2021 Year in Review

Consumer Finance

GOODWIN

Table of Contents

Overview

The year 2021 started with the hope of COVID-19 vaccines and a return to (relative) normalcy, only to conclude with new variants that presented new challenges and extended others longer than anticipated. Despite the persistence of the pandemic, in 2021 the consumer financial services regulatory landscape began to return to pre-pandemic norms.

... going forward, the CFPB indicated its intent to return supervisory and enforcement efforts to pre-pandemic levels, and stated that it would again exercise its authority to the full extent provided under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Most notably, throughout 2021 regulators rescinded flexibilities previously offered to companies in the wake of the pandemic and indicated their intent to strictly supervise and enforce companies' efforts to apply COVID-19-related programs and initiatives. For its part, the Consumer Financial Protection Bureau (CFPB or "the Bureau") formally rescinded seven policy statements issued in 2020 that had signaled substantial flexibility in legal compliance during the early weeks and months of the pandemic. The CFPB's rescission of the former administration's policies effectively revived enforcement of regulations that had been relaxed or suspended in an effort to allow industry participants leeway in assisting consumers through the pandemic. In announcing the CFPB's new approach, then-Acting Director Dave Uejio emphasized industry's and the bureau's need to focus on the pandemic's impact to consumers, noting that "[p]roviding regulatory flexibility to companies should not come at the expense of consumers." While Acting Director Uejio acknowledged that the pandemic also affected the industry, the CFPB expressed the view that the financial services sector's demonstrated ability to adapt to post-pandemic realities meant it was "no longer prudent to maintain these flexibilities." Thus, going forward, the CFPB indicated its intent to return supervisory and enforcement efforts to pre-pandemic levels, and stated that it would again exercise its authority to the full extent provided under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Other key financial services regulators have indicated a similar intent to return to pre-pandemic norms, particularly with respect to mortgage servicing, as evidenced by the joint statement issued in November 2021 by the Board of Governors of the Federal Reserve (Federal Reserve), CFPB, Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), Office of the Comptroller of the Currency (OCC), and state and state financial regulators. In that joint statement, the agencies collectively revoked the temporary supervisory and enforcement flexibility they had previously provided to mortgage servicers, announced in their April 2020 Joint Statement, advising that that flexibility was "no longer necessary because servicers have had sufficient time to adjust their operations by ... taking steps to work with consumers affected by the COVID-19 pandemic and developing more robust business continuity and remote capabilities." Collectively, these and other regulator statements during the past year indicate that while the pandemic may continue to pose challenges to both consumers and the industry, industry participants now face a world with normal (and likely enhanced) supervision and enforcement going forward.

The past year also ushered in a change in the federal administration, accompanied by increasingly clear indications of the regulatory agenda of the Biden administration as presidential appointees assumed key leadership roles throughout the federal regulatory establishment. Even as the CFPB waited for a permanent director to be confirmed, Acting Director Uejio began the work of dismantling what consumer groups had characterized as former Director Kraninger's industry-friendly guidance. For example, in addition to rescinding guidance on pandemic-related flexibility, Within the first weeks of his tenure, Director Chopra took a number of actions and issued numerous statements — many of which evidenced his intent to reshape the agency's regulatory and enforcement agenda.

in March 2021 the CFPB rescinded its Statement of Policy Regarding Prohibition on Abusive Acts or Practices, issued in January 2020. The 2020 policy was originally intended to provide clarity and address uncertainty concerning the abusiveness standard. Ultimately, the CFPB's new leadership felt the policy statement did not provide any clarity to regulated entities and, in fact, would foster uncertainty in the long run. The pace of change only accelerated once Rohit Chopra was confirmed as Director of the CFPB in September.

For example, Director Chopra announced several initiatives ranging from increased scrutiny on fair lending to reengaging enforcement in the payday lending space — signaling a more aggressive enforcement posture for the CFPB and a marked departure from his predecessor.

Other new (and familiar) faces in leadership roles reflect this same shift in regulatory priorities. In October of 2021, newly-appointed Attorney General Merrick Garland announced the U.S. Department of Justice's renewed focus on fair lending through a specific initiative to combat redlining. The initiative calls for enhanced state-federal or U.S. Department of Justice-U.S. Attorney's Office (DOJ) cooperation wherever possible to supplement federal investigations with the local expertise required to understand specific housing markets and local communities' credit needs.

Though it would be premature to predict all the ways that the change in administration will impact the consumer finance industry, one thing is clear: the industry should be prepared for new regulations and policy statements that impose onerous compliance obligations and aggressive enforcement by federal agencies.

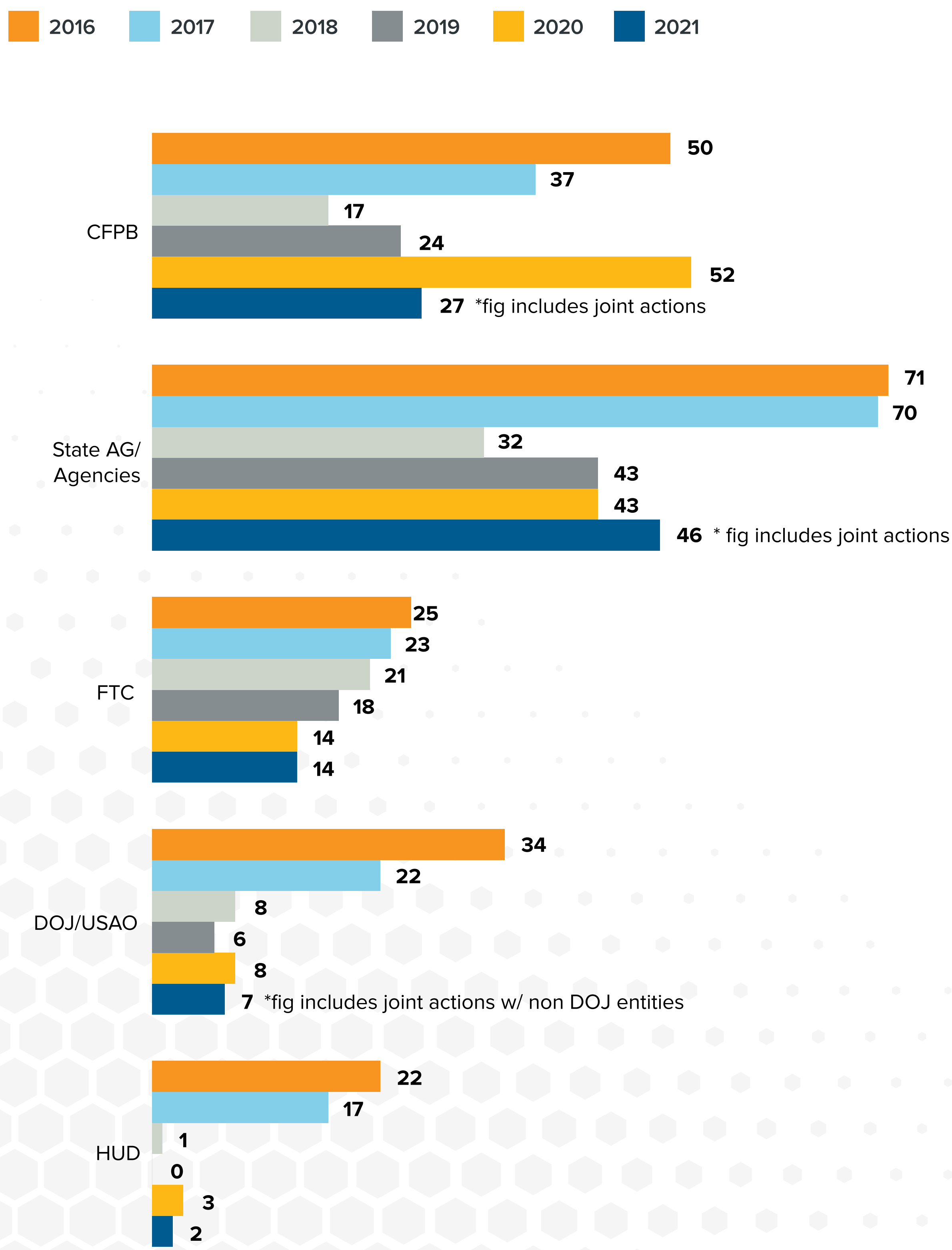
Key Trends

In 2021, Goodwin tracked 96 publicly announced federal and state enforcement actions related to consumer finance, representing a slight decrease from the 111 such actions tracked in 2020.

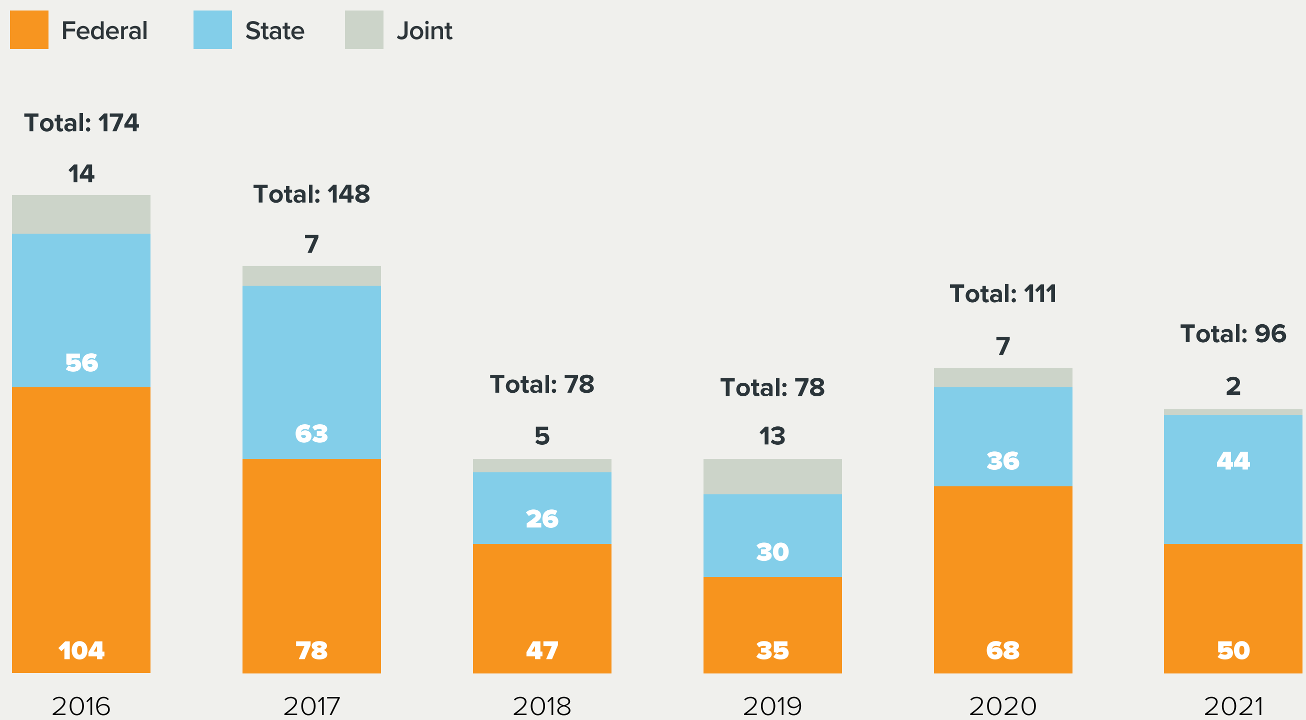
Nearly half of all enforcement activity across the year is attributable to actions initiated by state enforcement officials and agencies. Both the number of actions tracked and the number of states initiating at least one enforcement action increased from 2020 to 2021. California and Massachusetts continued to lead state-level enforcement activity, together bringing almost as many publicly announced actions as all other states combined. Though the state actions covered a wide array of issues, a majority of actions concerned either debt collection and debt settlement or student lending or student loan servicing (or both). Despite the uptick in state enforcement activity, these efforts resulted in total recoveries of approximately $55 million, a modest total sum compared to the total state recoveries seen in 2020. Notably, however, those 2020 recoveries were driven by a small number of high-dollar settlements, including two coordinated state settlements that totaled nearly $800 million.

On the federal side, the number of actions brought or settled by the CFPB decreased from 2020, as Goodwin tracked only 27 such actions during 2021 (four of which were joint federal-state or federal inter-agency actions). This reflects a decline from the 52 publicly announced CFPB actions tracked in 2020, though that discrepancy is likely attributable to a combination of factors, including Director Kraninger's efforts to wrap up enforcement actions before leaving office, the number of matters in the pipeline upon the change in administration, and the extended delay in confirmation of a permanent director.

Total Actions by Agency



Total Actions by Federal/State Government



The enforcement activity level of other federal agencies was consistent with 2020 levels. The U.S. Federal Trade Commission (FTC) reported 14 actions in 2021 — the same number as the previous year. The DOJ reported seven actions, down from eight in 2020. The Office of the Comptroller of the Currency (OCC), which was largely inactive in enforcement 2020, reported three actions in 2021, including securing a $250 million civil money penalty through a joint CFPB-OCC action. All told, total federal recoveries amounted to $556 million, a decrease from the nearly $4 billion recovered in 2020.

2021 Highlights

Significant Enforcement Actions

Wells Fargo Pays $250 Million Civil Money Penalty to OCC to Resolve Alleged Deficiencies in Loss Mitigation Practices

In the largest recovery of the year by dollar value, the OCC announced with the CFPB in September that it had entered into a consent order with Wells Fargo Bank, N.A. concerning Well Fargo's home lending loss-mitigation program, and alleged violations of a 2018 consent order. The OCC alleged that Wells Fargo's loss mitigation decisioning tools and operational deficiencies caused errors in its loss mitigation practices that negatively affected borrowers, and that it had inadequate controls, oversight, and governance to timely detect and prevent inaccurate loan modification decisions. Under the terms of the order, Wells Fargo agreed to pay a $250 million civil money penalty and agreed to limitations on its future loss mitigation and servicing-related activities until it had adjusted certain practices.

CFPB, DOJ, and OCC Resolve Redlining Allegations Against Trustmark National Bank

In October, the CFPB and the DOJ, in cooperation with the OCC, announced a settlement with Trustmark National Bank, a Mississippi-based lender, resolving allegations that Trustmark had engaged in redlining by deliberately refusing to market, offer, or originate home loans to consumers in majority-Black and Hispanic neighborhoods in the Memphis area, and by discouraging consumers residing in or seeking credit for properties located in those areas from applying for credit. Under the terms of the consent order, Trustmark agreed to invest $3.85 million in a loan subsidy program and pay a $5 million civil money penalty.

FTC Reaches Settlement with Payday Lenders
In February, the FTC announced that it had reached a $114 million settlement with Lead Express, Inc. and several affiliated entities and individual defendants (collectively, "Lead Express") to resolve allegations that Lead Express operated a tribal lending scheme that violated Section 5 of the FTC Act and other consumer protection statutes. The FTC alleged that Lead Express had initiated debits to customer's accounts without crediting those debits to customers' balances, had misrepresented the amounts that customers ended up paying for their loans, and had failed to make required credit transaction disclosures. Under the terms of the settlement, all outstanding consumer loans issued by Lead Express will be considered paid in full if the original amount of the loan and one finance charge have been repaid by the customer. The settlement also permanently banned Lead Express from the payday lending industry.

FTC Reaches Largest-Ever FCRA Settlement With Smart Home Monitoring Company Over Alleged Misuse of Credit Reports
In April, the FTC reached a settlement with Vivint, a Utah-based home security company, resolving allegations that the company had violated the FCRA, FTC Act, and FTC's "Red Flags Rule." The FTC alleged that Vivint's sales representatives would use credit reports associated with similarly-named consumers in order to qualify prospective customers for the company's home security and monitoring services, and would in some circumstances add relatives or other persons with better credit as a co-signer on the account without permission. If the customer later defaulted, Vivint then referred the third-party "co-signer" to its debt buyer. The $25 million monetary judgment obtained by the FTC is the largest monetary judgment obtained by the FTC to date for a FCRA case.

CFPB Enters Into $6 Million Consent Order With JPay Over Prepaid Cards to Incarcerated Consumers
In October, the CFPB announced that it had entered into a consent order with JPay, a prison financial services company that provides prepaid debit cards to currently incarcerated individuals and those recently discharged from incarceration. The CFPB alleged that JPay had abused its market dominance and violated the Consumer Financial Protection Act (CFPA) and the Electronic Funds Transfer Act (EFTA) by charging consumers unavoidable fees for prepaid cards used to return money owed to consumers at the time of their release from incarceration, requiring consumers in certain states to sign up for a JPay card as a condition of receiving government benefits, and misrepresenting fees to consumers. Under the terms of the consent order, JPay agreed to pay $4 million in consumer redress and $2 million in civil penalties.

New California Department of Financial Protection and Innovation Initiates First Enforcement Action Against Debt Collector
In September, the new California Department of Financial Protection and Innovation (DFPI) brought its first enforcement action against a debt collector under the California Consumer Financial Protection Law (CCFPL). The DFPI issued a cease-and-desist order to F&F Management Inc. for allegedly threatening to sue consumers and garnish their wages, and submitting negative information to a credit bureau without notifying the consumer (i.e., debt parking). The DFPI found that these actions violated the CCFPL and ordered the company to pay an administrative penalty of $375,000.

