions. Although there was only a slight uptick in the total number of enforcement actions, enforcement agencies reversed a four-year decline in total recoveries, securing approximately $49.7 million in consumer relief and civil money penalties compared to less than $18 million in 2019.

2020 was perhaps most notable for developments in payday lending regulation. The CFPB's Payday Lending Rule, promulgated in 2017 under then-Director Cordray, imposed new underwriting and payment requirements for covered loans. One of the first actions of Director Kraninger upon taking the helm in December of 2018 was to delay implementation of the rule until November 2020. In July, however, the CFPB issued a final rule rescinding certain key provisions of the Payday Lending Rule on the grounds that the Bureau had "re-evaluat[ed] the legal and evidentiary bases for these provisions and [found] them to be insufficient."

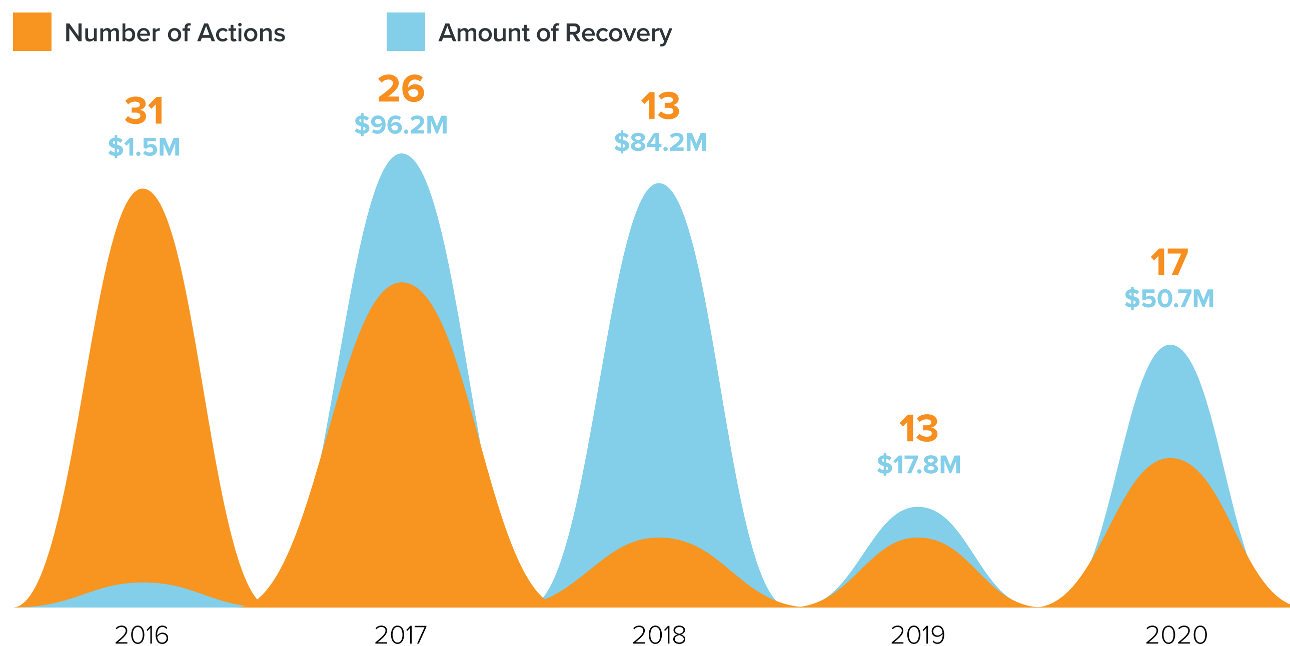
The CFPB also issued guidance related to new products emerging in the marketplace in response to the increasing demands for short-term liquidity, undoubtedly due in part to the COVID-19 pandemic. This year, the CFPB issued an advisory opinion clarifying the circumstances under which earned wage access products, which offer payday advances to consumers for earned but as-yet unpaid wages, are subject to Regulation Z. The CFPB also implemented a framework for traditional deposit banks and others to seek a no-action letter (NAL) on small loans ($100-500) offered by such institutions to consumers for a low flat fee.

Finally, OCC promulgated a rule clarifying when a bank has exercised its lending authority such that it is the "True Lender." This rule potentially simplifies the legal landscape for bank partnerships, although whether the rule survives legal challenge and whether courts will adopt the OCC's interpretation remains to be seen.

2020 Highlights

CFPB Rescinds Mandatory Underwriting Provisions of the Payday Lending Rule

Earlier this year the CFPB **announced** several amendments to key provisions of the Payday Lending Rule. The Rule, originally promulgated in 2017, established new requirements for lenders offering short term lending products such as payday loans, vehicle title loans, and certain installment loans. The original rule addressed two distinct issues, including the underwriting of covered loans (the Mandatory Underwriting Provisions) and also limitations on a lender's ability to collect payments (the Payment Provisions), such as through withdrawing payments



directly from a consumer's bank account. In July, the CFPB rescinded several of the rule's key underwriting provisions in their entirety, on the ground that the Bureau had "re-evaluat[ed] the legal and evidentiary bases for these provisions and [found] them to be insufficient." The July revisions scrapped a requirement that lenders determine a borrower's ability to repay before making a covered loan, as well as a requirement that lenders verify a consumer's income. The revisions also eliminated certain definitions related to the underwriting provisions, such as identifying as an "unfair and abusive practice" making covered loans without first determining a borrower's ability to repay. The Bureau contends that consumers will continue to have "robust consumer protections" pursuant to the CFPA's UDAAP provisions, the payments provisions of the 2017 rule, and other provisions of federal and state law.

CFPB Enters Consent Order with Cottonwood Financial, Ltd. Over Unfair and Deceptive Practices

In April, the CFPB **entered** into a consent order with Cottonwood Financial, Ltd., which operates under the name Cash Store, resolving allegations that the payday lender violated the CFPA, FCRA, and TILA by making deceptive representations to consumers in television ads and through direct telemarketing, phoning consumers' places of work even after being asked to stop, and disclosing the existence of consumers' debts to third parties. The lender also allegedly failed to maintain adequate policies and procedures for furnishing accurate information to credit reporting agencies, potentially affecting the accuracy of information furnished concerning some 20,000 consumers. Under the terms of the consent order, Cottonwood Financial agreed to pay $286,675 in consumer redress and $1.1 million in civil penalties.

CFPB Settles Claims Against Main Street Personal Finance and Its Subsidiaries over Finance Charges

In June, the CFPB **reached** a settlement with Tennessee-based payday and title loan lender Main Street Personal Finance, Inc. and its subsidiaries. The CFPB alleged that the companies provided deceptive disclosures, failed to refund overpayments on loans, and engaged in unfair debt collection practices. The CFPB alleged, for example, the companies concealed or understated finance charges on auto-title loans for over 4,000 customers, and that customers paid $3.5 million more in finance charges than were actually disclosed. The companies also allegedly made illegal calls to consumers' places of work and disclosed customers' debts to third parties. The consent order prohibits the companies from misrepresenting its finance charges on auto-title loans, requires timely refunds of non-disclosed finance charges, prohibits unlawful debt collection practices, requires that the companies pay $2 million in consumer redress, and imposes a $1 civil money penalty.

CFPB Issues No-Action Letter on Bank of America Small-Dollar Credit Products

In May, the CFPB announced a template that banks and credit unions within its jurisdiction can use to apply for NALs covering their small-dollar loan products. In accordance with this policy, the CFPB **granted** a NAL to Bank of America, N.A. regarding its then-proposed small-dollar credit product, "Balance Assist," which provides the Bank's checking account customers access to credit in increments of $100, up to $500, to be repaid in fixed minimum payments over three months, for a flat $5 "Product Fee." The NAL issued to Bank of America provides increased regulatory certainty that the CFPB will not bring a supervisory or enforcement action under the facts and circumstances provided for in Bank of America's NAL application. The NAL remains in effect until terminated by the CFPB.