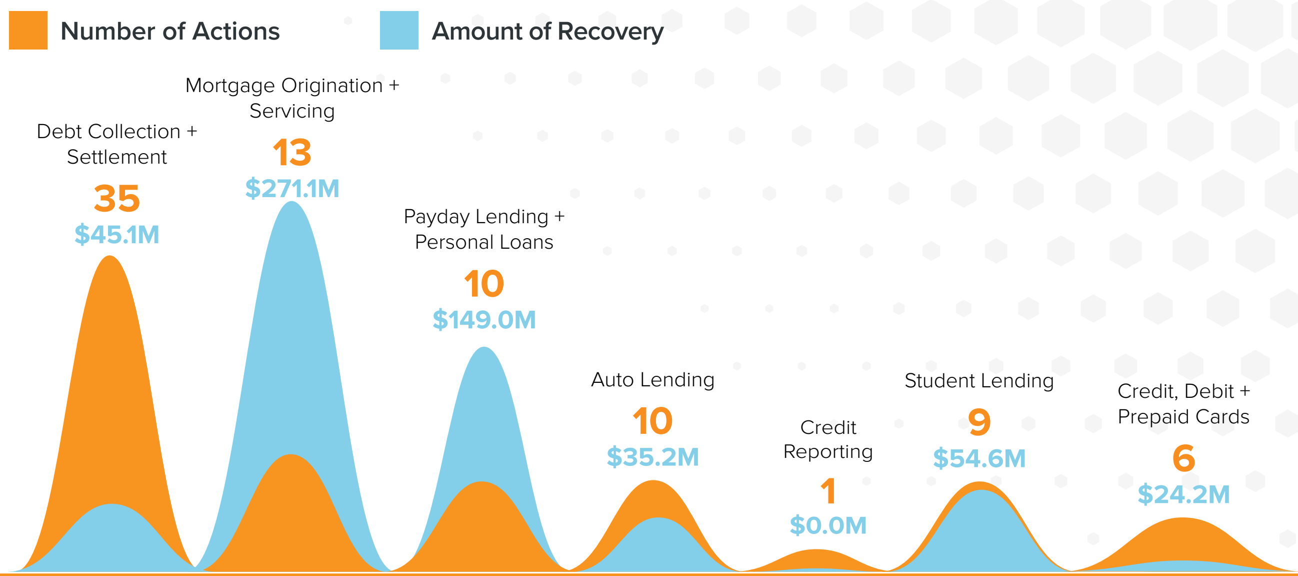
Significant Regulatory Developments

CFPB Rescinds Statement of Policy Regarding Prohibition on Abusive Acts or Practices
In March, the CFPB announced the rescission of its Statement of Policy Regarding Prohibition on Abusive Acts or Practices, which had been issued in January 2020. That policy was intended to address uncertainty with regard to how the CFPB would exercise its supervisory and enforcement authority to address abusive acts or practices. In rescinding the policy, the CFPB indicated that the principles set forth in the policy were inconsistent with the CFPB's duty to enforce the standards established by Congress under the CFPA and contrary to the CFPB's mission. Thus, the bureau stated that it now "intends to exercise its supervisory and enforcement authority consistent with the Dodd-Frank Act and with the full authority afforded by Congress," "to identify and remediate abusive acts or practices."

CFPB Finalizes Amendments to Regulation X to Protect Borrowers Against Increase In COVID-19 Foreclosures
In June, the CFPB finalized amendments to implementing regulation of the Real Estate Settlement Procedures Act (RESPA), Regulation X, which would establish temporary protections for mortgage borrowers as the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and various Federal and State foreclosure moratoria are phased out over time. 12 C.F.R. § 1024 (2021). The amendments extend additional borrower protections related to loss mitigation and loan modifications. These amendments went into effect on August 31 and regulators have already indicated their intent to closely monitor and enforce mortgage loan servicer compliance with the new provisions.

The CFPB Seeks Information From Payment Processing Companies
In October, the CFPB issued an order requiring several major tech companies that have operations in the payment services sector to provide information on their business practices. The orders reflect the Bureau's

Total Actions by Product (with Recoveries)



increasing concern as to how "Big Tech" manages consumer payments and uses consumer information. The orders were issued under the CFPB's rulemaking authority under Section 1022 of the CFPA, rather than pursuant to the Bureau's enforcement or supervisory authorities. These orders raise the prospect of a Bureau rulemaking related to Tech companies' payment practices and their use of consumer data.

Bank Regulators Rescind Trump-era Change to Community Reinvestment Act

In December, the OCC announced that it rescinded a 2020 revision to the Community Reinvestment Act (CRA). The 2020 revision removed various anti-redlining protections, among other changes, and was implemented without input from the Federal Reserve or the Federal Deposit Insurance Corporation (FDIC). The new rule is based on the original CRA rule adopted jointly by the banking agencies and reflects the agencies' intent to "work[] together to jointly strengthen and modernize" their CRA regulations in order to "achieve a consistent, modernized framework across all banks to help meet the credit needs in the communities in which they do business, including low and moderate-income neighborhoods."

CFPB Opens Inquiry Into "Buy Now, Pay Later" Industry

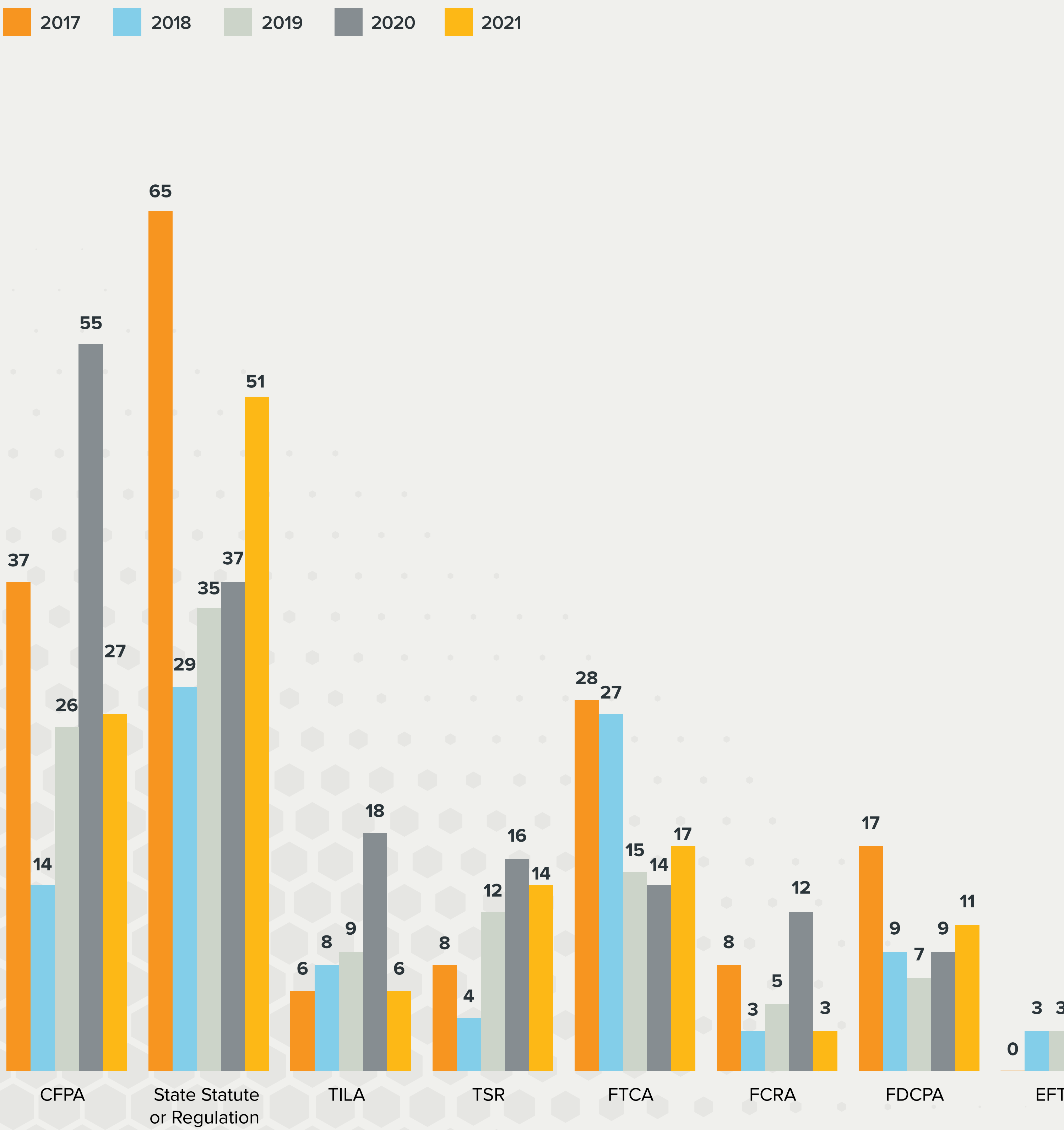
In December, the CFPB announced it was opening an inquiry into "buy now, pay later" (BNPL) services. BNPL is a type of deferred payment option presented to a customer at checkout that generally allows the consumer to split a purchase into smaller installments, typically four or less, often with a down payment of 25 percent due at checkout. The CFPB's announcement stated that it is looking to "collect information on the risks and benefits of these fast-growing loans" from five leading BNPL companies. The CFPB ordered the companies to submit information pursuant to the Bureau's authority under Section 1022(c)(4)(B)(ii) of the CFPA, in order for the Bureau to report to the public about industry practices and risks. The CFPB appears particularly concerned about consumer debt accumulation, regulatory arbitrage, and how BNPL companies harvest and use consumer data. In its announcement, the CFPB indicated that the ease of accessing BNPL options across multiple apps or web browser plug-ins may cause both overspending and consumer confusion, as well as possible payment difficulties and associated fees and charges. The CFPB also speculated that some BNPL providers may not be adequately assessing which consumer protection laws apply to their products and what associated regulatory requirements must be met. The CFPB described its inquiry as directed at gathering information relevant to those issues, as well as providers' data collection and marketing practices. The agency stated that it is working with the Federal Reserve, state officials and several other countries on the BNPL inquiry, and that it expects to publish its findings.

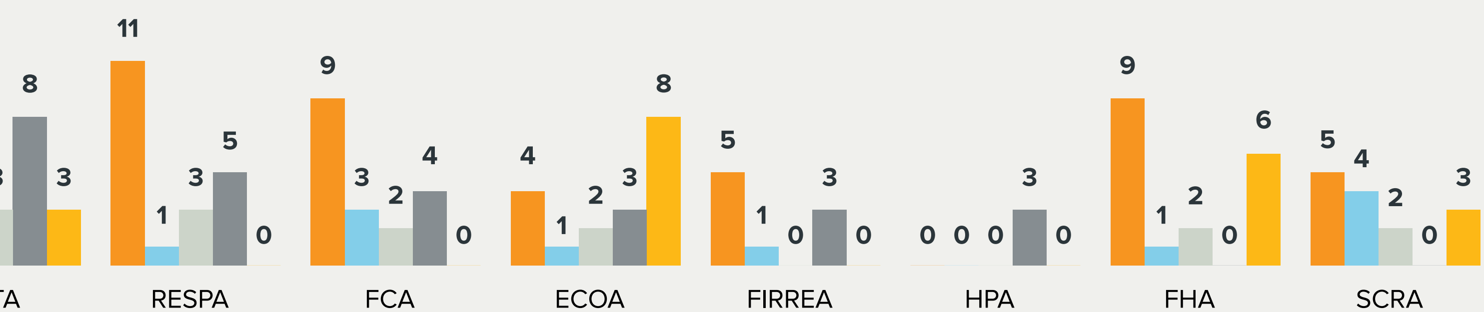
Appellate Highlights

Supreme Court Issues Landmark Business-Friendly Decision Interpreting Definition of "Autodialer" Under TCPA

In April, the U.S. Supreme Court resolved a circuit split on the type of technology that constitutes an "automatic

Total Actions by Statute




8
3
11
1
3
5
0
RESPA
9
3
2
4
0
FCA
4
1
2
3
8
ECOA
5
1
0
3
0
FIRREA
0 0 0
3
0
HPA
9
1
2
0
6
FHA
5
4
2
0
3
SCRA

telephone dialing system" (ATDS) under the TCPA. *See Facebook, Inc. v. Duguid, et al.,* No. 19-511. The Supreme Court unanimously ruled that to qualify as an ATDS, "a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator," thus rejecting a more expansive interpretation of the term previously endorsed in some Circuits. Under the more expansive view, an ATDS could have encompassed any equipment that stores and dials telephone numbers, including virtually all modern cell phones. As a result of the Supreme Court's decision, Goodwin has already observed a sharp decline in the number of new TCPA lawsuits alleging violations of the ATDS provision.

Supreme Court Holds That FHFA Is Unconstitutionally Structured

In June, the Supreme Court issued its decision in *Collins v. Yellen*, No. 19-422, holding that the single director leadership structure of the Federal Housing Finance Agency (FHFA) is unconstitutional. The Court found that its 2020 decision in *Seila Law v. Consumer Financial Protection Bureau*, No. 19-7, dictated a similar result and thus that the statutory limitation on the President's removal power, under which the FHFA director may only be removed "for cause", violated the separation of powers. Though the Court held that the leadership structure was unconstitutional, the Court also ruled that "there was no constitutional defect in the statutorily prescribed method of appointment," and thus the actions previously taken by the agency were not necessarily unconstitutional.

Second Circuit Dismisses Legal Challenge to OCC Fintech Charter Program

In June, the U.S. Court of Appeals for the Second Circuit dismissed the New York State Department of Financial Services' (DFS) action against the OCC. *See Lacewell v. Office of the Comptroller*, No. 19-4271. The suit challenged the OCC's authority to accept "special-purpose national bank" charters from financial technology companies "engaged in the business of banking, including those that do not accept deposits." The Second Circuit found that DFS lacked standing to sue because it did not allege that the OCC's decision had or would cause it to suffer an actual injury in fact. It also found that the claims were constitutionally unripe for judicial review because the OCC had not yet received or granted any applications. The Second Circuit expressed no view as to whether the statutory prerequisite that a company be engaged in the "business of banking" to fall within the authority of the OCC requires that the company receive deposits.

Looking Ahead to 2022: Our Predictions

New and expanded consumer protections introduced in 2021 will undoubtedly drive enforcement activity in 2022. Although CARES Act protections kept delinquency rates low, many pandemic-related moratoriums and forbearances expired or have been phased out. Federal and state regulators began to introduce new protections, and mortgage servicing will likely be a key focus in the coming year. In a November 2021 report, the CFPB described how it continued to respond to the "evolving needs" of both consumers and regulated entitles in the mortgage servicing space, but that it intends to continue targeted data collection and evaluation efforts to assess how servicers performed for consumers exiting forbearance. Servicers can expect additional scrutiny, particularly over loss mitigation and loan modification processes, as borrowers exit forbearance. Similarly, in late-December the Biden administration extended the pause on federal student loan payments, pushing out the restart date until May 1, 2022. Regardless of whether the restart is delayed again in May, there is likely to be confusion among borrowers about amounts owed when payments eventually resume. Borrower confusion tends to lead to increased regulatory scrutiny.

Director Chopra's leadership at the CFPB will also continue to shift the enforcement landscape. In his opening statement before the U.S. House of Representatives Committee on Financial Services, Director Chopra outlined just a fraction of what we can expect the CFPB to be focused on going forward. Among those priorities, Director Chopra specifically noted that fair lending is a top priority and that the CFPB will pursue bad actors, but will also be watching for so-called "digital redlining." This refers to a practice where institutions rely on algorithms, but can still run afoul of fair lending laws in practice if the algorithms fail to account for certain biases or existing disparities (thereby reinforcing them). This general sentiment was echoed by Attorney General Garland, who articulated how the DOJ will use U.S. Attorneys' Offices around the country as "force multipliers" to augment fair lending investigations with local market knowledge and partner with state authorities wherever possible. Payday lending is another area likely to see a swing in enforcement. Despite years of uncertainty and regulatory shifts on payday lending enforcement, the CFPB has made clear that it intends to enforce the 2017 CFPB payday lending rule, effective June 2022.

State agencies will also continue to apply enforcement pressure in the coming year. In 2021 state enforcement activity was up considerably from prior years. States also introduced new consumer protection legislation on a variety of topics, including debt collection (such as New York's Consumer Credit Fairness Act, referenced above). Armed with new rules and regulations to enforce, the promise of federal partnerships on issues such as fair lending, and a climate of uncertainty following the expiration of pandemic-related protections all indicate that elevated levels of state enforcement will likely continue.

Mortgage Origination & Servicing

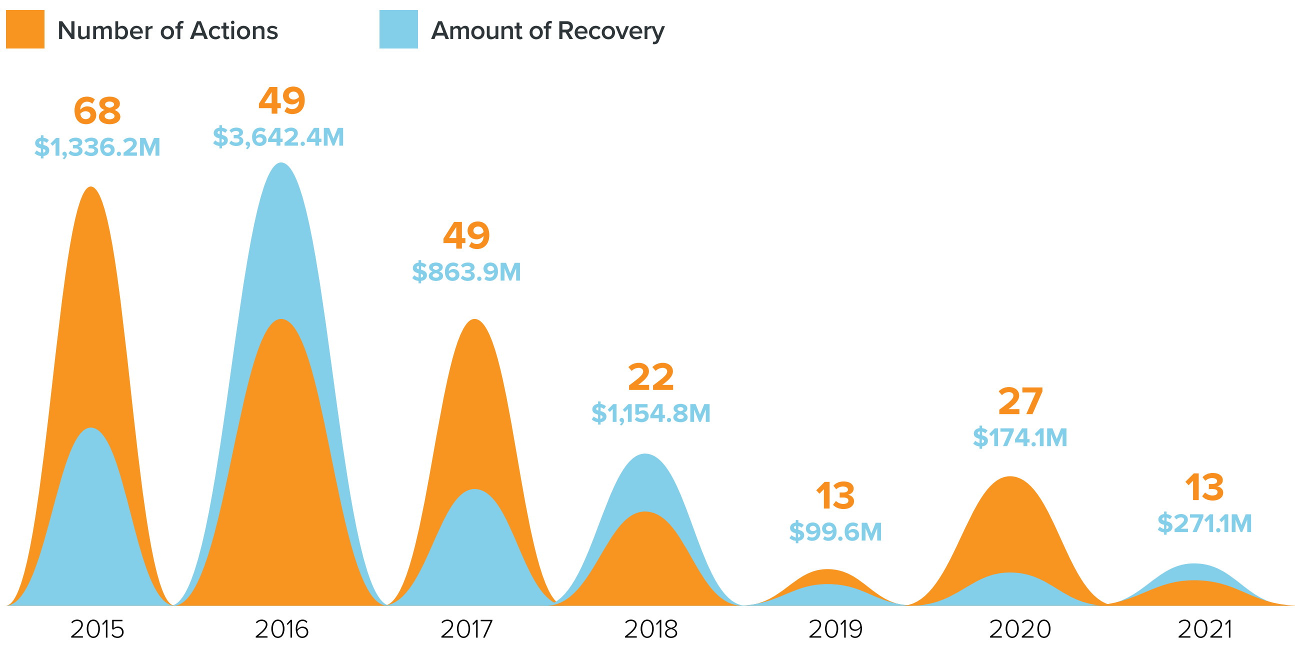
In 2021, Goodwin tracked 13 publicly announced mortgage origination and servicing enforcement actions at the state and federal levels resulting in total recoveries of approximately $271 million. This represented a decrease from the 27 actions we tracked in 2020, but an increase from the approximately $174 million recovered that year. Federal agencies were responsible for the majority of enforcement actions in the mortgage space, accounting for 10 of the 13 total actions tracked. The decrease in activity in this space in 2021 is not all that surprising given that COVID-19-related forbearances were extended until August 2021. However, with the expiration of millions of borrowers' forbearances — at least 2.1 million of which were for loans 90+ days behind on their payments as of March 2021 (according to the CFPB) — we anticipate that mortgage servicing in particular will be an area of scrutiny and enforcement as servicers continue to deal with challenges and new regulations resulting from the pandemic and COVID-19-related forbearance repayments. Additionally, based on recent statements and new leadership at the CFPB and DOJ, we anticipate that mortgage originators can expect heightened scrutiny of their fair lending practices.