Looking Ahead to 2021

In 2021, we anticipate that regulators and policymakers will focus on balancing the need to provide avenues through which consumers impacted by the pandemic can secure short-term liquidity against the sentiment of some Democrats and consumer protection advocates that payday lending should be regulated into oblivion. At a minimum, we expect that the CFPB will be aggressive in launching investigations and initiating enforcement actions in the payday lending space as a stop-gap measure until a more comprehensive suite of legislative or regulatory actions can be taken. In the long term, the industry should prepare for the Biden administration to support efforts to "reform" the industry, including through requiring additional loan disclosures, setting interest rate caps, and attempting to revive the now-rescinded "ability to repay" underwriting provisions of the Payday Lending Rule. Efforts to restore the original Payday Lending Rule are likely to be on the agenda of a Chopra-led CFPB, though such efforts may be tempered or postponed in light of the realities of the pandemic.

What to Watch

- Challenges to the OCC's True Lender Rule.
- Periodic guidance from the CFPB on Fintech alternatives to traditional payday lending.
- Legislative/regulatory proposals and court challenges aimed at resurrecting the Cordray-Era Payday Lending Rule.

BANK

Credit Reporting

In 2020, Goodwin tracked seven public enforcement actions related to credit reporting or credit repair services, a slight increase from the number of actions tracked in 2019. Despite few new publicly announced enforcement actions, federal agencies remained active in the space, including by issuing new policies and proposing new regulations related to credit reporting.

Key Trends

Since its creation, the CFPB has been the most dominant actor in policing credit reporting or credit repair services. This year, the CFPB brought four out of the seven actions concerning credit reporting related violations, and secured $5.35 million in civil money penalties. This year's enforcement actions focused on inaccurate credit reporting by credit furnishers, and also deceptive credit repair services and violations of the TSR's Advance-Fee prohibition, which prohibits charging consumers for any promised credit repair results offered through telemarketing until six months after such promised results have been achieved. Throughout the year, the CFPB also signaled the importance of protecting consumers with respect to credit reporting during the COVID-19 pandemic and complying with the requirements of the CARES Act.

In March, during the wake of COVID-19, the CARES Act amended the FCRA in several ways that impacted credit reporting entities. The CARES Act required that, retroactive to January 21, 2020 and through July 31, 2020 or 120 days from the date the COVID-19 national emergency is declared over, a furnisher of credit information who provided any type of consumer accommodation to report the consumer's account as either "current," or as the status reported prior to the accommodation if not previously current, for the duration of the period of the accommodation. For example, a furnisher of information could not report a consumer's account as delinquent so long as the account was current before COVID-19 impacted the consumer. An accommodation under the CARES Act includes situations where the credit reporting entity enters into an agreement with a consumer to defer one or more loan payments, make a partial payment, forbear any delinquent amounts, modify a loan or contract, or where any other assistance or relief is granted to a consumer who is affected by COVID-19.

States have followed suit in offering FCRA protections. New York's Governor Andrew Cuomo issued a temporary executive order that, although it has since expired, provided for payment accommodations, extension of payment due dates, and adjustment of existing loan terms, in an attempt to mitigate the adverse consequences of any negative credit reporting that stems from delinquencies. The Illinois Department of Financial and Professional Regulation (IDFPR) also issued guidance suggesting similar steps to mitigate damage to consumers' credit during the COVID-19 crisis. The IDFPR guidance is still in effect.

In April, the CFPB issued a **policy statement** for credit reporting companies and furnishers concerning credit reporting guidance during the COVID-19 pandemic. This announcement came in the wake of the **interagency statement** encouraging financial institutions to work constructively with borrowers and other customers affected by COVID-19 to meet their financial needs. The CFPB's April policy statement provided more specific advice to consumer finance companies concerning their reporting obligations in light of the COVID-19 crisis. The statement included three key provisions:

- The CFPB encouraged consumer finance companies to continue to furnish information to credit reporting agencies during the crisis due to the "substantial benefits for consumers, users of consumer reports, and the economy as a whole."
- The CFPB expects furnishers to comply with CARES Act requirements that furnishers report the payment status for certain credit obligations as current if payments are being made pursuant to an accommodation between the lender and consumer.

- Although the FCRA generally requires furnishers and credit reporting agencies to investigate disputes within 30 days of receipt, the CFPB announced that "[i]n evaluating compliance with the FCRA as a result of the pandemic, the CFPB will consider a consumer reporting agency's or furnisher's individual circumstances and does not intend to cite in an examination or bring an enforcement action against a consumer reporting agency or furnisher making good faith efforts to investigate disputes as quickly as possible, even if dispute investigations take longer than the statutory timeframe." The policy statement did not elaborate on what the Bureau meant by the terms "does not intend to cite," "good faith efforts" or "as quickly as possible."

Two months later, in its **June 2020 compliance aid**, the CFPB clarified that "the [April Policy] Statement did not say that the CFPB would give furnishers or credit reporting agencies an unlimited time beyond the statutory deadlines to investigate disputes before the CFPB would take supervisory or enforcement action." The CFPB added that furnishers still "remain responsible for conducting reasonable investigations of consumer disputes in a timely fashion." The CFPB continued to emphasize that it would not employ a one-size-fits-all approach to evaluating furnishers and credit reporting agencies during the pandemic: "the Bureau believes it is appropriate to evaluate individually the efforts and circumstances of each furnisher and consumer reporting agency in determining if it made good faith efforts to investigate disputes as quickly as possible."

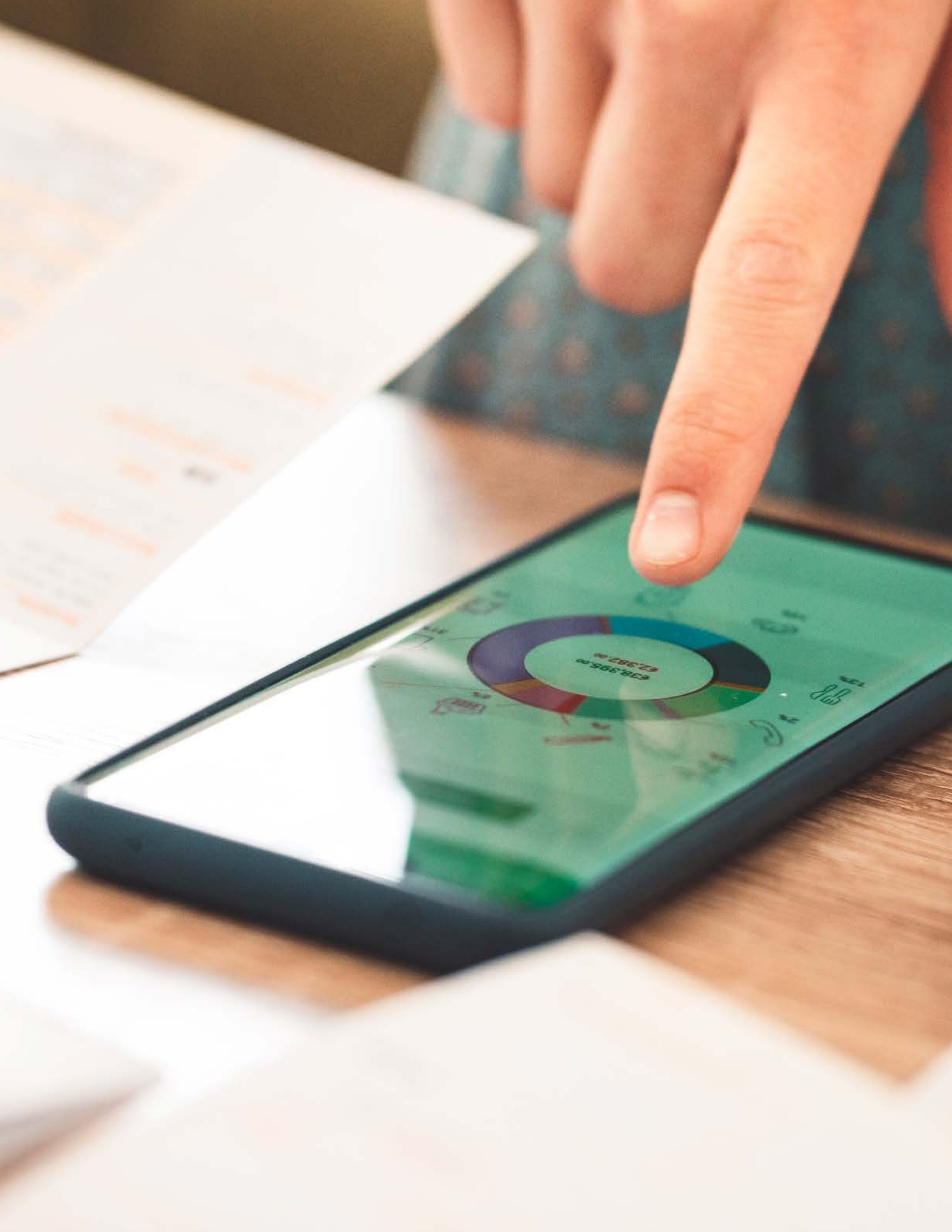
2020 Highlights

FTC Settles with Several Credit Repair Companies over Fees and Misrepresentations