Key Trends

Although enforcement in the mortgage space may have been down a tick in 2021 relative to years' past, a number of agencies — most notably the CFPB and DOJ — have indicated that mortgage lenders and servicers will be under enhanced scrutiny in the years ahead. First, in March, the CFPB issued policy guidance urging servicers to dedicate sufficient resources and staff to assist borrowers with their post-forbearance payment and loss mitigation options, and warning that the CFPB will "consider a servicer's overall effectiveness at achieving such goals, along with other relevant factors, in using its discretion to address violations of Federal consumer financial law in supervisory and enforcement matters," and it will "hold mortgage servicers accountable for complying with Regulation X." Then in June, the CFPB issued its final amendments to Regulation X to establish temporary protections for mortgage borrowers as the CARES Act and various Federal and State foreclosure moratoria are phased out over the summer. These amendments went into effect on August 31, 2021.

As 2021 drew to a close, the CFPB, federal banking agencies, and state regulators signaled that they are ready to return to pre-pandemic norms in the supervision and enforcement of the mortgage servicing industry. In a joint statement issued by the Board of Governors of the Federal Reserve, the CFPB, the FDIC, the NCUA, the OCC, and state financial regulators, the agencies alerted mortgage servicers that they were revoking the "temporary supervisory and enforcement flexibility" previously announced in April 2020 in response to the COVID-19 pandemic. As Goodwin reported last year, the agencies' April 2020 guidance advised that the agencies would not take supervisory or enforcement action against mortgage servicers for failing to meet certain timing requirements under the mortgage servicing rules provided that servicers made a good faith effort to furnish required notices and disclosures and took actions within a reasonable time period. According to the Joint Statement, the agencies believe that the flexible standards are "no longer necessary" because servicers have now had sufficient time to adjust their operations during the pandemic and have worked with consumers affected by COVID-19. Notably, the Joint Statement cautioned that the new approach includes the potential enforcement of servicer violations of the CFPB's August 31, 2021 COVID-19-related amendments to Regulation X (promulgated at 86 FR 34848). The agencies' Joint Statement did, however, acknowledge the ongoing challenges faced by mortgage servicers and their efforts to assist consumers who are impacted by the ongoing COVID-19 pandemic, explaining that they will "consider, when appropriate, the specific impact of servicers' challenges that arise due to the COVID-19 pandemic and take those issues into account when considering any supervisory and enforcement actions." Consideration, however, is not a promise of any leniency, and servicers should take note to ensure compliance with mortgage servicing rules in response

Mortgage Actions by Year (with Recoveries)



> Thus, the federal government will seek to coordinate with U.S. Attorneys as well as state attorneys general to gain this local knowledge to more effectively prosecute fair lending violations.

to this announcement. Servicers should similarly take note that in late-December the CFPB and DOJ issued a joint notice reminding mortgage servicers that as borrowers begin to exit COVID-19 forbearance in the coming months, thousands of servicemembers and veterans will be entitled to additional protections through Servicemembers Civil Relief Act (SCRA).

As the administration's newly appointed leading regulators settle into their respective roles, various actions and announcements throughout late-2021 indicate that fair lending will be another area of increased oversight and scrutiny. The CFPB, DOJ, and HUD each indicated that they are very interested in identifying fair lending violations in mortgage origination. For example, in October, Attorney General Merrick Garland (AG) announced the DOJ's "Combatting Redlining Initiative" — a program through which the DOJ will crack down on lenders that purportedly avoid offering particular products or services in certain communities because of the race, ethnicity, or national origin of the individual living in those communities. The announcement also specifically noted that the DOJ will utilize U.S. Attorneys' Offices around the country as "force multipliers" in its effort to restrict redlining practices and support fair lending enforcement. The AG's announcement noted that local-expertise is required to understand specific housing markets and local communities' credit needs. Thus, the federal government will seek to coordinate with U.S. Attorneys as well as state attorneys general to gain this local knowledge to more effectively prosecute fair lending violations.

This pairing of federal and local-facing resources was on display earlier this year, through a fair lending enforcement action in the Western District of Tennessee against a national bank for redlining practices in the greater Memphis area (detailed below).

From the CFPB, its December 2021 supervisory highlights telegraphed a renewed focus on fair lending enforcement for the year to come. The highlights note that examiners identified several violations of the Equal Credit Opportunity Act (ECOA) by mortgage lenders and specifically identified discrimination against African American and female borrowers in the granting of pricing exceptions, when compared to non-Hispanic white and male borrowers. The December 2021 report identified a lack of oversight and control over pricing exception procedures among the root causes driving these purported violations.

2021 Regulatory Developments

CFPB Issues Compliance Bulletin, Policy Guidance, and Supervisory Data Concerning COVID-Related Loss Mitigation Measures

In March, the CFPB issued a "Compliance Bulletin and Policy Guidance on Supervision and Enforcement" priorities (Bulletin 2021-02) to address the perceived "heightened risks to consumers needing loss mitigation assistance in the coming months as the COVID-19 moratoriums and forbearances end." The policy guidance began by urging servicers to "dedicate sufficient resources and staff to ensure they can communicate clearly with borrowers, effectively manage borrower requests for assistance, promote loss mitigation, and ultimately reduce avoidable foreclosures and foreclosure-related costs." The CFPB then proceeded to warn that it will "consider a servicer's overall effectiveness at achieving such goals, along with other relevant factors, in using its discretion to address violations of Federal consumer financial law in supervisory and enforcement matters." Specifically, the CFPB indicated that its examiners and enforcement attorneys would pay particular attention to whether servicers are "providing clear and readily understandable information to borrowers about their options for repayment assistance," "promptly handl[ing] loss mitigation inquiries," "evaluat[ing] [loss mitigation] applications consistent with Regulation X requirements to promote timely and consistent evaluations," among other priorities. Several months later, in August, the Bureau issued a report offering supervisory data concerning 16 large mortgage servicers' COVID-19 pandemic response that had been provided to the Bureau in response to April 2021 Metrics Requests, including data showing call handling and loan delinquency rates. The report reemphasized that "the CFPB has prioritized monitoring and oversight of mortgage servicing and servicers' engagement with borrowers at all stages in the loss mitigation process," and laid out what it deemed "key data metrics" that the Bureau would be monitoring. Those measures include metrics relating to topics including:

- Servicing portfolio;
- Call metrics;
- COVID-19 hardship forbearance enrollments;
- COVID-19 hardship forbearance exits;
- Delinquency; and
- Borrower profiles.

In announcing the report, then-Acting Director Uejio proclaimed that "[s]ervicers who find themselves at the bottom of the pack should immediately take corrective steps," and warned that "[t]he CFPB will hold accountable those servicers who cause harm to homeowners and families."

CFPB Finalizes Amendments to Regulation X to Protect Borrowers Against Forthcoming Increase In COVID-19 Foreclosures

In June, the CFPB finalized amendments to Regulation X of the Real Estate Settlement Procedures Act (RESPA), which would establish temporary protections for mortgage borrowers as the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and various Federal and State foreclosure moratoria are phased out over the summer. 12 C.F.R. § 1024 (2021). As noted in the CFPB's executive summary of the final rule, the amendments reflect four new sets of borrower protections:

- First, the amendments require that a borrower has a meaningful opportunity to apply for loss mitigation before his or her mortgage account is referred to foreclosure;
- Second, they provide servicers the ability to offer borrowers certain streamlined loan modifications without a complete loss-mitigation application;
- Third, they require servicers to provide additional information about the availability of loss mitigation options to certain delinquent borrowers promptly after early intervention live contacts are established; and
- Fourth, they establish timing requirements for servicers to renew reasonable diligence efforts to obtain complete loss mitigation applications from certain borrowers.

The amendments to Regulation X became effective on August 31 and, as noted above, the CFPB and other federal and state enforcement actors have already indicated their intent to closely monitor and enforce servicer compliance with the new regulations.

2021 Key Enforcement Actions

Ocwen Wins Summary Judgment in CFPB Suit Concerning Servicing Practices

In March, the U.S. District Court for the Southern District of Florida issued an order granting summary judgment in favor of Ocwen on nine of the 10 counts asserted by the CFPB in its action pending against Ocwen. The CFPB's lawsuit, which dates back to April 2017, accused Ocwen of inaccurate payment processing, foreclosure violations, and other servicing failures dating back to January 2014. The court ruled that Ocwen was entitled to partial summary judgment because nine of the 10 counts from the CFPB's case overlapped with claims resolved by the company's prior national mortgage settlement with the CFPB, and therefore were barred by principles of *res judicata*. As a result, the court ruled that the CFPB could only pursue a small fraction of its case — a single count for which judgment was not granted and only servicing conduct from after the February 2017 expiration of the national mortgage settlement on the nine counts for which partial judgment was granted. The CFPB subsequently amended its complaint to drop the remnants of its case, and the court entered full judgment in favor of Ocwen. The CFPB has appealed the final judgment, and that appeal is currently pending in the Eleventh Circuit.

OCC Issues $250 Million Penalty Related to Wells Fargo's Loss Mitigation Practices

In September, the OCC announced that it issued a $250 million civil money penalty on Wells Fargo Bank, N.A. concerning alleged deficiencies in the bank's home lending loss-mitigation program, and for purportedly failing to meet its obligations under a 2018 consent order that the bank entered with the OCC and the CFPB. As reported by Enforcement Watch, the bank previously entered a consent order in 2018 with the CFPB and the OCC based on purported deficiencies in the bank's enterprise-wide compliance risk management program. The current penalty and related cease and desist order address similar conduct related to the bank's purported failure to establish an effective home lending loss mitigation program. Under the terms of the cease and desist order, the bank must pay a $250 million fine and is limited in future loss mitigation and servicing-related activities until it addresses specific issues in mortgage servicing.

DOJ and OCC Obtain $8.5 Million Settlement with Cadence Bank N.A., Resolving Allegations of Lending Discrimination

In August, the DOJ announced that, together with the OCC, it reached a settlement with Cadence Bank N.A. to resolve allegations that the bank engaged in lending discrimination in the Houston area. In 2017, the OCC initiated a fair lending examination of the bank. Two years later, the OCC referred the matter to the DOJ after determining that the bank had likely violated the Fair Housing Act (FHA). The DOJ alleged that the bank violated the FHA and the Equal Credit Opportunity Act (ECOA) by engaging in redlining from 2013 through 2017. Specifically, the DOJ alleged that the bank avoided providing home loans and other home mortgage services in majority-Black and Hispanic neighborhoods, located and maintained nearly all of its branches in majority-white neighborhoods, and concentrated its marketing, outreach, and advertising in majority-white neighborhoods. The complaint and a consent order resolving the allegations were simultaneously filed on August 30 in the U.S. District Court for the Northern District of Georgia. Under the consent order, Cadence Bank must engage a qualified third-party consultant to evaluate its fair lending program and assist the bank in developing a Fair Lending Plan. The bank also was ordered to provide fair lending training to its employees, and to invest a minimum of $4.17 million into a loan subsidy program to increase the credit that the bank offers for home mortgage loans to residents in majority-Black and Hispanic neighborhoods in the Houston area. Additionally, the bank was ordered to partner with one or more community-based or governmental originations that provide the residents of majority-Black and Hispanic neighborhoods in the Houston area with homeownership services and through these partnerships spend a minimum of $750,000 on services to those residents, and to spend at least $625,000 on advertising, outreach, consumer financial education, and credit repair initiatives targeted at those communities. In addition to its consent order with the DOJ, the bank was assessed a $3 million civil money penalty by the OCC.

CFPB, DOJ, and OCC Resolve Redlining Allegations Against Trustmark National Bank

In October, the CFPB and the DOJ, working in cooperation with the OCC, announced a settlement with Trustmark National Bank, a Mississippi-based lender, to resolve allegations that the lender violated the FHA, ECOA, and CFPA. Specifically, the agencies alleged the lender discriminated against borrowers in Black and Hispanic neighborhoods by intentionally not offering or originating loans to consumer in certain areas in the Memphis metropolitan area. The consent order requires the lender to invest $3.85 million in a loan subsidy program to offer loans to potential borrowers seeking to purchase property in majority-Black and Hispanic neighborhoods, as well as to increase advertising and outreach to these same communities. The order also requires the lender to pay a $5 million civil penalty and comply with all fair lending laws.

Looking Ahead to 2022:

Both fair lending and loan servicing are likely to be the subject of increased federal scrutiny in 2022. Shortly after his confirmation, Director Chopra made public remarks signaling fair lending, and specifically issues such as redlining, will be a focus for the CFPB under his leadership. Director Chopra noted the CFPB will pursue bad actors, but also closely watch so-called "digital redlining" — a practice where institutions use supposedly neutral algorithms, which end up recognizing and then reinforcing previous biases or disparities.

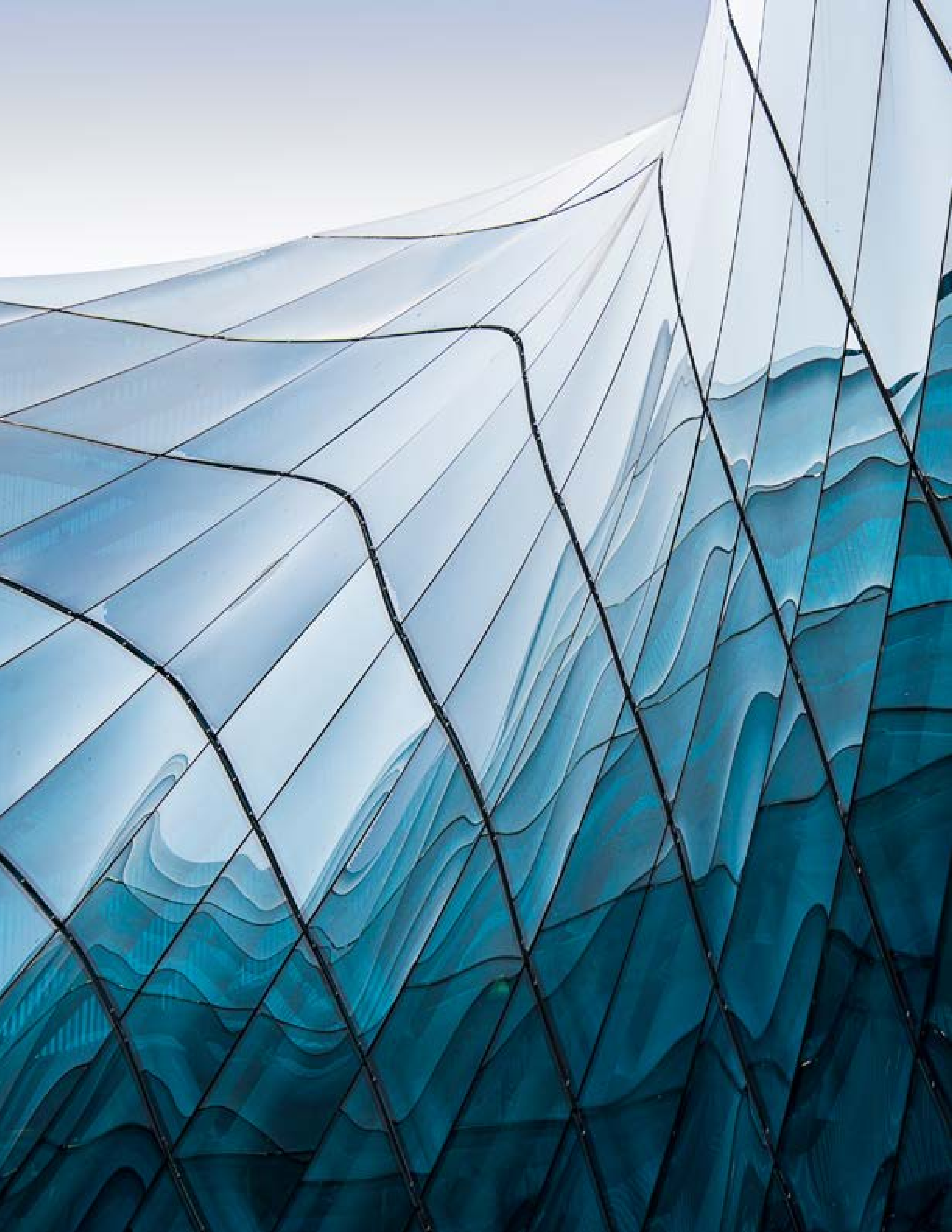
Key personnel appointments at the CFPB and HUD further indicate that fair lending is likely to be a CFPB and HUD priority. At the CFPB, former DOJ civil rights attorney, Eric Halperin, was appointed as assistant director of the CFPB's office of enforcement in October. Halperin previously worked in DOJ's Civil Rights Division and oversaw fair housing and fair lending matters, and was a special counsel for fair lending. Additionally, the CFPB's former Acting Director David Uejio has been nominated to serve as HUD's Assistant Secretary of Housing and Urban Development for Fair Housing and Equal Opportunity — an assignment that may be intended to increase HUD's supervision and enforcement of fair lending laws.

For mortgage servicers, the recent expiration of COVID-19 forbearances coupled with the CFPB's stated intent to enforce the newly promulgated amendments to Regulation X will likely lead to future enforcement actions in this space as servicers are tasked with figuring out how to apply newly promulgated rules in real-time while millions of forbearance periods expire and begin stress-testing existing loss-mitigation procedures. Servicers may also find themselves facing (or avoiding) litigation over their CARES Act processes, as well lawsuits over their modification processes.

Closely watch so-called "digital redlining" — a practice where institutions use supposedly neutral algorithms, which end up recognizing and then reinforcing previous biases or disparities.

What to Watch

- Fair lending investigations and actions brought by federal regulators partnering with U.S. Attorneys' Offices and/or state attorneys general and
- Examinations, investigations, and enforcement actions related to mortgage servicers' compliance with RESPA and Reg. X as post-forbearance payment and loss mitigation options continue to be implemented and federal watchdogs "return to enforcement of critical protections" for borrowers.