In January, the FTC **settled** with several individuals and companies that allegedly operated a multi-state credit repair scam. The FTC alleged that affiliated individual and companies in Wyoming, Colorado, New Jersey, and Florida violated the FTC Act, the Credit Repair Organizations Act (CROA), the Telemarketing and Consumer Fraud and Abuse Prevention Act, and other federal statutes by falsely claiming, through internet websites, telemarketing, and unsolicited emails and text messages, that they could improve consumers' credit scores by removing all negative information and hard inquiries from credit reports. The defendants also allegedly took fees in advance of providing debt relief services, failed to provide required disclosures, and made unauthorized withdrawals from consumers' bank accounts. Under the settlement, the defendants agreed to a ban from the credit repair services industry, and payment of an over $13 million judgment, most of which was suspended for inability to pay.

CFPB and Massachusetts Attorney General Sue Commonwealth Equity Group, LLC over False Promises and Monthly and Up-Front Fees

In May, the CFPB and Massachusetts Attorney General **filed** a complaint against Commonwealth Equity Group, LLC, a Massachusetts-based credit repair company, alleging that the company had engaged in deceptive acts or practices under the CFPA and Massachusetts state law, as well as abusive telemarketing acts and practices under the TSR. The CFPB and Massachusetts Attorney General alleged that the company misrepresented to consumers through its website, online advertising, and in its customer agreements, that it would be able to substantially increase consumers' credit scores and remove negative entries on consumers' credit reports when, in fact, the company was often unable to do achieve those promised results. The company also allegedly charged up-front and monthly fees prior to achieving promised results. Finally, the complaint alleges that the company misrepresented its services by falsely claiming that the company had a large number of certified credit experts, and assisted each client individually to secure "credit freedom." The complaint seeks injunctive relief, civil money penalties, consumer redress, and enforcement costs.



FTC Announces Notices of Proposed Rulemaking Related to FCRA

In August, the FTC **announced** five Notices of Proposed Rulemaking and requested public comment on their proposed changes to the rules that implement the FCRA. The FTC proposed limiting the scope of the five rules to apply only to motor vehicle dealers, asserting that the proposed changes would bring the FCRA in line with the Dodd-Frank Act. For instance, as amended, the scope of the Furnisher Rule would be narrowed from all furnishers to those primarily engaged in the sale and servicing of motor vehicles. The proposed changes were to the following five, existing rules:

- The **Address Discrepancy Rule**, which outlines the information collection requirements for consumer reporting agencies when they receive a notice of address discrepancy.
- The **Affiliate Marketing Rule**, which provides "consumers the right to restrict a person from using certain information obtained from an affiliate to make solicitations to the consumer."
- The **Furnisher Rule**, which requires entities that furnish information to CRAs to establish policies and procedures "regarding the accuracy and integrity of the information relating to consumers provided to a CRA."
- The **Pre-Screen Opt-Out Notice Rule**, which outlines "requirements for those who use consumer report information to make unsolicited credit or insurance offers to consumers."
- The **Risk-Based Pricing Rule**, which requires "those who use information from a consumer report to offer less favorable terms to consumers to provide them with a notice about the use of such data."

The FTC noted that it also sought comment on the general effectiveness of the five rules including: "(i) whether there is a continuing need for specific provisions of each rule; (ii) the benefits each rule has provided to consumers; (iii) what modifications, if any, should be made to each rule to benefit consumers and businesses; and (iv) what modifications, if any, should be made to each rule to account for changes in relevant technology or economic conditions." Comments were due by November 30, 2020.

CFPB Settles with Home-Alarm Company Alder Holdings, LLC for Using Consumers' Credit Scores Without Proper Notice

In December, the CFPB **announced** that it and the Arkansas Attorney General had reached a settlement with Utah-based home-alarm company Alder Holdings, LLC, resolving allegations that the company had violated FCRA by failing to provide customers with risk-based pricing notices. The CFPB alleged that the company would review customer's credit reports in connection with extending credit for the purchase of its home-alarm products, and that based on information in credit reports the company would then charge certain customers higher activation fees without simultaneously providing those customers with the risk-based pricing notice required by FCRA. Under the settlement, the company agreed to pay a $600,000 civil money penalty.

Santander Consumer USA Inc. Pays $4.75 Million to Resolve Alleged FCRA Violations

In December, the CFPB **announced** that it had entered into a consent order with Santander Consumer USA Inc., a national auto lender and auto loan servicer, resolving allegations that the company had violated the FCRA and failed to comply with a 2015 consent order concerning similar alleged conduct. The CFPB alleged that from January 2016 through at least August 2019, the Santander furnished information to CRAs that contained errors and contradictory information, when it knew or should have known about those errors. For example, the company allegedly reported inaccurate dates of first delinquency for delinquent accounts, and also reported dates of first delinquency for accounts that were current or paid in full. The company also allegedly failed to update or correct inaccurate information, or maintain reasonable written procedures for reporting accurate information to CRAs. The consent order requires that Santander pay a $4.75 million civil money penalty to the Bureau.

Looking Ahead to 2021

In 2021, we do not expect to see a significant increase in public enforcement actions concerning credit reporting or credit repair services, but we do expect the CFPB and FTC to remain active in this area, especially in policing credit repair service provides that charge advance-fees or engaged in deceptive advertising. The Biden administration has indicated some interest in creating a publicly-run credit reporting agency within the CFPB that would compete with existing CRAs, but whether this initiative will be a top priority for the administration or whether the proposal has wide support in Congress is unknown.

What to Watch

- Continued enforcement activity by CFPB and FTC against credit repair service providers.
- FTC's response to comments on FCRA rulemaking.
- Focus on furnishers' and CRAs' compliance with COVID-19 related requirements.
- Developments related to possible publicly-run CRA.

Student Lending

During 2020, Goodwin tracked seven federal and state enforcement actions related to student lending, representing a significant decrease from the 18 actions Goodwin tracked in 2019. These actions included litigation, administrative actions, and settlements involving student loan servicers, student loan debt relief providers, and a trust of third-party private student loans. In bringing these actions, enforcers continued to largely rely on the CFPA and state consumer protection statutes.

The economic disruption from the COVID-19 pandemic presented new compliance challenges for the student lending industry in 2020. Both the federal government and state governments have pushed the industry to afford greater protections to student loan borrowers, including through mandating forbearance periods for federal student loan borrowers. These initiatives are only likely to expand over the coming year, as student loan relief and reform is at the top of the Biden administration's regulatory agenda.

Key Trends

In contrast to 2019, the main focus of CFPB and FTC enforcement actions this year were smaller student loan debt relief providers and servicers, rather than national for-profit schools and student lenders. This resulted in agencies obtaining generally smaller judgments throughout the year totaling $368 million in recoveries — a more than 60% decline in total recoveries year-over-year. Furthermore, the majority of the amount recovered this year — approximately $330 million — was the result of a single settlement with ITT Educational Services, which is discussed in more detail below.

Nowhere was the impact of COVID-19 felt more than in the student loan servicing market. On March 20, the U.S. Department of Education implemented student loan relief **efforts** in response to the pandemic's impact on student borrowers. The Secretary of Education **directed** the office of Federal Student Aid to suspend loan payments, cease collections on defaulted loans, and waive interest rates for a 60-day period for federal student loans held by the Department.

On March 27, President Trump signed into law the emergency CARES Act, which suspended payment of federal student loans and collection efforts on defaulted loans and set interest rates at 0% for an initial six months, until September 30, 2020. Those benefits were subsequently extended three times — through September 30, 2021. It is likely that the Biden administration will extend these benefits as well until there is relative stability from the impact of COVID-19.

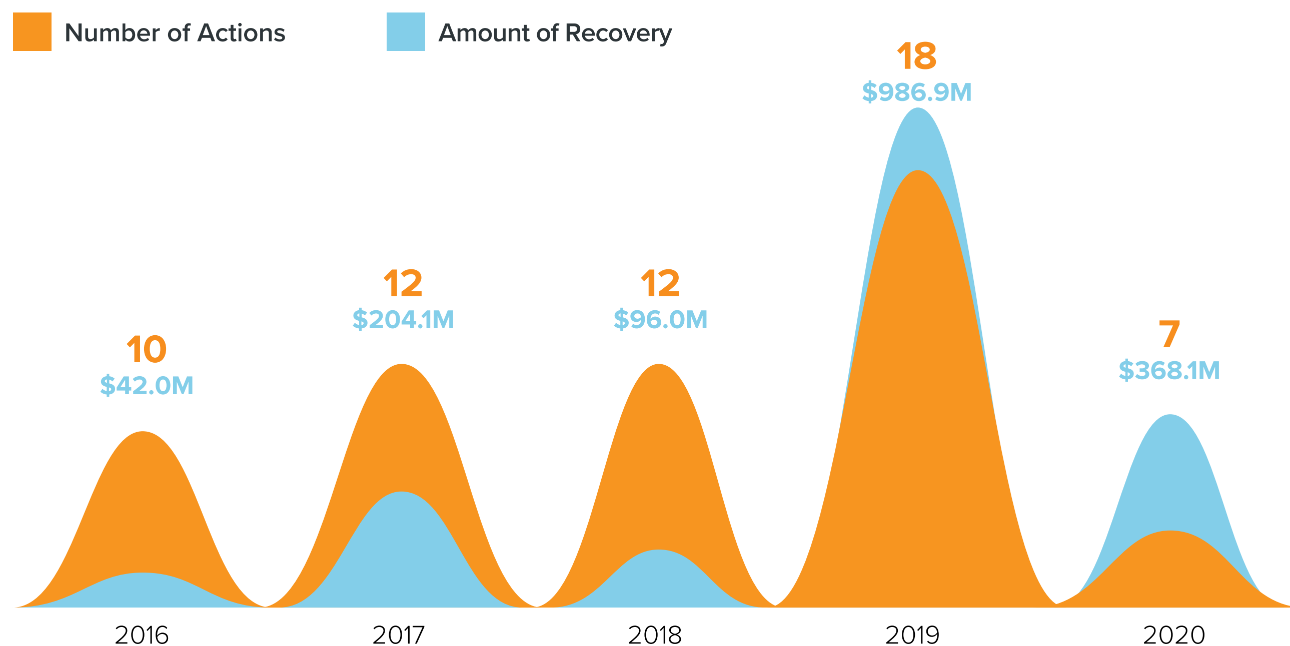
Despite these efforts, states have encouraged the federal government to do more to protect student borrowers that have been impacted by COVID-19. For example, a coalition of 27 state attorneys general sent a **letter** to the Department of Education, urging the federal government to expand student loan relief measures. In addition, this year a growing number of state attorneys general have sought to directly tackle perceived issues in the student lending space. In addition to the 50-state settlement with the holder of ITT Technical Institute's student loans, Minnesota, New Jersey, Colorado, Pennsylvania, California, and Virginia all took regulatory or enforcement action related to student lending this year. Given the popularity of student loan debt relief and the ongoing crisis, the trend of state involvement in this space is likely to continue.

2020 Highlights

CFPB Settles with Discover Bank for $35 Million

In December, the CFPB **entered** into a consent order with Discover Bank, The Student Loan Corporation, and Discover Products, Inc. (collectively, Discover) resulting from alleged violations of a 2015 consent order, the EFTA, and the CFPA. The 2015 consent order required Discover to refund $16 million to consumers and to rectify its allegedly unlawful student loan servicing and collection practices. However, the CFPB alleged that Discover failed to comply with the terms of the 2015 consent order by making material misrepresentations to consumers regarding their loan information and failing to fully pay the redress agreed to under the 2015 consent order. The CFPB also alleged that Discover had violated

Student Lending Actions by Year



the CFPA, EFTA, and Regulation E by withdrawing automatic payments from consumers' bank accounts without appropriate authorization, cancelling automatic payments without providing notice to consumers, and misrepresenting to consumers the amount of their minimum payments. Under the terms of this settlement, Discover agreed to pay at least $10 million in consumer redress and a $25 million civil money penalty.

CFPB and 47 States Agree to $330 Million Settlement with Holder of Private Student Loans for ITT Technical Institute Students

In September, the CFPB **reached** a settlement with a statutory trust that was created to hold beneficial ownership of third-party private student loans for students of now-defunct for-profit ITT Technical Institute. In its simultaneously filed complaint, the CFPB alleged that the trust provided substantial assistance to ITT in engaging in unfair acts and practices in violation of the CFPA because the trust allegedly knew or was reckless in not knowing that many student borrowers did not understand the terms and conditions of those loans, could not afford them, or in some cases did not even know they had them. Under the terms of the settlement, the trust agreed to forgive the remaining balances on all outstanding student loans — approximately $330 million in debt relief. This settlement is the third enforcement action initiated by the Bureau related to ITT's private loan programs.

Navient Defends Lawsuits Alleging for Deceptive Practices

In October, New Jersey Attorney General's Office **filed** a lawsuit in New Jersey state court against national student loan servicer Navient Corp. and Navient Solutions LLC (collectively, Navient) for allegedly unconscionable commercial practices and deception and misrepresentations made to consumers in violation of state law. The complaint alleged Navient steered borrowers into costly forbearance programs, failed to notify borrowers about deadlines for repayment plans, encouraged borrowers to have cosigners and subsequently made it difficult to obtain cosigner release, and misled borrowers about their past due amounts.

Navient has previously been under scrutiny in the student lending space. In October 2017, the Pennsylvania Attorney General's Office likewise **filed** suit against Navient for allegedly engaging in unfair and deceptive lending practices and failing to offer proper repayment plans to students. In December 2018, the United States District Court for the Middle District of Pennsylvania denied Navient's motion to dismiss in its entirety, which was subsequently affirmed by the Third Circuit Court of Appeals in July 2020. The Third Circuit rejected Navient's core argument that states may not bring CFPA claims where there is already a pending lawsuit by the CFPB to address the same violative conduct. As a result of this decision, discovery will resume and the case will proceed to trial.

California Passes Student Loan Borrower Bill of Rights

In September, California Governor Gavin Newsom signed into law the California Student Loan Borrower Bill of Rights. Though in recent years other states have passed laws designed to regulate student loan servicers, the California law is the first state law to comprehensively regulate the student loan industry, including private student loan servicers, depository institutions, and servicers of federal student loans. It is likely that certain components of the law will thus be challenged on preemption grounds. Perhaps the biggest impact of the law, however, is that it creates a private right of action, including in certain cases treble damages, punitive damages, and legal fees, for failure to comply with either the substantive provisions of the Borrower Bill of Rights or any federal law that applies to student loan servicers.

Virginia Enacts Student Loan Servicer Licensure Law

In April, Virginia enacted a law requiring student loan servicers to be licensed by the State Corporation Commission. In addition to licensure, the law creates a private right of action, requires that licensed entities refrain from a laundry list of "prohibited activities," and mandates a lengthy list of "affirmative acts" required of student loan servicers, which govern borrower communications, the posting of payments, credit reporting, and other activities.

Looking Ahead to 2021

Federal and state governments are likely to continue to prioritize seeking redress and additional protections for student loan borrowers, particularly until the COVID-19 crisis has abated. President Biden has expressed his commitment to student debt forgiveness and more forgiving repayment programs, including urging $10,000 in federal student loan forgiveness per borrower and $10,000 in additional student debt relief for undergraduate and graduate students who perform national or community service. Though there may be public pressure to implement even more progressive measures, such as complete student debt cancellation, the probability of cancellation remains low without cooperation and legislative action by Congress. However, the industry should expect more modest action from the Biden administration through executive order, including measures such as additional and lengthier forbearance programs and automatically enrolling all federal student loan borrowers in Income-Based Repayment programs.