Fintech

In 2021, fintech companies adjusted to continued scrutiny from state and federal regulators. Legal challenges to fintech companies partnering with banks increased, as did guidance directed to banks that choose to partner with fintechs. And toward the end of the year, fintechs came into the regulatory focus of CFPB.

Key Trends

From 2016 through 2020, state regulators launched enforcement initiatives and engaged in regulatory activity that had the result of filling the vacuum created by decreased enforcement activity at the federal level. For example, California created the DFPI, which requires certain fintechs to obtain a license from the Department, and which has initiated investigations into products and services marketed by financial institutions, including fintechs, in 2021.

During the latter half of 2021, the CFPB turned its focus to fintechs, issuing two orders – one directed at "buy now, pay later" services and one directed at the payment functions of large tech companies — that set the stage for potential rulemakings in 2022.

2021 Highlights

Guidance

Agencies Release Guide for Community Banks Conducting Due Diligence on Fintech Companies

In August, the OCC, the Federal Deposit Insurance Corporation (FDIC), and the Board of Governors of the Federal Reserve System (Federal Reserve) released a **joint guide** titled "Conducting Due Diligence on Financial Technology Companies: A Guide for Community Banks." The guide covers six main areas of due diligence for a community bank to perform when considering a partnership with a fintech company:

- The company's experience and qualifications;
- The company's financial condition;
- The company's legal standing and knowledge of legal and regulatory requirements;
- The effectiveness of the company's risk management and control processes;
- The company's information security measures; and
- The company's operational resilience.

Although the guide is written "from a community bank perspective," the agencies have stated that the fundamental concepts and areas of diligence "may be useful for banks of varying size and for other types of third-party relationships."

Enforcement Actions and Legal Challenges

DFPI Enters Into Settlement Agreement with Bank-Affiliated Fintech Company

In March, the DFPI entered into a **settlement agreement** with a fintech company that works with certain banking partners to provide consumer-oriented banking products. The fintech company itself is not licensed to operate as a bank. In the settlement agreement, the fintech company agreed to cease and desist from using the term "bank" in connection with the name of the fintech company, unless and until the company becomes a licensed bank, and to review and enhance its webpage and advertising to "distance itself from the use of the term 'banking' and derivatives." The settlement agreement sets forth specific disclosures, annotations, disclaimers, and revisions that the fintech company must incorporate. Finally, the fintech company agreed to establish, implement, enhance, and maintain policies and procedures designed to ensure compliance with the settlement agreement and Cal. Fin. Code § 561, and to submit a written compliance report to the DFPI Commissioner describing the manner in which the company has complied with the settlement agreement by June 15, 2021. DFPI Commissioner Alvarez previously stated that this behavior (*i.e.*, fintechs holding themselves out to be "banks") is deceptive to consumers, and the settlement agreement demonstrates the DFPI's focus on pursuing action against fintech companies who do so.

CFPB Renews Interest in Reverse Mortgage Provider Subject to Previous Consent Order

In October, the CFPB filed a **complaint** and proposed administrative **consent order** alleging that one of the nation's leading providers of reverse mortgages used deceptive home estimates to entice consumers into taking out such mortgages. A reverse mortgage is a type of home loan, available to individuals who are 62 or older, that does not require borrowers to make monthly payments; instead, a borrower may access the equity in its home while living in the home, and the loan is repaid when the borrower no longer lives in the home or defaults on the loan. The CFPB previously filed an administrative **consent order** against the same reverse mortgage provider in December 2016 (2016 consent order) for related violations, and the 2021 complaint alleges that the company violated the terms of the 2016 consent order. The proposed consent order would prohibit the reverse mortgage provider from future unlawful conduct and require the company to pay $173,400 in consumer redress and a $1.1 million civil money penalty. This action is consistent with Director Chopra's statement regarding the CFPB's increased focus on preventing recidivism (as described above). Fintechs offering reverse mortgage services should be aware of this consent order, and all companies previously involved in CFPB enforcement activity should anticipate renewed scrutiny.

CFPB Orders Large Technology Companies to Provide Information on Payment System Plans

In October, the CFPB issued a **series of orders** requiring certain large technology companies, including several fintech companies, to turn over information related to payment system plans and practices. The CFPB seeks the requested information in order to understand how these entities manage data access and use personal payments data. The CFPB acknowledged that, although faster and less expensive payment systems may benefit consumers, these changes also present risks and may jeopardize a fair, transparent, and competitive marketplace. The CFPB's orders will compel these companies to provide information on (i) data harvesting and monetization, (ii) access restriction and user choice, and (iii) other consumer protections.

CFPB Reaches $40.6 Million Agreement With LendUp, Company Must Cease Operations

In December, the CFPB announced that it reached an agreement with a California-based fintech company, LendUp, that would require the company to cease "(1) making new loans; (2) collecting on outstanding loans to harmed consumers; (3) selling consumer information; and (4) making misrepresentations when providing loans or collecting debt or helping others that are doing so." The stipulated final judgment and order, entered later the same month, requires the company to pay $40.5 million to the CFPB for the purposes of providing consumer redress, and a $100,000 civil monetary penalty. The agreement would resolve a September 2021 lawsuit brought by the CFPB in the U.S. District Court for the Northern District of California alleging violations of the CFPA, ECOA, and Regulation B. The CFPB's complaint also alleged that the company was in violation of a 2016 CFPB order by continuing illegal and deceptive marketing practices, deceiving consumers about the benefits of repeat borrowing, and failing to provide notices required by fair lending laws. According to the CFPB, LendUp — which was backed by prominent venture capital investors — offered single-payment and installment loans to consumers online that it marketed as an alternative to payday loans. The CFPB alleged that the lender marketed a program of free courses and told consumers that after completing courses, they would be eligible for lower interest rates and larger loan amounts on any future loans. However, according to CFPB, despite completing the courses, consumers did not qualify for larger loans and were offered similar or less favorable interest rates.

Laws, Rules and Regulations

New York DFS Issues New Commercial Financing Disclosures

In September, the New York Department of Financial Services (NYDFS) **announced** a **proposed regulation** that would require companies that offer commercial financing in amounts under $2.5 million to make standardized disclosures about the terms of credit. Subject providers, which could include fintechs, must comply with non-substantive formatting requirements, as well as very detailed requirements for the presentation of the required disclosures, which must be presented in a table consisting of a certain number of rows and columns, with specified content in each row and column. The standardized disclosures are intended to improve transparency for small businesses seeking commercial financing and to help businesses and individuals understand and compare the terms of different commercial financing offers. Earlier in 2021, the New York state legislature passed a law, codified at Article 8 of the New York Financial Services Law, mandating disclosures for commercial financing effective January 1, 2022. NYDFS's proposed regulation implements the Commercial Finance Disclosure Law (CFDL). The CFDL requires providers of commercial financing to provide disclosures to potential recipients commercial financing at the time a specific offer of financing is extended to a recipient. Section 600.05 of the regulation sets forth "general formatting requirements" for such disclosures in great detail. The requirements are strenuous, and subject entities, including fintech companies, should prepare to comply with the CFDL in advance of its January 2022 implementation.

Looking Ahead to 2022

As noted above, in 2021 the DFPI paid close attention to fintech companies that used the term "banking" such that customers could be deceived into thinking that a non-bank fintech is actually a licensed bank. California was not the first state to take action on this issue. In December 2020, the Texas Department of Banking issued a **supervisory memorandum** regarding permissible uses of "bank" and related terms in marketing and other limits related to marketing regulated financial services. In general, the supervisory memorandum addressed the "recent trend [] where [] non-bank vendors hold themselves out to the public as actual banks or providers of regulated money services without complying with applicable laws on banking and money services," and confirmed that such activity is illegal. This enforcement trend may well continue in 2022, in California and elsewhere. Fintech companies should be aware of this issue and take action to ensure compliance with applicable law.

Further, in December 2021 the CFPB **announced** it opened an inquiry into "buy now, pay later" (BNPL) services. In connection with this inquiry, the CFPB intends to collect information on the risks and benefits of these "fast-growing loans" from several leading BNPL companies, including prominent fintech entities. Accordingly, it has already ordered BNPL companies to submit certain information pursuant to the CFPA regarding consumer debt accumulation, regulatory arbitrage, and consumer data harvesting. After the CFPB's announcement, Goodwin hosted a BNPL **webinar** that discussed what companies with BNPL products and services should expect. Goodwin will continue to monitor the CFPB's actions in the BNPL space in 2022.

What to Watch

- Continued enforcement activity by federal and state agencies, with the DFPI likely to maintain a high level of scrutiny on fintechs; and
- Additional state-initiated challenges to the OCC's Final Lender Rule, as well as challenges by other industry players.

Telephone Consumer Protection Act

This year companies finally got clarity on the meaning of an "automatic telephone dialing system" (ATDS) from the U.S. Supreme Court in a landmark decision that helped stem the tide of TCPA litigation under the statute's ATDS provision. On the heels of that decision, however, the Florida legislature quickly passed legislation designed to unwind the Supreme Court's decision with respect to certain calls and texts to Florida residents, resulting in a new wave of class actions in that state. And, in 2021 the FCC issued two new orders placing new restrictions on certain automated and prerecorded calls.

Key Trends

TCPA litigation remained a favorite of the plaintiffs' bar in 2021, with almost 1,400 new TCPA complaints filed between January 1, 2021 and September 30, 2021. That number was, however, about half of the number of TCPA lawsuits filed in 2020. The likely explanation for the decrease is the U.S. Supreme Court's landmark decision resolving the issue of what constitutes an ATDS under the TCPA.

As described in **Goodwin's 2020 Review**, the ATDS issue had been hotly contested in courts across the country following the D.C. Circuit's 2018 ruling in *ACA International v. FCC*, No. 15-1211, finding that the FCC's definition of an ATDS was overly broad. After the *ACA International* decision, and leading up to the Supreme Court's decision to adopt a narrow definition, the circuit courts were split as to whether a broad or more limited construction of the definition of an ATDS under the TCPA was appropriate. The Second Circuit, Sixth Circuit, and Ninth Circuit all took the position that a device was an ATDS when it stored numbers to be automatically dialed, which would encompass most modern smartphones. In contrast, the Third Circuit, Seventh Circuit, and Eleventh Circuit each took a more narrow construction of the TCPA, holding that a device must be capable of storing or producing phone numbers using a random or sequential number generator to qualify as an ATDS.

In April 2021, as described more fully in the section below, the Supreme Court resolved the circuit split by holding that the more narrow interpretation of the definition of an ATDS was correct. Since then, district courts have applied the Supreme Court's holding to dispose of TCPA cases at the summary judgment stage of litigation, and the plaintiffs' bar has had to be more selective in bringing TCPA suits alleging violations of the statute's ATDS provision.

Additionally, the FCC has continued its trend of enhancing consumer protection against unlawful robocalls. At the tail-end of 2020, the FCC issued two orders implementing restrictions relating to automated calls, text messages, and certain calls to residential landlines, and expanding its efforts to allow telephone carriers to block robocalls.

2021 Highlights

Supreme Court Enters Landmark Business-Friendly Decision in *Facebook, Inc. v Duguid* to Narrow Definition of Autodialer

In April, the U.S. Supreme Court resolved a circuit split on what technology constitutes an ATDS under the TCPA in the class action suit *Facebook, Inc. v. Duguid, et al.*, No. 19-511. The Supreme Court unanimously ruled that to qualify as an ATDS, "a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator," thus rejecting the expansive interpretation of the statutory ATDS definition previously endorsed in some circuits.

The TCPA defines an ATDS as "equipment which has the capacity — (A) to store or produce telephone numbers to be called using a random or sequential number generator; and (B) to dial such numbers." Before the Supreme Court decision in April, some circuit courts (D.C., Third, Seventh and Eleventh) had followed the statutory definition, holding that that equipment qualifies

1 This data as of September 2021, per WebRecon.

as an ATDS only if it uses a random or sequential number generator to produce or store telephone numbers to be called, and then dial. Other circuit courts (Second, Sixth and Ninth) had adopted a broader definition and held that equipment qualifies as an ATDS if it automatically dials numbers from a stored list. In a decision largely based on grammatical and statutory interpretation, the Supreme Court found that the narrower interpretation better matched the scope of the TCPA, and the problems caused by autodialers that Congress sought to address. Duguid's interpretation, on the other hand, would encompass any equipment that stores and dials telephone numbers, including virtually all modern cell phones. Notably, following the *Duguid* decision, the number of new TCPA cases alleging violations of the ATDS provision has precipitously declined.

Florida Tightens Telemarketing Restrictions In Wake of Supreme Court Ruling

On July 1, 2021, Florida enacted a new law, Senate Bill 1120 or the Florida Robocall Bill, containing tighter restrictions on telemarketing calls and texts to Florida residents than those under the TCPA, including as to calls and texts made with automated technology.

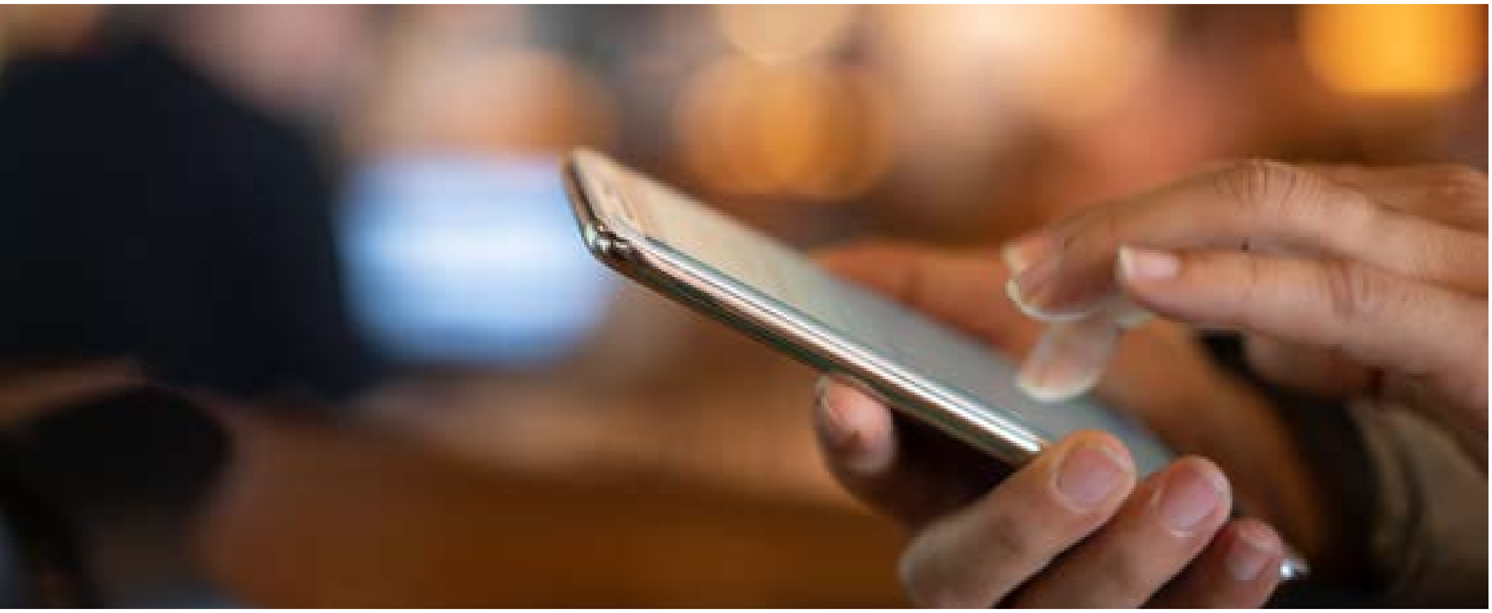
Under the Supreme Court ruling in April, an ATDS for the purposes of the TCPA is "a device [with] the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." The Florida act's "automated system," by comparison, is broader than the TCPA's ATDS, because it is not limited to just systems that store or produce a phone number using a random or sequential generator — it includes systems that dial numbers or select numbers in an automated manner. Specifically, an automated system is defined under the new Florida law as one that is used "for the selection or dialing of telephone numbers" or the "playing of a recorded message." Fla. Stat. § 501.059(1)(g)(1).

Additionally, the new Florida law amended the preexisting Florida Telemarketing Act to further restrict when and how many times a company can make telemarketing calls to Florida residents, in two important ways. First, the amendments reduced the hours during which a company can make a commercial solicitation call. The previous hours, which did not allow unsolicited telemarketing calls between 9:00 pm to 8:00 am, became 8:00 pm to 8:00 am under the revised statute. Fla. Stat. § 501.616(6)(a). Second, the amendments limited the number of unsolicited telemarketing to no more than three calls to one person in 24 hours, regardless of any particular phone number called. Fla. Stat. § 501.616(6)(b). Further, the amendments added an anti-spoofing provision, punishable as a misdemeanor, that prohibits companies from using "technology that deliberately displays a different caller identification number than the number the call is originating from to conceal the true identity of the caller." Fla. Stat. § 501.616(7)(b).

The other new component of the law, however, mirrored the TCPA: It created a private cause of action that allows individuals to get $500 per violation of Florida's "automated system" and prerecorded call prohibitions, which can be tripled to $1,500 for willful or knowing violations. Fla. Stat. § 501.059(10). And the plaintiff's bar has taken notice, with no less than a half-dozen class actions filed under the new law in the first two months since its passing.

FCC Issues Two Year-End TCPA Orders to Place New Limitations on Automated & Prerecorded Calls

In December, the FCC issued two orders, FCC 20-186 (Section 8 Order) and FCC 20-187 (Call Blocking Order), to implement certain restrictions on existing exemptions to the provisions of the TCPA relating to automated calls, 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." The FCC's orders implemented and expanded upon Section 8 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), which requires that, for any exemptions granted pursuant to TCPA Sections 227(b)(2)(B) and (C), the FCC must define requirements for who may make such calls, who may be called, and the number of such calls that a calling party may make to a particular called party.



The Section 8 order took steps to implement Section 8 of the TRACED Act by (1) codifying in its rules all existing exemptions for calls to wireless numbers, (2) amending previously-codified exemptions for calls made to residential telephone lines to satisfy the requirements of Section 8, and (3) adding new opt-out requirements for non-exempted calls. The FCC advised that callers who wish to place more artificial or prerecorded voice message calls than permitted by the Section 8 order obtain prior express consent from the called party to receive additional calls. Alternatively, callers may forgo prerecorded messages and place additional calls (including to obtain consent) with a live agent. In that regard, the FCC's order reflects a preference for live calls over prerecorded ones, finding that "artificial and prerecorded voice calls are often a greater invasion of privacy than live calls because the call recipient cannot interact with the caller."