On the federal level, industry participants should pay careful attention to the CFPB's regulatory and enforcement agenda. The change in direction at the CFPB is likely to be felt acutely by the student loan servicing industry, particularly given Director-nominee Rohit Chopra's prior experience as the CFPB student loan ombudsperson. The industry should expect that, if Mr. Chopra is confirmed, the CFPB will take broader, more aggressive enforcement action against the entire student loan ecosystem: lenders, servicers, service-providers, investors, and colleges and universities.

States are likely to continue to take an active role in policing the student lending industry, even with more aggressive federal enforcement on the horizon. Student loan servicers who operate in California are likely to experience increased scrutiny from the DFPI as a result of this year's passage of the Student Loan Borrower Bill of Rights. Though California is not the first state to pass such a law, the California law is likely to spur legislative action in other states. The student lending industry should also prepare for an increase in private litigation as a growing number of student lending laws, including the California one, provide a private right of action to student loan borrowers for violations of the laws' substantive requirements.

What to Watch

- Passage of a growing number of state-level student loan borrower "Bill of Rights" laws.
- Additional federal student loan relief options, including lengthier forbearance periods and income-based repayment.

Auto Lending

In 2020, Goodwin tracked 11 publicly announced auto lending enforcement actions, similar to the 11 such actions Goodwin tracked in 2019. Though states brought a majority of the publicly announced actions, the number of federal enforcement actions did increase about 20% year-over-year. The total amount recovered this year was approximately $562 million — more than 40 times the amount recovered in 2019.

Key Trends

Unlike 2019, during which the CFPB announced no new auto finance enforcement actions, 2020 saw the CFPB publicly announce four actions related to auto finance. In each instance the CFPB took action under its authority to enforce UDAAP.

In contrast to the CFPB, the DOJ was notably absent from the auto lending space this year, announcing only a single settlement and no new public enforcement actions or investigations. In recent years, the DOJ has played an active role in this space, particularly as to alleged violations of anti-discrimination laws, such as ECOA. In 2020, however, the DOJ took a far less active role.

States continued to play the predominant enforcement role in the auto lending space. Over half of publicly announced actions were UDAAP actions by state attorneys general, including the attorneys general of Massachusetts, Michigan, and Vermont. The amounts recovered by states, approximately $553 million, also dwarfed the amounts recovered by federal agencies, approximately $10 million. But nearly all of the total amounts recovered this year are the result of a single enforcement action: the $550 million settlement reached between 34 state attorneys general and Santander, discussed in more detail below.

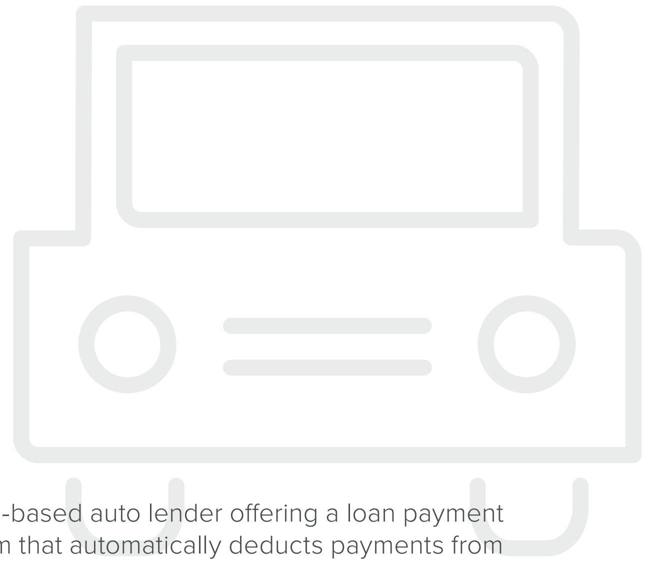
2020 Highlights

Santander to Pay $550 Million to End Five-Year Multi-State Investigation

In May, 34 state attorneys general **reached** a $550 million settlement agreement with Santander Consumer USA Inc., resolving a five-year investigation into the company's alleged subprime auto lending practices. The states alleged that Santander's credit scoring model predicted that certain segments of borrowers had a greater than 70% chance of default, and yet Santander originated auto loans to these borrowers anyway. The complaint also alleged that Santander failed to ensure that dealers had verified borrowers' qualifying information, and that Santander's policies and procedures did not adequately prevent false information from being used in the underwriting process. Finally, Santander allegedly required borrowers to make payments through methods that caused borrowers to incur additional fees, and allegedly misled borrowers about their rights under the loan contract. Under the settlement, Santander agreed to waive deficiency balances for some customers who had defaulted ($433 million), to provide debt cancellation for consumers in the high-risk borrower category ($45 million) and additional consumer restitution ($65 million), and to pay costs to the settlement administrator ($2 million) and Multistate Working Group ($5 million). The settlement allows Santander to continue to operate its auto lending division, but requires that a Monitoring Committee comprised of various state attorneys general monitor the company over the next three years.

CFPB Settles with Lobel Financial Corporation over Loss Damage Waiver Charges

In September, the CFPB **entered** into a consent order with Lobel Financial Corporation, a California auto loan servicer, resolving allegations that Lobel had charged consumers for loss damage waiver coverage without actually providing the coverage. The CFPB alleged that any time that a borrower failed to sufficiently cover



the value of their vehicle through insurance, Lobel would add loss damage waiver coverage to borrowers' accounts and charge borrowers $70 per month for the coverage. Lobel would then cease providing the loss damage waiver coverage when borrowers became 10 or more days delinquent on their auto loan. However, the CFPB alleged that Lobel continued to charge borrowers premiums after they had become 10 days delinquent even though coverage had ceased. The CFPB alleged that Lobel's conduct was "unfair" under the CFPA because Lobel charged borrowers for a service that borrowers did not receive. To resolve these allegations Lobel agreed to pay $1.35 million in consumer relief to 4,000 affected consumers and $100,000 in civil money penalties.

Nissan to Pay $5 Million to Resolve Alleged UDAAP Violations

In October, the CFPB **entered** into a consent order with Nissan Motor Acceptance Corporation, an auto finance subsidiary of Nissan, for alleged UDAAP violations. The CFPB alleged that Nissan repossessed hundreds of vehicles, despite the consumers' accounts being current, and that Nissan demanded that consumers pay a separate storage fee for personal property contained in repossessed vehicles. Further, the CFPB alleged that Nissan made deceptive statements in many loan extension agreements that created the erroneous impression that consumers could not file for bankruptcy. Under the consent order, Nissan agreed to pay $1 million in consumer redress to consumers subject to wrongful repossession and to credit any outstanding charges from wrongful repossessions. Nissan also agreed to pay a $4 million civil money penalty to the CFPB. The consent order further requires Nissan to prohibit its repossession agents from charging personal property fees.

CFPB Settles with SMART Payment Plan over Allegedly Misleading Statements Made to Consumers

In November, the CFPB **entered** into a consent order with SMART Payment Plan, LLC (SMART), a Texas-based auto lender offering a loan payment program that automatically deducts payments from consumers' bank accounts at periodic intervals and forwards those payments to consumers' creditors. The CFPB alleged that SMART's disclosure statements purported to show amounts that consumers could save by using SMART, when in fact SMART's fees typically exceeded the borrowers' savings. SMART agreed to pay $1.5 million in consumer redress and $1 million in civil money penalties to resolve potential claims.

U.S. Equity Advantage and Its Founder Agree to Pay $900,000 to Resolve Alleged UDAAP Violations

In November, the CFPB **entered** into a consent order with U.S. Equity Advantage, a Florida-based company offering an auto loan payment program, and its founder, resolving alleged UDAAP violations. The CFPB alleged that U.S. Equity Advantage misrepresented the amounts that consumers could save through using the loan payment program by failing to disclose fees, including enrollment fees. Further, the CFPB alleged that U.S. Equity Advantage inaccurately advertised that it could help consumers save money without having any factual basis for that claim. U.S. Equity Advantage agreed to pay $900,000 in consumer relief to resolve potential claims.

California DBO (Now DFPI) Launches Investigation of LoanMart Over "True Lender" Issues

In September, the California Department of Business Oversight (DBO), now the DFPI, **launched** a formal investigation into LoanMart, one of the largest state-licensed auto title lenders operating in California. The DBO said that it was investigating LoanMart for potential evasions of California's new interest rate caps. Under the Fair Access to Credit Act, effective January 1, 2020, the maximum interest rate for most types of loans is 36%. But the Fair Access to Credit Act applies only to loans issued by California lenders. According to the DBO, instead of complying with that law, LoanMart partnered with out-of-state CCBank, based in Utah, to originate auto title loans at interest rates exceeding 90%. DBO stated that the purpose of

the investigation is to determine whether LoanMart's role in the arrangement is such that it, rather than CCBank is the true lender, such that the loans contravene the state's usury caps.

Looking Ahead to 2021

We expect auto lending to be a key focal point for federal and state regulators over the next couple of years. On the federal level, the new administration will likely take a more active role in the auto lending space for several reasons. First, two years ago, Congress invalidated the CFPB's Obama-era indirect auto lending bulletin, which stated that lenders offering auto loans through dealerships would be held responsible for the discretionary pricing practices of auto dealers where those practices resulted in pricing disparities among consumers based on race, ethnicity, or national origin. It is likely that the CFPB under the Biden administration will attempt to revive the bulletin in some fashion, even though under the Congressional Review Act re-implementing the prior rule would require an act of Congress.

Second, Democrats — including those most likely to place an active role in shaping the future of the CFPB — have stated that discrimination in auto lending is rampant. Elizabeth Warren recently criticized the CFPB for not having "taken meaningful action to combat these trends during [Director Kraninger's] tenure." Further, Warren reportedly characterized auto loans as "the most troubled consumer financial product." Similarly, President Biden's pick for CFPB Director, Rohit Chopra, has made public statements in the past urging the FTC to do more to combat discriminatory intent and disparate impact in the auto lending industry.

Third, the Biden administration has announced that COVID-19-relief measures will be a near-term priority. Some industry observers have predicted that such relief may include a moratorium on vehicle possessions until the crisis is over. There is good reason to believe that federal agencies may make auto lending a COVID-19 relief priority: the CFPB **reported** a spike in consumer complaints about auto financing since the start of the COVID-19 pandemic. Consumers submitted more than 2,800 auto loan and lease complaints from March through July of 2020, more than any other five-month period throughout the eight-year history of the Consumer Complaint Database. Complaints regarding auto loan payment relief skyrocketed to almost 300 complaints filed between March and July of 2020, more than double what was reported during the same

By the end of 2021 we anticipate an increase in federal enforcement activity across the board and consumer-friendly agency guidance, proposed rules, and proposed legislation in a number of key areas, including auto lending, mortgages, payday and small-dollar lending, and student lending.

period in 2019. The CFPB has also **stated** that auto loan servicing will be at the top of the CFPB's list of "prioritized assessments." The CFPB plans to conduct targeted examinations into the products and practices of each industry designated for prioritized assessment.

Under the Biden administration it is likely that CFPB investigations and enforcement will be more robust and that remedies will be more aggressive. The Biden administration has made clear that providing relief to consumers who have been economically impacted by the COVID-19 pandemic will be a top priority. To that end, many predict that federal agencies will focus on auto repossessions, potentially even placing a moratorium on vehicle repossessions in the coming year.

The industry may also face renewed interest at the state level. Though states have always been the primary actors in the auto-finance enforcement space, auto lenders doing business in California are likely to face increased scrutiny. Though the former California Department of Business Oversight could investigate state-licensed auto lenders for certain alleged violations of California's usury limits and licensing laws, the new California DFPI has much broader authority over the auto lending industry, including the authority to bring enforcement actions for alleged violations of all California and federal consumer financial protection laws that apply to auto lenders. Some California assembly-members have called for quick action by the DFPI to address what they view as predatory loan practices in the auto finance industry.

Thus, we predict an increase in enforcement activity related to the auto lending industry in 2020, both at the federal and state levels.

What to Watch

- New federal guidance and/or investigations related to dealer markups/discretionary pricing practices.
- How the DFPI exercises its new authority over auto lending enforcement.

Major U.S. Supreme Court + Appellate Cases Decided In 2020

2020 brought the much anticipated Supreme Court decision in *Seila Law LLC v. CFPB*, along with a variety of Courts of Appeals decision with sweeping impacts on the financial services industry and legal landscape. Multiple Courts of Appeals focused on the FDCPA, issues of standing and class awards.

2020 Highlights

Supreme Court

Supreme Court Strikes Down For-Cause Removal of CFPB Director

In June, the Supreme Court issued its highly anticipated decision in *Seila Law LLC v. CFPB*, No. 19-7. As predicted, the Supreme Court held that the Dodd-Frank Act's for-cause removal provision for the CFPB Director violates the separation of powers, as Article II of the Constitution vests in the President the power to remove federal officials. The Supreme Court found that the CFPB Director did not fit into the only two exceptions to the President's unrestricted removal of power. First, the CFPB Director is not an inferior officer with limited duties and "no policymaking or administrative authority." Second, the CFPB's Director is not like the commissioners of multimember executive agencies; she exercises "substantial executive power." However, the Court was careful to avoid striking down the other provisions of the Dodd-Frank Act that establish the CFPB and define its authority, holding that while the leadership structure is unconstitutional, the Act's for-cause removal protection could be severed from the rest of the statute. Thus, the agency may continue to operate as long as its Director can be removed by the President at will.

Courts of Appeals

Ninth Circuit Upholds CID Issued Against Seila Law

In December, on remand from the Supreme Court, the Ninth Circuit held in *CFPB v. Seila Law LLC*, No. 17- 56324, that the civil investigative demand (CID) issued against Seila Law LLC was validly ratified by the CFPB Director despite the Supreme Court holding that the agency's leadership structure was unconstitutional. The Ninth Circuit found that the ratification "remedies any constitutional injury that Seila Law may have suffered due to the manner in which the CFPB was originally structured."

Ninth Circuit Broadens Statutory Definition of Debt Collector Under FDCPA

In March, the Ninth Circuit held in *McAdory v. M.N.S. Associates, LLC*, No. 18-35923, that entities that otherwise meet the definition of "debt collector" cannot avoid liability under the FDCPA by outsourcing its debt collection activities. In *McAdory*, the plaintiff alleged that the defendant — a passive debt buyer — fell within the definition of a "debt collector" as defined under the FDCPA. Included in the FDCPA's definition of debt collectors is "any person who uses any instrumentality of interstate commerce or the mail in any business the principal purpose of which is the collection of any debts." Citing the Third Circuit's decision in *Barbato v. Greystone All., LLC*, No. 18-1042, the Ninth Circuit found that the words "collection" and "principal purpose" in the definition of "debt collector" focus on *what* is being collected rather than the *act* of collecting. In other words, "the relevant question . . . is whether debt collection is incidental to the business's objectives or whether it is the business's dominant, or principal, objective." The Court held that the plaintiff had adequately alleged that the defendant's principal purpose was debt collection. It also found that a defendant could fall under the definition of "debt collector" and a "creditor" simultaneously under the FDCPA.

Third Circuit Holds FDCPA Does Not Require Debtors to Dispute Validity of Debt in Writing

In March, the Third Circuit in *Riccio v. Sentry Credit, Inc.*, No. 18-1463, overruled Third Circuit precedent, *Graziano v. Harrison*, No. 91-5082, holding that debt collection notices sent under the FDCPA do not require debtors to dispute the validity of their debt in writing. In overruling itself, this decision resolved a circuit split and "restore[d] national uniformity to the meaning of § 1692g." Since

Congress did not specify that these disputes must be expressed in writing, the Court held that Section 1692g(a)(3) of the FDCPA permits oral disputes.

Fourth Circuit Finds Plaintiffs Lack Standing in Alleged RESPA Claim Where No Concrete Injury Exists

In March, the Fourth Circuit in *Baehrs v. The Creig Northrop Team et al*, No. 19-1024, held plaintiffs lacked standing to bring an action under RESPA where plaintiffs could not establish a concrete injury. The Court held that plaintiffs did not allege any harm that Congress enacted RESPA to prevent. Instead of alleging that they were harmed by exceedingly high costs of settlement services, plaintiffs alleged they were harmed by being deprived of impartial and fair competition between settlement service providers. This was not a concrete injury under RESPA. Relying on the Supreme Court decision in *Spokeo, Inc. v. Robins*, No. 13-1339, the Fourth Circuit noted that a mere statutory violation does not always create a concrete injury.