The Call Blocking Order expanded upon the TRACED Act by: (1) requiring all voice service providers to take affirmative steps to stop illegal traffic on their networks and assist the commission and law enforcement in tracking down callers that make such calls; (2) expanding the FCC's existing call blocking safe harbor based on reasonable analytics to cover network-based blocking under certain circumstances; (3) adopting rulings to provide greater transparency and ensure that callers and consumers can better identify blocked calls and ensure those that are wanted are un-blocked; and (4) broadening the FCC's point-of-contact requirement to cover caller ID authentication concerns under section 4(c)(1)(C) of the TRACED Act.

Sixth Circuit Finds the Severability of the Government-Debt Exemption of the TCPA Applies Retroactively

In September, the U.S. Court of Appeals for the Sixth Circuit issued a decision in *Lindenbaum v. Realgy, LLC*, No. 20-4252, that reversed a district court opinion finding the TCPA unconstitutional from 2015 to 2020. The Sixth Circuit's decision follows the U.S. Supreme Court's holding in July 2020 in *Barr v. American Association of Political Consultants, Inc.*, No. 19-0631, about which Goodwin reported in its 2020 Review. In *Barr*, the Supreme Court held that Congress's 2015 addition of a government-debt exemption to the TCPA's prohibition on robocalls to cell phones and landlines created "impermissible content discrimination," but that the exemption could be severed from the TCPA. In *Lindenbaum*, the private debt-collector defendant argued that the severance of the government debt-exemption applied only prospectively, and thus government debt collectors acting from 2015 to 2020 would have a due process defense to liability because they did not have "fair notice" of the unlawfulness of their conduct, resulting in content discrimination for private-debt collectors. The Sixth Circuit found that the Supreme Court in *Barr* had "automatically displace[d]" the government-debt collector exemption and held that the severability of that exemption applies retroactively. The Sixth Circuit further held that applying the severability retroactively does not violate the First Amendment because "whether a debt collector had fair notice that it faced punishment for making robocalls turns on whether it reasonably believed that the statute expressly permitted its conduct."

Looking Ahead to 2022

While the Supreme Court's decision in April changes the TCPA-compliance landscape in many respects, it does not impact the TCPA's restrictions on calls or texts to numbers properly registered on the federal do not call list, or the TCPA's restrictions on placing calls to residential and wireless numbers using a prerecorded or artificial voice. Accordingly, while we can expect to see substantially fewer TCPA cases alleging violations of the ATDS provision in 2022, we anticipate seeing increased litigation regarding violations of the TCPA's do-not-call-list provision and restrictions on prerecorded message or artificial voice calls. We also expect to see new state laws (like Florida's), tightening restrictions on telemarketing calls and text messages, and increased enforcement thereof, including an increasing number of lawsuits in Florida challenging telemarketing calls to Florida residents under the new law.

Lastly in 2022, we also expect to see companies taking advantage of the FCC's reassigned numbers database, which debuted on November 1, 2021. Over the last several years, many companies faced TCPA lawsuits for making calls or texts intended for consumers whom had consented to receive such communications, only to discover that the consumer's number had been reassigned. The FCC's reassigned number database provides a mechanism for companies to check for reassigned numbers before making calls or texts and, if companies do so and the database reflects that the number has not been reassigned, FCC regulations provide a potential safe harbor from TCPA liability if the number had in fact been reassigned. To take advantage of the safe harbor, companies need to sign-up for the database, establish and implement a policy or practice to check numbers against the database for calling or texting, and not call or text any reassigned number without proper consent from the new owner or user of the reassigned number.

What to Watch

- Increased TCPA litigation regarding violations of the TCPA restrictions on calls or texts to numbers on the federal do not call list or calls using an artificial voice or prerecorded message;
- Increased litigation for violations of the Florida mini-TCPA; and
- New state legislation placing restrictions on telemarketing calls and text messaging.

Credit, Debit & Prepaid Cards

During 2021, Goodwin tracked six enforcement actions related to credit, debit, and prepaid cards, a slight increase from the four such actions we tracked in 2020. This continues the slow increase in the number of such actions, as there were only three actions in 2019. In 2021, total recoveries amounted to just over $24 million, a substantial decrease from the over $3.1 billion recovered in 2020 ($3 billion of which was attributable to a single recovery), but on trend with a steady increase relative to the $15 million in total recoveries in 2019.

Despite the relatively small number of enforcement actions and recoveries in this space over the past year, the CFPB and its new Director Rohit Chopra have indicated that they intend to monitor this space more closely, identifying a few areas of key interest. One particular focus will be prepaid cards offered through single-source government contracts. Another area of focus will be consumer banking, checking, and debit card-related fees, as Director Chopra announced in December that the CFPB will focus attention on NSF or overdraft fees as well. Referring to such fees as "junk fees" and "opportunistic penalties," Director Chopra indicated that not only will the CFPB pay increased attention to overdraft fee revenues during examinations, it will take action against large financial institutions whose overdraft practices violate the law. Additionally, in April 2021, the CFPB rescinded several of its policy statements providing compliance and regulatory flexibility to credit card issuers during COVID-19, which also indicated a more aggressive approach to enforcing compliance on these issues moving forward.

Key Trends

Prepaid Benefit Cards Continue to Attract Regulatory Scrutiny.

As Goodwin explained last year, prepaid government benefits cards continue to carry increased litigation and regulatory risk, particularly given the expansion of certain benefits and with the advent of the Pandemic Unemployment Assistance (PUA) program in response to the COVID-19 pandemic. In particular, 2021 saw a spike in private litigation relating to prepaid unemployment and disability benefits cards. The CFPB also targeted other prepaid benefits cards, including an action against JPay, an issuer of cards provided to individuals recently released from incarceration. Director Chopra indicated the action reflected broader concerns about the "market power created by single-source government contracts for prepaid cards," and indicated that any "misuse of a dominant position in the offering of consumer financial services, where consumers cannot easily switch, is unlawful under the [CFPA's] prohibition on abusive practices." In addition, Director Chopra expressly announced his intention to monitor and "scrutinize" companies disbursing government benefits through prepaid cards for any legal violations or "abuses of dominance."

Enhanced CFPB Focus on Overdraft and NSF Fees

In December, Director Chopra announced the CFPB's plans to make overdraft and NSF fees a major focus of their agenda. The announcement came alongside the publication of two CFPB research reports, which indicated that revenue from overdraft and NSF fees make up nearly two-thirds of fee revenue, and that revenue from overdraft and NSF fees continue to rise. According to the CFPB, overdraft and NSF fees are an effect of the lack of a transparent and competitive bank market due, in part, to the difficulty in switching financial institutions. Director Chopra's statements specifically pointed to account pricing that appears to be "free" but, in reality, is "offset by opportunistic penalties that take advantage of complex rules and captive customers" will lay at the center of its efforts.

The CFPB announced a three-pronged approach to addressing overdraft and NSF fees. First, the CFPB promised to take enforcement action against large institutions whose overdraft and NSF practices violate the law. Additionally, the CFPB noted that it intends to provide additional policy guidance outlining unlawful overdraft and NSF fee practices. Second, the Bureau announced its plan to prioritize the examination of banks that are heavily reliant on overdraft fees, or that impose a higher than average fee burden on consumers. Third, the Bureau stated that it intends to use technology to make it easier for consumers to change banks, allowing them to avoid being "trap[ped]" by banks into accounts with heavy fees.

COVID-19-Related Flexibility on Regulation Z Enforcement Rescinded

The CFPB rescinded various policy statements issued in response to the COVID-19 pandemic providing temporary regulatory and compliance flexibility to financial institutions, three of which applied to credit or prepaid card issuers. First, the Bureau rescinded its guidance relating to Regulation Z billing error resolution timelines. The prior guidance allowed the CFPB to consider "creditor's circumstances" and refrain from citing a violation or bringing an enforcement action when billing resolution takes longer than required, so long as the creditor made a good faith effort to get all necessary information, made a determination as quickly as possible, and complied with all other applicable error resolution requirements. That guidance has now been rescinded. Second, the Bureau rescinded its policy statement that loosened information collection requirements for credit card and prepaid account issuers, directing issuers to prepare to meet all information collection requirements under TILA, Regulation Z, and Regulation E by April 2021. Third, the CFPB rescinded its statement allowing for flexibility in electronic card disclosures, and issuers must again obtain a consumer's E-Sign consent during over-the-phone transactions.

FTC Issues Comment on Proposed Rule to Require Fair Competition Between Debit Card Gatekeepers

In August, the FTC announced the submission of a comment urging the Board of Governors of the Federal Reserve to clarify and strengthen the implementation of debit card fee and routing reforms under the EFTA. The comment was submitted in response to a proposed rulemaking by the Federal Reserve. The proposed rule would require card issuers to enable at least two networks for both cards where a physical debit card is used, and to "card-not-present-transactions." The two-network requirement would ensure merchants can select a low-fee network when accepting consumer payments. The FTC's comments emphasizes the need for issuers to provide sufficient options for merchants to accommodate the rapid growth of mobile and electronic payments during the COVID-19 pandemic. In addition, the FTC also called on the Federal Reserve to promulgate rules prohibiting debit card networks from exploiting an issuer's position by paying incentives to the issuer based on how merchants route electronic debit transactions using that issuer's debit cards.

2021 Highlights

CFPB Enters Into Consent Order With JPay Over Prepaid Debit Cards Issued to Incarcerated Persons

In October, the CFPB announced that it had entered into a consent order with JPay, LLC, a financial services company that provides prepaid debit cards to currently incarcerated persons and those recently discharged from incarceration, resulting in a total recovery of $6 million. JPay provided prepaid debit card services to incarcerated consumers pursuant to contracts with various departments of corrections. The prepaid debit cards provided by JPay were used to provide consumers with the funds owed to them at the time of release, including the consumer's own commissary or trust funds and any Gate Money provided to consumers at the time of their release in order to meet their basic needs. The CFPB alleged that JPay violated the EFTA by requiring consumers to establish a prepaid card account as a condition of receiving a government benefit, violated the CFPA by providing fee-bearing prepaid cards to consumers who were required to use the cards to receive money owed to them at the time of their release, and violated the CFPA by charging unauthorized fees and making misrepresentations about those fees to consumers. Under the terms of the consent order, JPay agreed to pay $4 million in consumer redress and $2 million in civil money penalties to the CFPB. JPay also agreed to a prohibition on charging fees on the prepaid cards, except for inactivity fees after 90 days of inactivity.

In announcing the consent order, Director Chopra issued a separate statement containing several key insights for the consumer finance industry:

- JPay charged a number of fees on its prepaid cards, even though people could not obtain their money through other means, shop among prepaid card providers, or readily cash out the cards without paying a fee. In effect, JPay abused its market power created by single-source government contracts for prepaid cards;
- In some cases, the misuse of a dominant position in the offering of consumer financial services, where consumers cannot easily switch, is unlawful under the Consumer Financial Protection Act's prohibition on abusive practices; and
- This case illustrates some of the market failures and harms that occur when the disbursement of government benefits is outsourced to third-party financial services companies that fail to adhere to the law. Important benefits like unemployment insurance, stimulus checks, tax refunds, higher education benefits, and juror pay are often disbursed or managed by companies offering products and services similar to JPay's. The CFPB will continue to scrutinize these companies, particularly when law violations and abuses of dominance undermine the intent of such government benefits, and where the harms fall heavily on people who are struggling financially.

FTC Takes Action Against Payment Processors and Consumer Credit Services Providers

The FTC was somewhat active in the space, announcing at least four card-related settlements in 2021. First, in January, the FTC announced a settlement with Seed Consulting, LLC and Credit Navigator, LLC, resolving allegations that the companies violated the FTCA, TCPA, TSR, CROA, and CRFA. Specifically, the FTC alleged the companies were party to a "credit stacking" scheme that misled consumers into paying the companies opening personal credit cards on their behalf in order to participate in trainings offered by third-party partners, and then deceived customers into believing they would be able to make $100,000 after participating in the programs. The settlement requires the companies to pay the FTC $2.1 million in monetary relief, and bans the companies from selling consumer credit services, misrepresenting the financial status of a consumer, and selling a consumer's financial account information without their consent.

Then, in February, the FTC announced settlements with Electronic Payment Solutions of American and Electronic Payment Solutions to resolve alleged violations of the FTCA and the Telemarketing Act. Specifically, the FTC alleged the companies assisted in a credit card laundering scheme by obtaining and maintaining fraudulent merchant accounts that allowed them to make over $6 million in credit card charges. The settlement included a suspended judgment of $10.9 million.

Finally, in July, the FTC announced two joint settlements obtained with the assistance of the Ohio Attorney General against various companies for alleged violations of Section 5 of the FTCA and the TSR. One action resolved allegations brought against Educare Centre Services, Inc., Tripletel, Inc., and Globex Telecom for making false and unsubstantiated promises and guarantees that they would reduce interest rates on consumers' credit cards. In the other action, Madera Merchant Services, LLC and B&P Enterprises, LLC, were alleged to have created and processed payment orders allowing fraudsters withdraw money from victims bank accounts. The FTC will distribute $2.3 million in consumer refunds as a result of the two settlements.

State AGs Settle with Citibank for $4.2 Million Over Alleged Credit Card Overcharges

In February 2021, the state Attorneys general for North Carolina, Iowa, Massachusetts, New Jersey, and Pennsylvania (State AGs) **announced** a $4.2 million **settlement** with a national bank to resolve allegations that it overcharged credit card interest for certain customers, in violation of the CARD Act and state law. According to the settlement agreement, the State AGs conducted a joint investigation into whether Citibank failed to reevaluate and reduce APRs for certain consumer credit card accounts between 2011 and 2017. Citibank self-identified and self-reported the issues with its APR practices, and self-initiated remediation by providing over $335 million in restitution between 2017 and 2020. The State AGs also alleged that the same APR practices violated state consumer protections laws by overcharging interest to affected consumers. While Citibank denies any violation of state law, it will pay approximately $4.2 million in consumer redress to the State AGs in order to resolve the allegations.

Looking Ahead to 2022

Increasing Focus on Prepaid Benefits Cards

Director Chopra's statements following the JPay enforcement action indicate the Bureau's clear intent to place continued attention on prepaid government benefits cards. In particular, prepaid card issuers should be aware of the expanded definition of "abusiveness" invoked by Director Chopra, and its inclusion of "abuses of dominance" or practices that "took unreasonable advantage of consumers' inability to protect their interests." In addition to potential enforcement actions, private litigation involving prepaid cards will likely remain active in 2022.

The Bureau has also indicated an intent to increase enforcement activity on heavy overdraft fees relating to consumer banking accounts stemming from the use of checking and debit card services, citing what it views as the banking industry's "reliance" on these fees. The Bureau found that in 2019, overdraft and non-sufficient fund fees totaled $15.47 billion across the industry, dwarfing the amounts collected in ATM and regular account service fees. Director Chopra, in a December 2021 statement, explained his view that regulatory intervention was required, as the complexity of overdraft policies and inconvenience of switching financial institutions makes it difficult for consumers to avoid fees. In addition to warning of potential enforcement actions against any "big banks" engaged in unlawful overdraft fee practices, Director Chopra indicated he is considering releasing new guidance on overdraft and non-sufficient fund fees in 2022.

What to Watch

- Increased CFPB attention and enforcement action on prepaid government benefit cards; and
- Additional CFPB guidance regarding overdraft and NSF fees, along with increased examination scrutiny of NSF and overdraft fees.

Debt Collection & Settlement

In 2021, Goodwin tracked 35 publicly-announced state and federal enforcement actions related to debt collection or debt settlement. This is a slight increase from the number of debt collection and debt settlement actions tracked during 2020 (32 actions). Though 2020's numbers were largely expected to be an anomaly because of the number of actions attributable to the Federal Trade Commission's "Operation Corrupt Collector" initiative, debt collectors and debt settlement companies remained in the crosshairs. Overall, though consistent with last year's data and an increase from 2019's numbers, the number of publicly announced debt collection and debt settlement actions in 2021 still represents a marked decrease from the average number of such actions announced during the 2016-2018 time period (42 per year).

The total amount recovered by federal and state agencies decreased from 2020. In fact, total recoveries have declined every year since Goodwin began tracking debt collection and debt settlement enforcement actions. In 2021, federal and state agencies secured approximately $45 million in civil money penalties, restitution, and consumer relief as a result of settlements and court judgments (excluding suspended judgments). In 2020, in contrast, agencies secured over $63 million as a result of enforcement actions, and in 2016 agencies secured over $400 million through enforcement.

Though there were no significant federal rule changes during 2021 that impact the debt collection or debt settlement industry, state regulators were active in this space. New York and California have proposed amending or amended their debt collection regulations during 2021. In October, the New York DFS proposed amendments to its debt collection regulations that change the information required to be included in initial disclosures by debt collectors, add new limitations governing communications with debt collectors, and require new disclosures for time-barred debts. Meanwhile, in November, the California DFPI proposed modifying its debt collector licensing requirements, effective December 31, 2021, to clarify, among other terms, the definition of "debt collector."

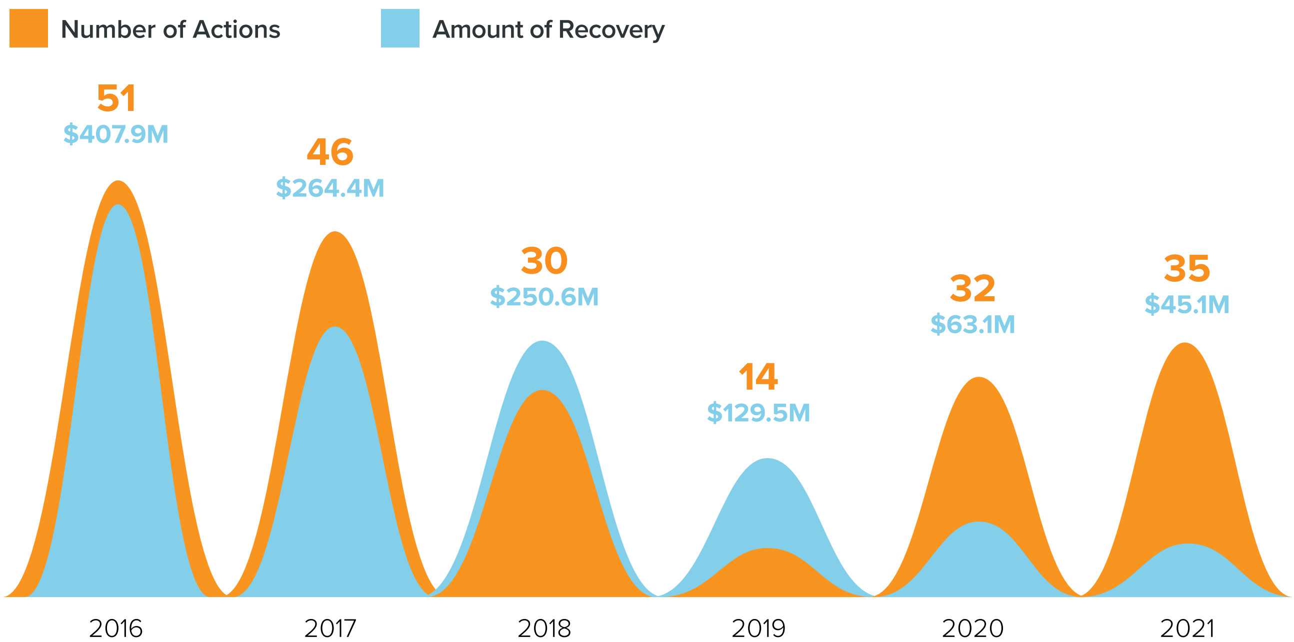
Key Trends

Historically, the CFPB and FTC are more active than other federal or state agencies in initiating and settling actions related to debt collection and debt settlement services. In 2020, the CFPB initiated 13 such actions, but in 2021 the CFPB initiated only seven actions. Similarly, in 2020, the FTC initiated six enforcement actions targeting debt collection or debt settlement companies in 2020, whereas the FTC initiated seven such actions in 2021. Consistent with historical norms, 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 and FDCPA.

One unexpected shift from 2019 and 2020 has been the number of state enforcement actions relative to actions announced by the CFPB and FTC. In 2019 and 2020, the CFPB was the most prominent enforcement actor in the debt collection and debt settlement space. In 2021, by contrast, states were the most active enforcers, initiating nearly twice the number of enforcement actions as federal agencies. In fact, in 2021, state agencies were the most prominent enforcers for the first time since Goodwin began tracking enforcement statistics in 2016. State agencies brought 21 actions in 2021, a substantial increase from 2020. California led the way, with eight enforcement actions, while state attorneys general from Delaware, Georgia, Indiana, Massachusetts, Minnesota, Pennsylvania, Virginia, Washington, and West Virginia all also initiated or resolved enforcement actions with debt settlement or debt collection companies this year.

Goodwin's 2020 Year in Review predicted that in 2021, enforcement in the debt collection market would continue to focus on representations made to consumers. That prediction has largely been proven true. One such example is from February 2021, when the State of Delaware filed an administrative lawsuit against Centerdon Group, Inc. n/k/a Hilvanim Group, Inc., a debt-management services company, for allegedly using misleading advertising to target elderly

Debt Collection + Settlement Actions by Year (with Recoveries)



and low-income Delaware residents. The company allegedly sent a Delaware notary to consumers' homes as a "representative" of the company. While at the consumers' homes, the notaries allegedly presented consumers with the company's debt settlement contract, which was styled as a "Legal Services Agreement," and which referred to the company as a "law firm," when the company was not a law firm and employed no Delaware attorneys. Delaware alleges that this conduct violates the Uniform Debt-Management Services Act, the Consumer Fraud Act, and the Deceptive Trade Practices Act.

2021 Highlights

Eleventh Circuit Panel Issues Decision in *Hunstein*, Leading to Significant Increase in FDCPA Claims

The Eleventh Circuit in *Hunstein v. Preferred Collection and Management Services, Inc.*, 994 F.3d 1341 (11th Cir. 2021) (*Hunstein I*), held that providing debt information, such as debtor's name and debt balance, to a third-party vendor retained to generate debt collection letters was a "communication" to a third-party under Section 1692c(b) of the Fair Debt Collection Practices Act, which prohibits disclosing information about a consumer's debt to a third party "in connection with the collection of any debt." The panel reached this conclusion after finding that the consumer had standing to sue despite the absence of tangible harm. Though the panel vacated its prior decision following the Supreme Court's decision in *TransUnion*, the panel again held, in *Hunstein v. Preferred Collection and Management Services, Inc.*, 17 F.4th 1016 (11th Cir. 2021) (*Hunstein II*), that the debtor had standing, holding that the disclosure of a consumer's information to a mailing vendor was concrete albeit intangible. The panel also doubled-down on its holding that providing information about a consumer's debt to a third-party mailing vendor was a violation of Section 1692c(b) of the FDCPA.

Hunstein is one of the most significant FDCPA cases decided in the past several years because it opens the door to liability under the FDCPA every time a third-party vendor is used in connection with the collection of a debt. Perhaps unsurprisingly, the Eleventh Circuit has agreed to rehear the case en banc. If the en banc court is inclined to vacate the panel opinion, it could do so on one of two grounds. It could hold that under *TransUnion*, the plaintiff lacks standing to sue because of the absence of a concrete injury. Or, the court could hold that Section 1692c(b) does not extend to vendors, like the mailing vendor in *Hunstein*, who are acting on behalf of the entity to whom the debt is owed.

Seventh Circuit Issues Key Decision Applying *Spokeo* to FDCPA Allegations

In May, the Seventh Circuit reaffirmed a "slew" of cases holding that a bare statutory violation of the FDCPA is not necessarily sufficient, in and of itself, to satisfy Article III standing requirements. In *Markakos v. Medicredi, Inc.*, 997 F.3d 778, 781 (7th Cir. 2021), the plaintiff had received letters from a debt collector listing different amounts that the borrower owed. The plaintiff alleged that the inconsistent amounts reflected on the letters constituted a violation of the FDCPA because she was entitled to correct information about the amount of the debt she owed and that the letters "confused and aggravated" her. The Seventh Circuit, however, held that the plaintiff had failed to allege that the misinformation had injured her in a concrete way because she did not allege that she paid more money to the debt collector than she owed, that her credit suffered, or that she took some other action to her detriment in reliance on the misinformation.

Markakos is noteworthy because two of the judges on the panel issued concurring opinions that, though agreeing with the result, questioned the Seventh Circuit's recent approach to evaluating standing under *Spokeo*. Judge Ripple in his concurrence stated that he was concerned that recent cases in the Seventh Circuit overread *Spokeo* and "take too restrictive a view of Congress's authority to identify intangible injuries and to allocate enforcement burdens." *Id.* at 782. In her concurrence, Judge Rovner largely agreed with Judge Ripple, stating that "the approaches taken in some other circuits are consistent with Article III case-or-controversy jurisprudence, while being more properly deferential to the Congressional judgment inherent in the determination of harms and remedies in the FDCPA." *Id.* at 786-787 ("[O]ther circuits have held that an allegation of a statutory violation can itself establish standing, where the violation implicates the concrete interest of the statute.").

Hunstein, *Markakos*, and the Supreme Court's recent decision in *TransUnion LLC v. Ramirez* illustrate that the contours of Article III standing, particularly in the debt collection and settlement realm, remain unsettled.

CFPB's Final Rules Modernizing the FDCPA Take Effect

Last year Goodwin reported on the CFPB's issuance of two final rules under Regulation F implementing the FDCPA, which include limited-content message requirements, call frequency limitations, and clearer requirements on the disclosure of debt information to consumers to help them identify the debt being collected (these disclosures are called "validation information").

Citing the pandemic, in early April 2020 the CFPB proposed delaying the rules' effective dates until January 29, 2022. But, following the change in administration, on July 30, 2021 the CFPB withdrew that proposal and announced that the rules would take effect on November 30, 2021, as originally planned. The CFPB then updated its **FAQ** and issued additional guidance related to the two new rules. The updates to the FAQ answered questions related to limited-content message requirements, call frequency limitations, and validation information, including an additional section devoted to answering questions related to validation information for residential mortgages. In also issuing additional validation information guidance, the CFPB said that it was attempting to help debt collectors comply with the disclosure requirements by providing instructions on how to use the new model validation notice, which provides a safe harbor for compliance with the rules' content and format requirements.

One aspect of the new rules that has garnered significant attention is that, under the new rules, a debt collector can contact a consumer on social media, provided that the message is private, the debt collect identifies themselves, and the debt collect includes a way for the consumer to opt out of receiving social media messages.

California's DFPI Prioritizes Debt Collection Enforcement and Regulation

In its first full year of operations, the new California DFPI issued several new rules and brought multiple debt collection and debt settlement enforcement actions.

In April and August, the DFPI promulgated notices of rulemaking related to implementing the new California Debt Collection Licensing Act's licensing requirements. On September 1, 2021, the DFPI announced that had begun accepting applications for licensing from debt collectors. Under the Act, to continue operating in California, debt collectors currently engaged in the business of debt collection in the state have until January 1, 2022 to be licensed.

In September, the DFPI brought its first enforcement action against a debt collector under the California Consumer Financial Protection Law (CCFPL). The CCFPL makes it unlawful for a covered person to engage in any unfair, deceptive, or abusive act or practice with respect to consumer financial services or products or to offer or provide a consumer financial product or service not in conformity with any consumer financial law. The DFPI issued a cease-and-desist order to F & F Management Inc. under the CCFPL for allegedly unlawfully threatening to sue consumers and garnish their wages, and submitting negative information to a credit bureau without notifying consumer (i.e., debt parking). The DFPI found that these actions violated the CCFPL and ordered the company to pay an administrative penalty of $375,000.

New York Enacts New Law Protecting Consumer From Debt Collection Lawsuits

In November, New York Governor Kathy Hochul signed into law the Consumer Credit Fairness Act (NYCCFA). The act amends the state civil practice rules and will take effect May 6, 2022, except for the provisions relating to the revival or extension of the statute of limitations, which will take effect April 6, 2022.

The NYCCFA includes a number of provisions designed to afford consumers greater protections from debt collection, including: shortening of the statute of limitations to enforce a debt from six years to three years; protecting borrowers who make a payment on the debt from triggering a restart of the three-year statute of limitations period; additional documentation requirements for collections actions arising from consumer credit transactions, such as attaching to the complaint the contract the lawsuit is based on; and requirements of specialized notice to the court if a collection action arising out of a consumer credit transaction is filed or when summary judgment is sought against a pro se plaintiff in a collection action arising out of a consumer credit transaction.

CFPB Enters Into Consent Order with Yorba Capital Management, LLC Over Alleged FDCPA Violations

In April, the CFPB and Yorba Capital Management, LLC entered into a consent order to resolve allegations that Yorba had violated the CFPA and FDCPA by falsely threatening consumers with legal action in the event that they refused to pay their debt. Yorba mailed letters to consumers titled "LITIGATION NOTICE" and the letters included a "Case no." and caption similar to that of a court filing. The letters contained other language stating that a lawsuit "may be the next step" if the consumer did not pay, and implied that some form of legal action had already been commenced against the consumer. The CFPB alleged, however, that Yorba neither employed law firms or lawyers nor filed lawsuits to enforce outstanding debt. The CFPB found these practices to be "deceptive" under both the CFPB and the FDCPA. Under the consent order, Yorba agreed to a permanent ban from the debt collection industry.

Looking Ahead to 2022

We expect the CFPB to devote more energy to enforcement and regulation in the debt collection and debt settlement space in the coming year. During his time at the FTC, Director Chopra was highly critical of the FTC's "go-it-alone debt collection enforcement strategy" because he believed that it "frequently leads to outcomes where victims receive only a miniscule percentage of their losses." Instead, he advocated for the FTC to "work in concert with the Consumer Financial Protection Bureau" so that consumers could be made whole through the CFPB's civil penalty fund and the Bureau's authority to impose civil money penalties.

Director Chopra also criticized what he viewed as the FTC's "Whack-a-Mole" approach to policing the debt collection industry. He noted that "the CFPB has important tools that could significantly reform this market," including the authority to issue a rulemaking on "first-party debt collection" that could ensure "[c] ommonsense rules for ensuring accuracy in the collection and sale of debt."

Now that Director Chopra leads the CFPB, look for the Bureau to pursue more systemic actions — including through the rulemaking process — to reform what Director Chopra sees as the industry's abuses.

What to Watch

- Continued state enforcement, particularly by California and New York under their new debt collection enforcement powers CFPB enforcement of new FDCPA rules;
- Increase in the number of CFPB enforcement actions; and
- Potential CFPB rulemaking on first-party debt collection practices.

Payday & Small Dollar Lending

Key Trends

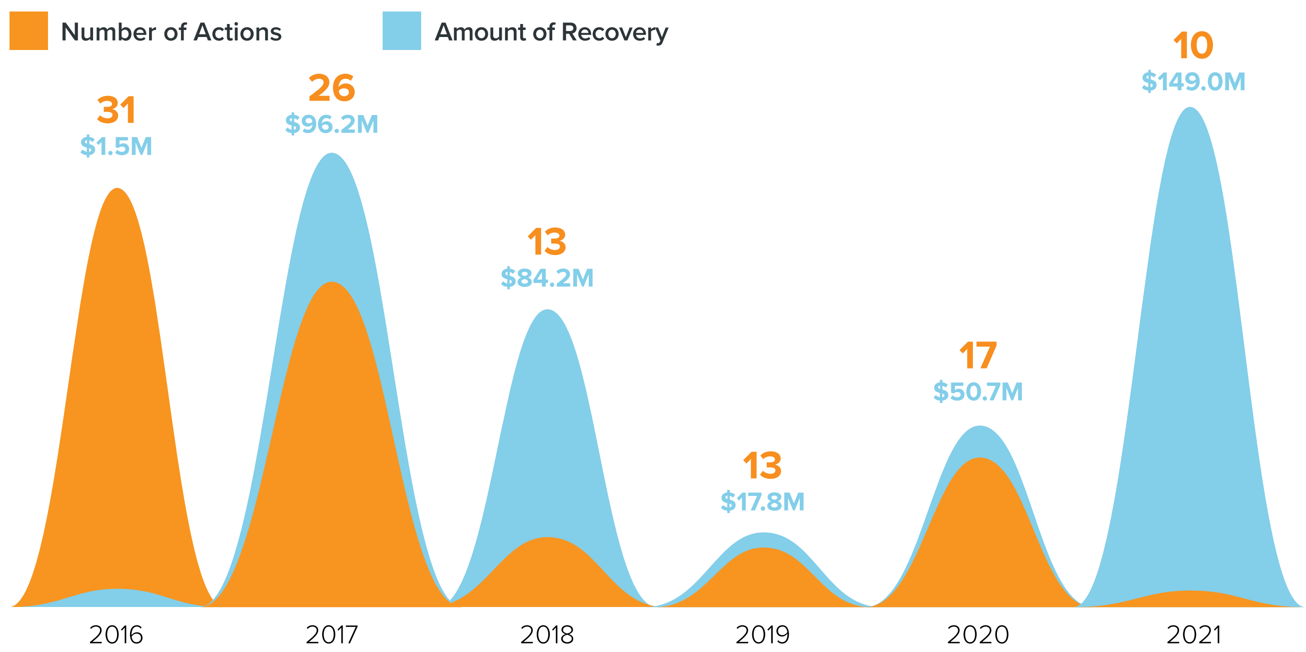
Although we predicted in 2020 that the CFPB would be aggressive in launching investigations and enforcement actions in the payday lending space, Goodwin only monitored 10 publicly announced actions concerning payday, installment, or small dollar lending in 2021. Five of 2021's actions were brought by the CFPB, two were brought by the FTC and alleged violations of the FTCA and UDAP, as well as the Telemarketing Act, TSR, TILA, EFTA, and Regulation E, and one by the state of Illinois. As shown below, 2021 represents a decrease in public enforcement activity in the small dollar lending space, as Goodwin previously monitored 17 actions in 2020, 13 actions in both 2018 and 2019, and 26 actions in 2017.

Despite the noted decrease in enforcement in 2021, the CFPB continues to investigate and scrutinize this area. Both then-acting Director Uejio and newly-appointed Director Chopra have indicated that payday and small dollar lending will be among the areas of focus under the current administration. Most notably, under the leadership of then-acting Director Uejio and current Director Chopra, the CFPB made clear that it intends to begin enforcing the 2017 CFPB payday lending rule effective June 2022. Further, the Bureau's new leadership **stated** that the Bureau is not satisfied with the status quo in the space, nor is it satisfied with the changes to the payday lending rule made under the Trump administration. As acting-Director Uejio stated, "the Bureau believes that the harms identified by the 2017 rule still exist, and will use the authority provided by Congress to address these harms, including through vigorous market monitoring, supervision, enforcement, and, if appropriate, rulemaking."

Additionally, the CFPB's Summer and Fall 2021 Supervisory Highlights detailed categories of deceptive acts or practices it identified in payday lending that the agency intends to focus on. First, in the Summer **Supervisory Highlights**, the CFPB "found that lenders engaged in deceptive acts or practices in violation of the CFPA when they sent delinquent borrowers collection letters stating an 'intent to sue' if the consumer did not pay the loans." CFPB examiners also found that although a "reasonable borrower could understand the letters to mean that the lender had decided it would sue if a borrower did not make payments as required by the letter," the lenders in fact had not made such a decision, and in most instances did not follow through with suit. Second, the CFPB "observed that lenders engaged in a deceptive act or practice in violation of the CFPA when they falsely represented on storefronts and in photos on proprietary websites that they would not check a consumer's credit history" because lenders in fact used consumer reports from at least one agency in their determination regarding whether to extend credit to the consumer. Finally, the CFPB found lenders made deceptive representations of repayment options to borrowers by "presenting fee-based refinance options to struggling borrowers while withholding information about contractually available no-cost repayment plan options," causing "many consumers [to] enter[] into fee-based refinances despite being eligible for a no-cost repayment option."

Then in its Fall 2021 **Supervisory Highlights**, the CFPB detailed additional categories of deceptive acts or practices it identified in the payday lending space as areas to focus on. First, the CFPB "found that lenders engaged in unfair acts or practices when they debited or attempted to debit from consumers' accounts the remaining balance of their loans on the original due date after the consumers (1) applied for a loan extension, and (2) received a confirmation email stating that only an extension fee would be charged on the due date." The CFPB determined such practices are "likely to cause substantial injury" including "unexpected debits of the full loan balance" and "bank fees." Second, CFPB examiners concluded that lenders engaged in deception when they either: (1) "debited or attempted one or more additional, identical, unauthorized debits from consumers' bank accounts after consumers called to authorize a loan payment by debit card and lenders' systems erroneously indicated the transactions did not process," or (2) "debited or attempted one or more duplicate, unauthorized debits

Payday/Small Dollar Lending



on consumer accounts due to a coding error." The CFPB also concluded that such actions were likely to cause substantial injury, depriving consumers of access to needed funds and creating a risk of bank fees. At bottom, despite this year's decrease in publicly-announced enforcement activity, the new leadership at the CFPB and the enactment of the payday lending rule will almost certainly lead to increased supervisory and enforcement activity for small dollar lending in the years ahead. Thus, we expect that 2021 was likely a blip, rather than a trend, in enforcement in this space.