Seventh Circuit Finds FDCPA Claim Failed Where No Evidence of a Significant Fraction of the Population Would Find Collection Letter Misleading

In June, the Seventh Circuit in *Johnson v. Enhanced Recovery Company, LLC*, No. 19-1210, upheld the Northern District of Indiana's granting of summary judgment in favor of a debt collector. A debtor, alleging that the debt collector had sent her misleading collection letters in violation of the FDCPA, could not provide evidence of confusing or misleading language in the letters. The collection letter identified the creditor, three payment options, and noted that the "letter serves as notification that your delinquent account may be reported to the national credit bureaus." The Seventh Circuit, in evaluating the language from the perspective of an "unsophisticated debtor," held that the collection letter was not misleading, stating that "'mere speculation' by the plaintiff that a collection letter is misleading is insufficient to survive a debt collector's motion for summary judgment." The Court noted that while the FDCPA protects the unsophisticated debtor, it does not protect the "irrational one."

Ninth Circuit Upholds that the Home Owners' Loan Act of 1933 Preempts State Law

In September, the Ninth Circuit confirmed the OCC's view on preemption by holding that California's law requiring the payment of interest on escrow accounts was preempted by the Home Owners' Loan Act of 1933 (HOLA), and its implementing regulations. In *McShannock, et al. v. JP Morgan Chase Bank NA*, No. 19-15899, the Court explained that through HOLA, Congress vested the Office of Thrift Supervision with broad authority to shape the regulatory environment for federal savings associations. Because California's interest-on-escrow law imposed a requirement regarding escrow accounts; affected the terms of sale, purchase, investment in, and participation in loans originated by savings associations; and had more than an incidental effect on the lending operations of savings associations, the panel held that the claims were preempted by HOLA. The plaintiffs' claims against the national bank defendant were preempted even though the conduct giving rise to the complaint occurred after the bank had acquired the loans in question from a federal savings association. Although the Second Circuit has not yet decided this same issue, a pair of cases in the Eastern District of New York have petitioned the Second Circuit to review the district court's decisions in ruling that the HOLA does not preempt nearly identical claims. This sets up the issue for a potential circuit split between the Ninth and Second Circuits, depending on how the Second Circuit rules.

Eleventh Circuit Strikes Incentive Awards for Class Plaintiffs

In September, the Eleventh Circuit held in *Johnson v. NPAS Solutions, LLC*, No. 18-12344, that it is improper to provide incentive awards to a named plaintiff to compensate that plaintiff for his time and/or for participating in the lawsuit. The Eleventh Circuit held that the District of Florida improperly awarded payment of an incentive award to the named plaintiff. The Eleventh Circuit found that the incentive award was similar to that of a salary and prohibited under Supreme Court precedent. Relying on Supreme Court case law from

the 1800s, the Court held that a plaintiff suing on behalf of a class cannot be paid a salary or be reimbursed for his personal expenses. This decision is significant as incentive awards for class plaintiffs are very common in class action litigation. Acknowledging this, the Eleventh Circuit invited either Congress or the Supreme Court, in the event that it disagrees with the Eleventh Circuit's decision, to either provide for incentive awards by statute or overrule the Supreme Court precedent prohibiting named plaintiffs from being paid salaries or being reimbursed for his personal expenses.

Looking Ahead to 2021

In 2020, we expected the Supreme Court to resolve the issue of the Dodd-Frank Act's for-cause removal provision in *Seila Law LLC v. CFPB*, which it did, with the Ninth Circuit on remand finding that any constitutional injury to Seila Law through the CFPB's structure was remedied and the CID properly ratified by the CFPB's Director. Now that the Supreme Court granted certiorari in *Collins v. Mnuchin*, No. 19-0422 — where the constitutionality of the FHFA structure is at issue — it will remain to be seen if the Court will extend the same reasoning to *Collins* or any other challenges to other agencies' structures that may arise in 2021. Please refer to the "What We're Watching: 2021 Emerging Issues" section for an overview of Supreme Court cases set for hearing on the Court's 2021 docket.

What to Watch

- Supreme Court's resolution of TCPA definition of ATDS.
- Continued constitutional challenges to government agencies and federal regulations.
- Potential Circuit Court split between the Ninth and Second Circuits regarding HOLA's preemption of state laws.

EQUAL JUSTICE UNDER LAW

What We're Watching: 2021 Emerging Issues

Enforcement + Regulatory Trends

In 2019, we predicted that federal enforcement action would remain down unless or until there was a change in administration. Surprisingly, 2020 saw an uptick in federal action, largely attributable to a much more active CFPB. Under the Biden administration, we expect the upwards trend in federal enforcement actions — by the CFPB and other agencies — to continue in 2021. In particular, we expect more frequent enforcement activity at the federal level targeting large market participants, even where the alleged consumer harm may be indirect, speculative, or difficult to measure.

Although there was a slight decrease in state enforcement activity in 2020 as compared to 2019, state activity remains significant. We expect state activity to remain at or above this level into 2021, and expect California, Massachusetts, and New York to remain leaders in this space. In particular, we expect enforcement activity by California to increase as the newly-formed DFPI, commonly referred to as a "mini-CFPB," gets up and running in 2021.

The results of the recent presidential election have led to speculation regarding what legal changes may be in store for the consumer financial services industry and, in particular, the CFPB. In January 2021, Director Kraninger resigned from her position at President Biden's request. President Biden reportedly intends to replace her with Rohit Chopra. Mr. Chopra (whose nomination to the FTC was unanimously confirmed) is likely to be confirmed given the Democrat's control of the Senate. Under Mr. Chopra's leadership, the CFPB is likely to be much more aggressive across the board in initiating investigations and pursuing enforcement actions. Based on Mr. Chopra's public statements and experience, we expect the student loan origination and servicing industry to be a prime target of CFPB enforcement activity, followed by the auto lending and payday loan industries. We further expect the actions taken by the CFPB to be more punitive — a return to the Director Cordray-era where one objective of the Bureau was to punish enforcement targets by extracting large civil money penalties through settlements and administrative actions. One other potential concern for the consumer financial services industry is that investigations by CFPB staff that were not given final approval to bring enforcement actions during Director Kraninger's tenure could be reopened and reconsidered by Mr. Chopra.

With the Democrats seizing control of both houses of Congress, and a consumer-friendly Biden administration, we expect that the House of Representatives and Senate Democrats will continue to seek a role in consumer finance oversight and enforcement. Given the Democrats' narrow majority in the Senate, they may be foreclosed from pursuing certain aggressive consumer protection initiatives, at least for the time being.

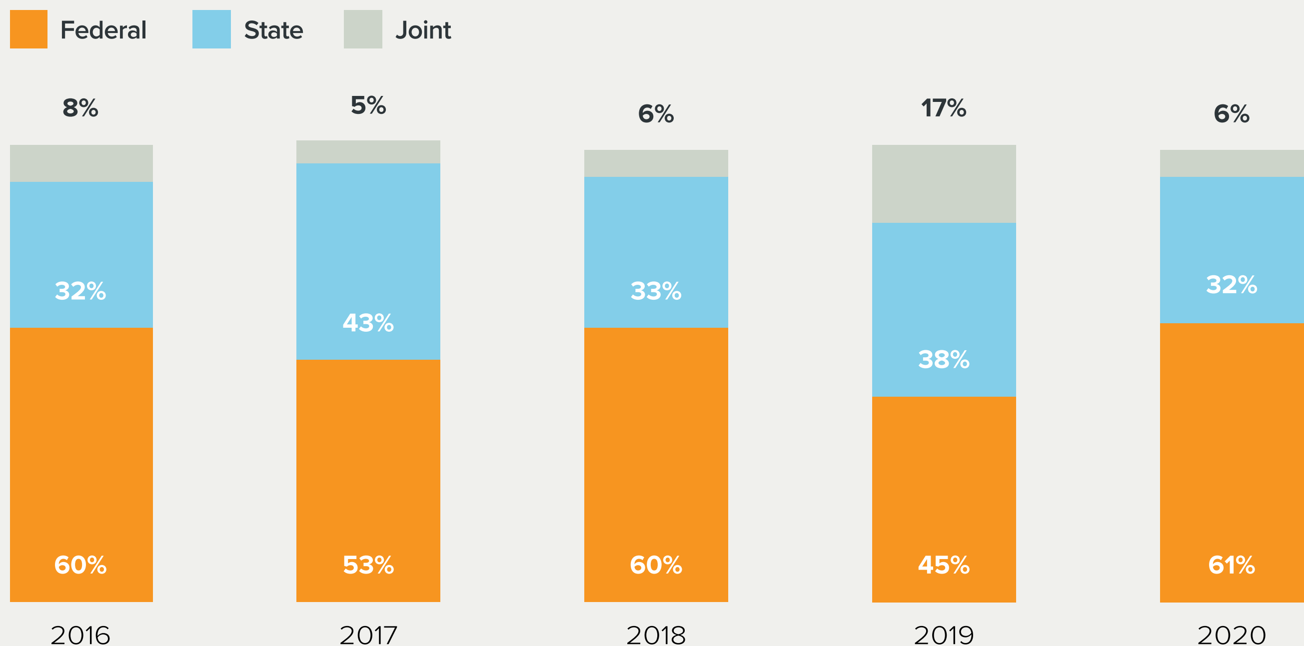
The global pandemic will also likely to continue to distract from and disrupt Democrats' consumer finance efforts, at least through the first half of 2021. After the focus has shifted away from *managing* the effects of COVID-19, we expect to see federal and state agencies commence investigations of the industry's compliance with pandemic-related consumer protection measures. With the shifting of priorities, we also expect the Biden administration to advance a number of consumer-friendly policies, particularly in the areas of payday lending, indirect auto lending, and student lending — all areas we expect a CFPB led by Rohit Chopra to prioritize based on his record and public statements. At the state level, we expect California to lead the way, given its new "mini-CFPB" with regulatory and enforcement authority of nearly all financial products offered to California consumers.

Looking Ahead to 2021 – The U.S. Supreme Court's Docket

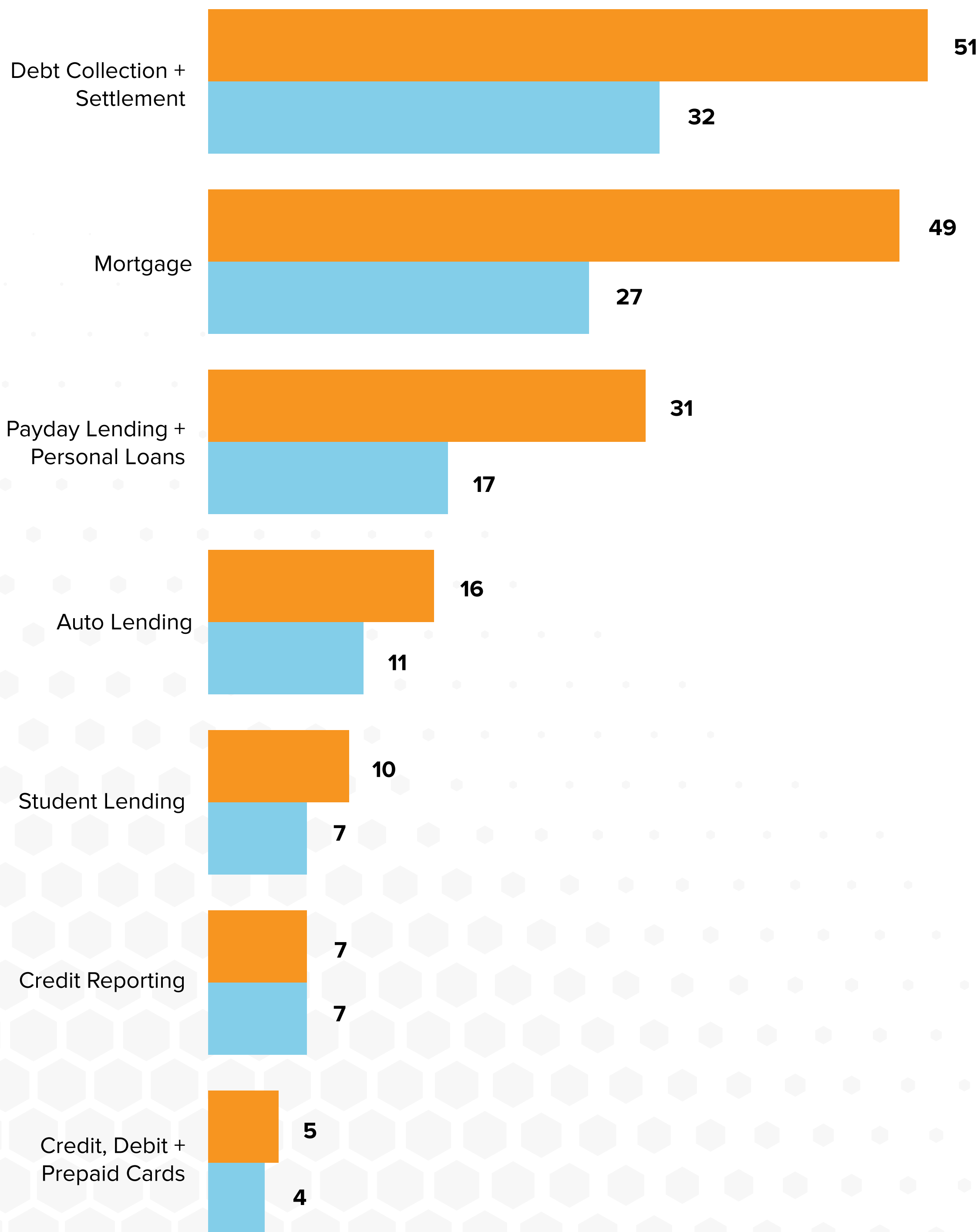
The Supreme Court is set to decide several important cases in 2021 that affect the consumer finance industry.

FHFA Structure
As predicted in Goodwin's 2019 Review, in 2020, the Supreme Court granted certiorari in *Collins v. Mnuchin*, No. 19-422, to review the Fifth Circuit's panel and *en banc* rulings that FHFA's structure violates the separation of powers. Oral argument was conducted on December 9, 2020. Following on the heels of its ruling in ***Seila Law LLC v. CFPB***, No. 19-7, where the Supreme Court held that the similarly structured CFPB violated the separation of powers, the Court will now decide whether the Fifth Circuit was correct in *Collins* by declaring the FHFA's structure unconstitutional. If the Court finds the FHFA's structure unconstitutional, the Court may also decide whether the unconstitutional provisions may be severed, such as it did with the Dodd-Frank Act's for-cause removal provision for the CFPB Director. Given its recent ruling in *Seila Law LLC v. CFPB*, the Court may once again take a middle of the road approach, holding that the provisions are unconstitutional but also that the unconstitutional provisions can be severed.

Federal Trade Commission Act
The Supreme Court also granted certiorari to review the Ninth Circuit's decision in *AMG Capital Management, LLC v. Federal Trade Commission*, No. 19-0508. The Court is expected to addresses whether Section 13(b) of the FTC Act, which authorizes



Tracking Actions by Product in 2016 + 2020



the FTC to seek injunctions against unfair or deceptive trade practices, also authorizes the FTC to demand monetary "equitable" relief such as restitution. Oral argument was conducted on January 13, 2021.

FCRA Class Action Damages

The Supreme Court is also poised to decide *TransUnion LLC v. Ramirez*, No. 20-0297. It will determine whether either Article III of the U.S. Constitution or Rule 23 of the Federal Rules of Civil Procedure authorize federal courts to award damages in a FCRA class action where the majority of the class was not actually injured. The Ninth Circuit held that class-wide damages were proper, even though only a minority of the class had their credit reports containing inaccurate information disseminated to potential creditors. The Ninth Circuit concluded that the entire class suffered a "risk of harm," even the class members whose inaccurate credit reports were never seen by any third party. The Court must now decide whether this injury is sufficient "where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered." Argument has been scheduled for March 30, 2021.

TCPA

The Supreme Court granted certiorari in *Facebook Inc. v. Duguid*, No. 19-511, and **heard arguments** in December 2020. The Court is now expected to decide whether the TCPA's definition of an ATDS includes devices that can store and automatically dial telephone numbers even if they do not use a "random or sequential number generator." The Court's ruling will likely decide the current circuit courts' split between the D.C., Third, Seventh and Eleventh Circuits and the Second, Sixth and Ninth Circuits concerning the ATDS definition. Whichever way the Court decides will also have potentially sizeable consequences for telemarketers and will impact TCPA litigation across the country.

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