2021 Highlights

CFPB Overcomes Challenge to Payday Lending Rule
In August, the U.S. District Court for the Western District of Texas **issued an opinion** upholding the CFPB Rule regulating payday lending. *Community Financial Services Association of America, LTD., et al. v. CFPB*, Case No. 1:18-CV-00295 (W.D. TX.) (*Community v. CFPB*). The November 2017 "Payday, Vehicle Title, and Certain High-Cost Installment Loans" Rule (Rule) at issue included an underwriting provision, which restricts lenders from making covered loans "without reasonably determining that the consumers will have the ability to repay the loans" and a payment provision, which restricts certain lenders from attempting to withdraw from a consumer's account after two failed withdrawal attempts, without a new consumer authorization. In 2020, the Supreme Court held that the leadership structure of the CFPB was unconstitutional. *Seila Law LLC v. CFPB*, 140 S .Ct. 2183, 2192 (2020) (*Seila Law*). Shortly thereafter, the CFPB rescinded the underwriting provision of the Rule, but ratified the payments provision of the Rule. 85 Fed. Reg. 4 1,905-02 (July 13, 2020).

Community v. CFPB was brought on behalf of lenders and businesses impacted by the Rule and its ratification, relying on *Seila Law* to present a direct challenge to the Rule's payment provisions. Ultimately, the district court rejected plaintiff's position, siding with the CFPB in holding that the payment provision should not be set aside. The district court relied, in part, on Supreme Court precedent that *Seila Law* does not mean actions taken by an agency with an unconstitutional structure are *void ab initio* or must necessarily be undone. Further, the court found the ratification cured the constitutional injury. In addition to the *Seila Law* challenges, plaintiffs also argued that the CFPB's denial of one of its members rulemaking petition to amend the Rule to exclude debit card payments was arbitrary and capricious. Again the court sided with CFPB, finding it had "established the rational connection between the facts found and the choice made when it chose to include" debit card payments in the Rule.

Following the court's ruling, then-Acting Director Uejio issued a **statement** applauding the ruling and reiterating the Bureau's intent to begin enforcing the rule beginning on its June 13, 2022 effective date. As noted above, the Bureau also indicated that it intends to supervise and enforce the payday lending space vigorously, and that it does not agree with the CFPB's efforts under the prior administration to amend and restrict the Rule. Thus, industry participants should be wary of the Bureau's new administration and anticipate potential efforts to enforce provisions of the Rule that were removed in 2020.

FTC Reaches Settlement with Payday Lenders

In February, the FTC **announced** that it had reached a $114 million settlement with Lead Express, Inc., Camel Coins, Inc., Sea Mirror, Inc., Naito Corp., Kotobuki Marketing, Inc., Ebisu Marketing, Inc., Hotei Marketing, Inc., Daikoku Marketing, Inc., La Posta Tribal Lending Enterprise, and individual defendants. The settlement resolved allegations that the defendants operated a tribal lending scheme that allegedly violated the UDAP provisions of the FTC Act, 15 U.S.C. § 45(a), the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act), 15 U.S.C. §§ 6101-6108, the TSR, 16 C.F.R. Part 310, TILA, 15 U.S.C. §§ 1601-1666j, the EFTA, 15 U.S.C. §§ 1693-1693r, and its implementing regulation E, 12 C.F.R. Part 1005. According to the FTC, the payday lenders operated a fraudulent scheme — carried out online under the names Harvest Moon Financial, Gentle Breeze Online, and Green Stream Lending — in which they misrepresented to consumers that payday loans would be repaid in a fixed number of payments. The FTC alleged that defendants, in fact, continued to draw funds from the victims' bank accounts after the loans had been fully repaid, resulting in consumers being overcharged millions of dollars. Defendants purportedly only ceased the withdrawal of funds when the consumers closed their bank accounts or found another way to stop the fraudulent payments.

The **settlement** provides for a monetary judgment of $114.3 million, which has been partially suspended based on inability to pay. The precise amount suspended is presently unknown as the settlement requires defendants to turn over all corporate assets, domestic personal assets, and certain personal property. In addition, all outstanding consumer loans issued will be considered paid in full if the original amount of the loan and one finance charge have been repaid. Defendants are also permanently banned from the lending industry.

The CFPB Denies Integrity Advance, LLC and its Owner's Request to Stay $51 Million Decision and Order

In March, the CFPB denied online payday lender Integrity Advance LLC and its individual owner's (collectively "Integrity Advance") request to stay a final decision and order pending appellate review. The decision and order at issue require payment of approximately $51 million in restitution and civil monetary penalties stemming from the CFPB's 2015 notice of charges alleging violations of TILA, EFTA, and the CFPA's prohibition on unfair or deceptive practices by (1) continuing to withdraw funds from borrowers' accounts after authorization to do so had been revoked; (2) requiring borrowers to repay loans via pre-authorized EFT; and (3) deceiving consumers about the costs of short-term loans. The CFPB's decision concluded that Integrity Advance's motion to stay "fail[ed] to make the sort of showing that would warrant a stay pending appellate review." In particular, the Bureau found Integrity Advance (1) had "neither shown that they are likely to succeed on the merits nor raised a serious legal argument" as to whether ratification of the action was an appropriate remedy for the purported constitutional injury resulting from the fact that when the notice of charges was brought, the director was not fully accountable to the president; and if it was, then the statute of limitations had already expired; (2) had failed to show an irreparable injury by the payment of money into an escrow account; and (3) "the balance of the equities tips strongly" against Integrity Advance. The CFPB did, however, grant a 30-day stay of the order to allow Integrity Advance to seek a stay from the Tenth Circuit.

New Illinois Law Limits Bank and Non-Bank Partnerships and Drive Payday Lenders Out

In March, Illinois enacted "The Predatory Loan Prevention Act" (PLPA), which was designed to prevent lenders from taking advantage of minority communities by capping payday loans at an interest rate of 36%, as part of a legislative package intended to address economic inequities. The law applies to all consumer loans made or renewed after the effective date, and was effective immediately. Although the law generally applies to any person or entity that offers or makes a loan to a consumer in Illinois, there is an exception for banks, credit unions, and insurance companies that are chartered by the United States or any state. Exempt parties, however, may be indirectly impacted by the applicability of the law to its non-exempt partners and service providers. Specifically, a person who does not make a loan, but purchases, brokers or acts as an agent for the party that originates the loan may also be a covered "lender."

Additionally, the PLPA has a sweeping anti-evasion provision which provides that a person may be a covered lender by purporting to act as an agent of a bank or other exempt party, and engages in marketing, arranging or brokering loans made by the exempt party, or holds or acquires the predominant economic interest in the loans generated by the exempt party. That provision appears to have been designed, at least

in part, to curb the use of partnerships between banks and non-banks. Failure to comply may result in the loan becoming null and void. Although Illinois Governor JB Pritzker characterized the PLPA as "restrict[ing]… usurious loans in Illinois," some lenders believe the interest late is far too low and have said the law has forced lenders to stop operating in the state because they're unable to cover overhead with a 36% interest rate cap. Lenders have criticized the law as "tak[ing] a lifeline away from those who need it," which will lead to fees for bounced checks and overdrafts, exceeding the cost of a payday loan.

Looking Ahead to 2022

In 2022, watch for CFPB Director Chopra's increased focus on payday lending — particularly with the advent of the long-anticipated payday lending rule in June 2022. Director Chopra's agenda will also likely include re-evaluation of rules eased under the Trump administration generally, with a particular emphasis on payday lending, such as rules requiring payday lenders to assess borrowers' ability to pay back loans and ending access to the automatic seizure of consumer payments from checking accounts. In addition to revisiting regulations eased in the Trump era, we anticipate increased activity by the CFPB in connection with areas of perceived deceptive practices discussed in the Summer and Fall 2021 Supervisory Highlights — namely (1) misrepresentations regarding intent to sue borrowers who fail to repay loans; (2) misrepresentations concerning whether the lender will check the consumer's credit history when making a decision on whether to extend credit; and (3) deceptive presentation of fee-based repayment options to borrowers contractually eligible for no-cost repayment plans leading consumers to believe no-cost installment repayment options did not exist; (4) erroneous debiting and misrepresentations regarding loan extensions; and (5) unauthorized, duplicative debits.

What to Watch

- Director Chopra's revisiting of payday lending rules eased under Trump administration;
- The implementation and enforcement of the payday lending rules effective June 2022;
- Increased enforcement activity in payday lending space for practices identified in CFPB Supervisory Highlights; and
- Resolution of trade groups' challenge to the payment provisions in the CFPB's 2017 Payday Lending Rule.

Credit Reporting

In 2021, Goodwin tracked just one public enforcement actions related to credit reporting or credit repair services. The single action tracked in 2021 represents a decrease in the number of actions tracked when compared to 2020 (seven actions). Despite few new publicly announced enforcement actions, federal agencies — including most notably the CFPB — remained active in the space, initiating enforcement actions, issuing guidance, publishing reports, and making public statements — all of which suggests that the industry should be prepared for a higher level of activity in this space in the coming years.

Key Trends

In our 2020 YIR, we predicted that there would not be a significant increase in public enforcement actions concerning credit reporting or credit repair services. Though that prediction proved to be true, the CFPB and FTC did remain active in this space, and that activity appears to be laying the groundwork for an ever more active 2022.

In March 2021, the Bureau rescinded its policy statement, announced in April 2020, for credit reporting companies and furnishers concerning credit reporting guidance during the COVID-19 pandemic. That policy statement had expressed some flexibility in terms of how the Bureau would evaluate compliance with FCRA as a result of the pandemic. In rescinding that policy statement, the Bureau "announce[d] its intent to exercise its supervisory and enforcement authority consistent with the Dodd-Frank Act and FCRA and with the full authority afforded by Congress consistent with the statutory purpose and objectives of the Bureau." The Bureau expressed concern that "[d]eclining to cite conduct that is a violation of FCRA, and Regulation V based on the articulated principles in the [COVID-19 Guidance] may skew the consumer financial marketplace, to the detriment of market participants who do not act in violation." Thus, the Bureau stated that it is "more important than ever that institutions adhere to consumer protection and consumer reporting requirements and that the Bureau use its supervisory and enforcement tools to the full extent and with the full flexibility afforded by Congress." However, the rescission leaves in place the policy statement provisions concerning "Furnishing Consumer Information Impacted by COVID-19," articulating the CFPB's support for furnishers' voluntary efforts to provide payment relief to customers impacted by the COVID-19 pandemic.

In November, the CFPB issued a **research report** concerning credit reporting disputes, and specifically the demographics of consumers impacted by such disputes. The report is part of a series that focuses on trends in the consumer financial marketplace, and uses data on various types of loans and credit card accounts opened between 2012-2019. The report concluded that "dispute flags appear to be more common for young and low-credit-score borrowers and more common in majority Black census tracts." In announcing the report's finding, Director Chopra emphasized that accuracy of credit reporting will be a focus of the Bureau under his leadership. The director expressed particular concern over "[e]rror-ridden credit reports" in minority communities which he said "are far too prevalent and may be undermining an equitable recovery."

Also in November 2021, the Bureau issued its first **advisory opinion** since the change in administration. The advisory opinion concerned name-only matching procedures used by CRAs. Those procedures "match[] information to the particular consumer who is the subject of a consumer report based solely on whether the consumer's first and last names are identical or similar to the first and last names associated with the information, without verifying the match using additional identifying information for the consumer." The Bureau said that name-only matching "is particularly likely to lead to inaccuracies in consumer reports." The opinion concludes that "name-only matching is not a procedure that assures maximum possible accuracy," and thus "consumer reporting agencies that use name-only matching violate FCRA section 607(b)."

Finally, the Bureau's Winter 2021 issue of **Supervisory Highlights** included observations of ways that CFPB examiners found that consumers had been harmed in connection with companies pandemic-related credit reporting practices. First, the CFPB found that some companies had furnished new and/or advancing delinquency information to CRAs despite providing the consumer an accommodation. Due to staffing delays, some companies were unable to immediately process an accommodation despite telling a customer that the accommodation had been made, which resulted in reporting some consumers as delinquent even though they were current. Second, the CFPB found that some auto furnishers had insufficient furnishing policies and procedures because, as a result of the pandemic, auto furnishers reported that customers were delinquent on leased vehicles that the dealership had picked up from the customers' homes, but where there was a delay in processing the lease termination. Third, the Bureau found that staffing challenges due to the pandemic caused some furnishers and CRAs not to conduct a timely investigation of disputed tradelines.

2021 Highlights

FTC Finalizes Changes to Five FCRA Rules

In last year's review, we discussed the FTC's announcement of a notice of proposed rulemaking and request for public comment on changes to the rules that implement the FCRA. In September, the FTC approved final revisions to five FCRA rules: the Address Discrepancy Rule, the Affiliate Marketing Rule, the Furnisher Rule, the Pre-screen Opt-Out Notice Rule, and the Risk-Based Pricing Rule. Because the CFPA transferred FCRA rulemaking authority to the CFPB, the primary purpose of the FTC's amendments to these rules is to clarify that the FCRA rules enforced by the FTC apply only to motor vehicle dealers, and not to consumer finance companies. The other amendments to the five FCRA rules are "technical" amendments rather than amendments that change the substance of the rules.

CFPB Settles with Fair Collections & Outsourcing Over Failure to Investigate Consumer Disputes

In August, the CFPB and Fair Collections & Outsourcing (FCO) agreed to a stipulated final judgment and order, resolving a 2019 lawsuit filed by the CFPB in the U.S. District Court for the District of Maryland alleging that FCO's debt collection and furnishing practices had violated the CFPA, FCRA, and FDCPA. Specifically, the CFPB alleged that FCO lacked reasonable policies and procedures with respect to handling of indirect credit reporting disputes, that it failed to conduct reasonable investigations of those disputes, and that it continued to furnish information about accounts even where the consumer had submitted an identity theft report to the company. The Bureau also alleged that FCO violated the FDCPA when it represented to consumers that they owed debts that FCO had no reasonable basis to believe the consumer owed. Under the settlement agreement, FCO has agreed to pay an $850,000 civil money penalty, to implement reasonable furnishing policies and procedures, and to review identity theft reports submitted to the company.

Supreme Court Reinforces Limits on Federal Court Standing, But Important Questions Remain

In June, the U.S. Supreme Court decided *TransUnion LLC v. Ramirez*, revisiting some of the Article III standing principles it had set forth in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), and addressing their application to Rule 23 class actions. *Ramirez*, like *Spokeo*, arose from FCRA claims alleging that the defendant failed to "follow reasonable procedures to assure maximum possible accuracy" of its consumer background data, as the statute requires. 15 U.S.C. § 1681e(b). In *Ramirez*, unlike *Spokeo*, the plaintiff had concededly suffered palpable harm when an alert that he was a "potential match" to a name on a government list of sanctioned terrorists and drug traffickers cost him an auto loan. His class included 1,853 others who had the same alert on their credit reports and 6,332 additional members who had it in their credit file without it ever appearing on a report sent to a third party. The Court held that the 1,853 class members whose reports were disseminated suffered actual injury in the form of "concrete reputational harm," but the 6,332 class members whose reports were never disseminated

suffered no harm and had no standing to seek damages. The decision, and several important takeaways that emerge from the opinion for companies that face suits under all varieties of consumer statutes, is discussed in more detail below.

CFPB, FTC, and State of North Carolina File Amicus Brief in *Henderson v. The Source for Public Data, L.P.*

In October, the CFPB, FTC, and state of North Carolina filed an amicus brief in support of the plaintiffs in *Henderson v. The Source for Public Data, L.P.*, a case on appeal to the Fourth Circuit. The defendant — the Source for Public Data — compiles publicly-available information on consumers and sells the information to its customers. In *Henderson*, the district court held that 47 U.S.C. § 230 of the Communication and Decency Act, which protects interactive computer service providers from liability as a publisher of third-party information, barred the plaintiffs' FCRA claims arising from the furnishing of reports that contained false or inaccurate information. In announcing the filing of their amicus brief, Director Chopra and FTC Chair Khan said that the case "highlights a dangerous argument that could be used by market participants to sidestep laws expressly designed to cover them," and that "tech companies . . . will need to follow the same laws that apply to other market participants." The Eleventh Circuit has yet to issue a decision on the appeal.

CFPB Files Lawsuit Against Credit Repair Cloud and Its CEO Over Software Used by Credit Repair Companies

In September, the CFPB filed a lawsuit against Credit Repair Cloud (CRC) and its CEO Daniel Rosen in the U.S. District Court for the Central District of California alleging that they had violated the Telemarketing Sales Rule and CFPA by providing substantial assistance or support to credit repair companies that charged illegal advance fees to consumers. The complaint alleges that in its marketing materials CRC encouraged the users of its software services to charge consumers at enrollment, with monthly fees thereafter, and that its software integrates with a billing platform that allows users to charge up-front and recurring fees. The CFPB further alleges that CRC were aware that its users were violating the TSR and CFPA in charging consumers up-front fees before services were rendered. The Bureau seeks an injunction, equitable relief, civil money penalties, and enforcement costs.

FTC Reaches $25 Million Settlement With Smart Home Monitoring Company Over Alleged Misuse of Credit Reports

In April, the FTC reached a settlement with Vivint, a Utah-based home security company, resolving allegations that the company had violated the FCRA, FTC Act, and FTC's "Red Flags Rule." The settlement resolves a complaint simultaneously filed by the U.S. Department of Justice in the U.S. District Court for the District of Utah, alleging that Vivint's sales representatives would use credit reports associated with similarly-named consumers in order to qualify prospective customers for the company's home security and monitoring services, and would in some circumstances add relatives or other persons with better credit as a co-signer on the account without permission. If the customer later defaulted, Vivint then referred the third-party "co-signer" to its debt buyer. The $25 million monetary judgment obtained by the FTC is the largest monetary judgment to date for an FTC FCRA case.

Looking Ahead to 2022

Even before his appointment to lead the CFPB, then-FTC Commissioner Chopra's public statements focused on the importance of the credit reporting industry and perceived consumer vulnerability. For example, in one public statement Commissioner Chopra said that CRAs, not just debt collectors, have a responsibility to correct "debt parking." He went on to say that "[t]he CFPB can address this problem by using its authority" to stop what he called "unfair, deceptive, and abusive practices by credit reporting agencies." In **testimony** to the U.S. House Financial Services Committee given shortly after his confirmation Director Chopra expressed concern that consumers "lack the leverage to get problems fixed" in markets like credit reporting because they "are not the customer." Taken in context with the trends noted above, the early indications are that fair credit reporting will be among the priority of a Director Chopra-led CFPB.

Likely developments in 2022 may include both legislation and regulation to remedy perceived inequity stemming from inaccurate credit reporting. Director Chopra's emphasis on consumers' lack of bargaining power may drive further enforcement actions targeting non-financial services companies or targeting ancillary supporting conduct (such as the software company facilitating illegal credit repair fees).

While the Biden administration has signaled an interest in creating a publicly-run credit reporting agency within the CFPB, the Biden administration has not adopted that proposal as an administration priority, nor has the proposal gained traction among members of Congress. With the looming midterms, we do not expect to see any significant movement on this issue in the coming year despite Director Chopra's concern about unfair, deceptive, and abuse practices engaged in by CRAs.

What to Watch

- Increased enforcement activity by CFPB in credit reporting space, including against CRAs and non-financial services companies; and
- Guidance or other regulatory action designed to ensure credit reporting accuracy, particularly in minority communities.

Student Lending

In 2021, Goodwin tracked 9 federal and state enforcement actions related to student lending, representing a slight increase from the seven actions Goodwin tracked in 2020. Though 2021 saw an increase in the number of enforcement actions, the amounts recovered were much lower than in recent years, as state and federal enforcement agencies obtained only $54.6 million in redress and penalties compared to $368.1 million in 2020 and $986.9 million in 2019. The decrease in recoveries was driven by the fact that 2021 lacked large individual actions like the $100+ million settlements with three different student loan providers in 2019, or the $330 million settlement with ITT Educational Services in 2020. A majority of this year's actions were brought by states, namely California and Massachusetts, whereas the remaining actions were brought by various federal agencies including the CFPB, FTC, and DOJ. Looking ahead to 2022 and beyond, we anticipate an eventual increase in both state and federal scrutiny, especially in light of the massive federal student repayment currently set to occur in May 2022 (or sometime soon thereafter) and the recent appointments to CFPB leadership's experience and interest in the student lending space.

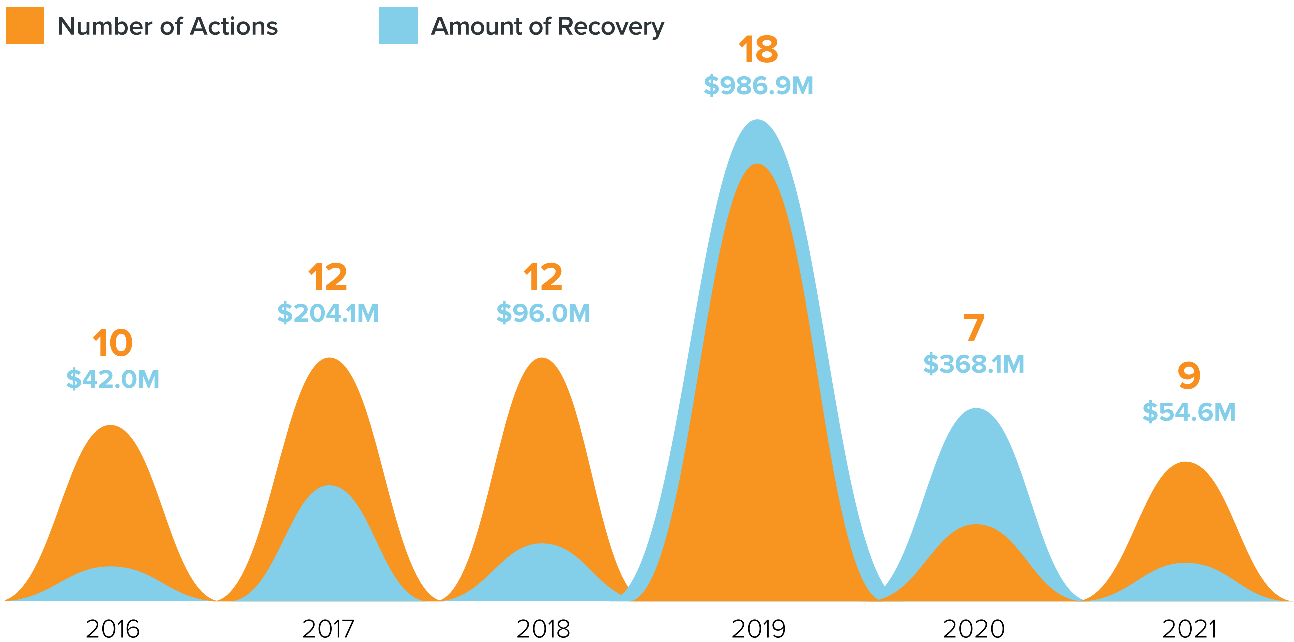
Key Trends

Although student lending has been an area of interest for enforcement agencies at both the state and federal level in recent years, including under the Trump administration, lenders should expect even greater scrutiny under the new CFPB Director Rohit Chopra. Under the Obama administration, Chopra served as the CFPB's first Education Loan Ombudsman and helped establish the Student Aid Bill of Rights. More recently during Director Chopra's March 2021 CFPB Director confirmation **hearing**, he stated that "[t]he CFPB has a big role to play in working with the Department of Education, State Attorneys general" and overseeing how "servicers [are] communicating, and making sure that borrowers can navigate their options." Director Chopra further signaled that the CFPB will be more active in student lending space. Director Chopra acknowledged that, as millions of consumers prepare to resume federal student-loan repayment in May 2022, "[w]e are at a critical moment when so many borrowers are going to have to restart their payments," and the CFPB intends to ensure that the restart is "happening lawfully so we can avoid an avalanche of defaults when any moratorium might end."

In response, in part, to this anticipated increased scrutiny by the CFPB (and others), several of the largest student loan servicers have elected to exit the federal student lending market, and it would not be surprising if other servicers follow suit. Two of those servicers (Granite State and the Pennsylvania Higher Education Assistance Agency (PHEAA)) announced that they will not renew their federal contracts. In explaining its departure, the PHEAA **announced** that "[i]n the 12 years since PHEAA accepted the terms of its federal servicing contract, the federal loan programs, as managed by the U.S. Department of Education, have grown increasingly complex and challenging while the cost to service those programs increased dramatically." Subsequently, the nation's largest servicer of federal student loans (Navient) **announced** that it has elected to transfer the entirety of its federal contract and student loan portfolio to a new party (Maximus). The result of these changes is that 16 million borrowers and a loan volume of over $650 billion will be transitioning to new servicers beginning in February 2022. Although President Biden's recent extension of the federal student loan forbearance period from February 1, 2022 to May 1, 2022 will provide these new servicers a little more breathing room, the proximity of the servicing transfers and return-to-payment promises to pose challenges.

The upcoming return-to-payment and disruption in the student lending market led the CFPB Education Loan Ombudsman to state in its October 2021 **annual report** that the CFPB anticipates the upcoming return of 32 million borrowers to federal loan repayment — the largest entry into repayment in the history of higher education — will lead to an unprecedent challenges. Nevertheless, the CFPB expects servicers to be prepared for this transition and prevent consumer harm, claiming that "[t]he potential issues and challenges that may cause

Student Lending Actions by Year



borrower confusion and borrower harm are mostly known, and thus, they can be planned for and then mitigated." The CFPB further cautioned that "planning and mitigation efforts must be done at scale and done correctly the first time," and that "[s]trong leadership at the servicers is required to navigate through these transitions." The CFPB proclaimed that "[t]hough these tasks and others may be delegated, ultimate responsibility and accountability for the success of these transitions cannot be delegated," "their preparation, planning, and execution are leadership responsibilities that start and end at the C-suite level," and cautioned "[b]eing unprepared for the transitions is unacceptable."

The CFPB report further explained that "[a]ccountability starts with the servicer's internal systems and controls, which are supposed to identify risks and prevent, mitigate, and resolve borrower harm before a complaint is even filed with regulators" and that "[s]ervicers must be held accountable throughout the pendency of loan repayment which may be twenty years or more." Finally, the CFPB reported that it has been collaborating with the U.S. Department of Education and Federal Student Aid (FSA) so that these agencies may mitigate and prevent student harm, and also has been proactively sharing complaint information with the FSA pursuant to a 2020 memorandum of understanding.

Servicers planning on servicing federal student loans next year should heed the CFPB's warnings and be prepared for increased scrutiny — especially with respect to the following issues: (1) marketing of private student loan interest rates that could be perceived as deceptive; (2) failing to inform borrowers about their eligibility for Public Service Loan Forgiveness (PSLF), or making misrepresentations about the program; (3) failing to reverse the negative consequences of automatic natural disaster forbearances; (4) failing to honor consumer payment allocation instructions; or (5) providing inaccurate monthly payment amounts to consumers after a loan transfer.

2021 Highlights

President Biden Extends Student Loan Forbearance Period Another 90 Days to May 1, 2022

On December 22, President Biden and the U.S. Department of Education announced that the Biden administration will extend the pause on federal student loan payments another 90 days to May 1, 2022. The pause had previously been scheduled to expire at the end of January 2022, which would also have coincided with the massive transfer of Navigant-serviced loans to Maximus. The extension was applauded by Democratic lawmakers and progressives, who had been pushing for additional time to assist those "still coping with the impacts of the pandemic." It remains to be seen whether, come May 2022, payments will in fact restart, or whether

an additional pause will be implemented. But for now, borrowers can benefit from the additional reprieve, while servicers have been afforded some additional time to prepare for the inevitable restart.

Minnesota AG Reaches $39 Million Settlement with For-Profit Universities

The largest reward obtained this year was in September when the U.S. Bankruptcy Court for the District of Minnesota approved a $39.4 million settlement between the Minnesota Attorney General and two defunct, for-profit colleges: Globe University and Minnesota School of Business. Both schools allegedly engaged in consumer fraud and illegal lending practices by misleading students about potential program benefits that caused students to take out substantial student loans to enroll. The schools also allegedly violated the state's usury law by charging unlawful interest rates. This settlement brings to rest a lawsuit that was first filed in 2014 and spanned two trials, several appeals, and a bankruptcy filing.

California DFPI Actions

Last year, we predicted that student loan servicers operating in California may experience increased scrutiny from the California Department of Financial Protection and Innovation (DFPI) as a result of last year's passage of California's Student Loan Borrower Bill of Rights. As expected, this year the DFPI announced three actions against student lenders and debt relief companies under the new California Consumer Financial Protection Law (CCFPL) provisions prohibiting companies providing consumer financial products or services to California residents from engaging in unlawful, unfair, deceptive, or abusive acts or practices or from committing any act in violation of a consumer financial law.

In February 2021, the DFPI **issued** its first enforcement action against a student debt relief company. The company, Optima Advocates, Inc., was alleged to have operated a student loan debt relief scam for over three years whereby it convinced California residents to pay tens of thousands of dollars to "wipe away" their student loans by getting them "dismissed" or "discharged" in exchange for the consumers paying Optima between 25% to 40% of the total student loan balance. According to the DFPI, Optima never provided any of these services; rather, it simply allowed the consumers to default on their loans. Optima was ordered to provide refunds to all consumers who were charged illegal fees and pay a fine of $45,000.

In April 2021, the DFPI **entered** into a settlement agreement with Lambda School, an online coding school, resolving allegations that the school deceptively indicated that its promise-to-pay contracts with students could not be discharged in bankruptcy. According to the DFPI, the school offered its students the option to finance their education through a contract in which the student promised to repay the school based on a percentage of the student's future income. This contract had a provision that stated, "this extension of credit is a qualified educational loan and is subject to the limitations on dischargeability in bankruptcy contained in Section 523(a)(8) of the United States Bankruptcy Code." The DFPI alleged that this language is deceptive because the school's contract is not a "qualified educational loan" and therefore is not subject to limitations on dischargeability. Under the settlement, the school must update this provision and inform students who entered into the contract that this provision is not accurate.

Finally, in September 2021, the DFPI **issued** its first enforcement action against a debt collection company. According to the DFPI, the company (F&F Management Inc.) engaged in various unlawful practices from May through August 2021, including: (1) leaving consumers automated voicemails that failed to identify the company; (2) making false representations about its power initiating legal proceedings and wage garnishments; and (3) engaging in "debt parking" by furnishing negative credit information to credit bureaus without first attempting to communicate with consumers about the alleged debt or notifying consumers in writing within 30 days of furnishing that negative credit information in violation of the Consumer Credit Reporting Agencies Act (CCRAA). The company was ordered to pay an administrative penalty of $375,000.

DOJ Reaches $50,000 Settlement with NJ HESAA

Keeping with the trend Goodwin observed this year regarding the enforcement of military servicemembers' rights across various industries, the DOJ **obtained** a settlement from the New Jersey Higher Education Assistance Authority (HESAA). The settlement resolved allegations that New Jersey violated the Servicemember Civil Relief Act (SCRA) by seeking default judgments from servicemembers. SCRA requires lenders seeking default judgment to notify courts of the consumer's military status as a safeguard in case the servicemembers are unable to appear in court and defend themselves due to their military service. Specifically, HESAA is alleged to have filed false affidavits stating that borrowers were not in military service when they in fact were. Under the proposed consent order, HESAA must pay restitution in the amount of $15,000 to the two servicemembers who had default judgments entered against them and a $20,000 civil money penalty.

Virginia AG Settles with Equitable Acceptance Corporation

In March 2021, then-Virginia Attorney General Mark Herring **obtained** a settlement against the student debt relief company Equitable Acceptance Corporation (Equitable) to resolve allegations that the company misled students into purchasing debt relief services that were already available to them at no cost. In particular, from February 2015 through August 2018, the Virginia AG alleged that Equitable: (1) misled nearly 2,200 students into purchasing student debt relief services that were either already available to them; (2) made promises that it would enroll students into programs that they were not eligible for; and (3) made loans that had interest rates above the state's usury cap of 12% APR. Under the settlement, Equitable must pay $40,000 in restitution, forgive $51,657.92 in student loans, and pay $10,000 in enforcement costs. If Equitable fails to comply with the settlement, a $5.5 million civil money penalty will be assessed.

Virginia has been active in the consumer protection space in recent years, but this may change given Mark Herring's recent defeat by Republican Jason Miyares. If Miyares acts similarly to other Republican Attorneys general, we anticipate seeing a decline in Virginia actions in the next four years — although perhaps not in the student lending space.

CFPB Enters into Consent Order with Better Future Forward, Inc.

In September 2021, the CFPB entered into a consent order with Better Future Forward, Inc. and its affiliate companies. The order resolves allegations that the company falsely mischaracterized the income share agreements (ISA) it provided to consumers as neither "credit" nor "private education loan." In particular, the CFPB alleged that Better Future Forward violated the Consumer Financial Protection Act (CFPA), Regulation Z (Reg Z), and the Truth in Lending Act (TILA) by failing to provide borrowers with required disclosures under Reg Z and imposing unlawful prepayment penalties in violation of TILA. Under the consent order, Better Future Forward is enjoined from engaging in the alleged misrepresentations and must provide consumers with required disclosures. The CFPB **noted** that it did not impose any financial penalties against the company "considering its responsible conduct, namely that it demonstrated good faith and substantial cooperation beyond that required by law."

Looking Ahead to 2022

In 2022, we expect that the student lending space will continue to be an active area for federal and state supervision and enforcement as student lenders attempt to navigate the challenges posed by 32 million federal student loan borrowers returning to repayment, while also transferring approximately half of those borrowers to a new servicer. We expect the CFPB in particular to be more active in student lending given the agency's recent proclamations and the fact that student lending was one of Director Chopra's primary issues when he was previously with the CFPB and the FTC. Additionally, the Bureau recently announced that Seth Frotman, a former CFPB Student Loan Ombudsman, is returning to the CFPB to serve as Acting General Counsel and Senior Advisor — further signaling that student lending is likely to be at or near the forefront of the agency's prospective supervision and enforcement priorities.

We also expect to see an increase in state enforcement actions in the coming year. Last year, numerous states passed student borrower protection laws that many state agencies and attorneys general may be eager to enforce. Additionally, this year the U.S. Department of Education furthered that effort by issuing **guidance** clarifying that, though federal law preempts state regulation in certain narrow areas, states may regulate student loan servicing in many other ways without being preempted by the federal Higher Education Act (HEA). Finally, in May 2021, the FSA **announced** a change in its information-sharing policy that should make it easier for state attorneys general to obtain information from FSA regarding loan servicers that are suspected of violating the law.

What to Watch

- The challenges and potential pitfalls facing student loan servicers, especially federal student loan servicers, will likely be at or near an all-time high in 2022, so servicers should be sure to review and take efforts to strengthen their compliance controls in preparation for the inevitable scrutiny and supervision to come.

Auto Loan Origination & Servicing

In 2021, Goodwin tracked 10 publicly announced auto lending enforcement actions, down from 11 such actions tracked in 2020. 2021 saw a decline in the number of such actions announced by states. Only four of the 10 publicly announced actions were brought by states, whereas in 2020 there were six such actions. The total amount recovered by enforcement agencies this year was approximately $35.2 million dollars — a fraction of the amount recovered in 2020 ($562 million), but more in line with the amounts historically recovered by federal and state agencies for actions in this space.

Key Trends

Unlike 2020, where the DOJ initiated no new publicly announced enforcement actions in the auto lending space, 2021 saw the DOJ file two new auto finance enforcement actions. In both instances, the DOJ alleged claims under the Servicemembers Civil Relief Act (SCRA) arising from auto lenders' alleged refusal to terminate lease agreements and refund prepaid lease amounts after the consumer entered military service or received orders to deploy.

The CFPB, in contrast, took a step back from the enforcement space this year. In 2020, the CFPB publicly announced four actions related to auto finance, but last year the CFPB announced only a single such action. That action, discussed in more detail below, arose from a California auto finance companies' failing to disclose to consumers that it would charge interest on late payments of loss damage waiver fees.

States no longer played the predominant enforcement role in the auto lending space in 2021. State attorneys general and enforcement agencies announced only two new enforcement actions in 2021, compared to the six enforcement actions announced in 2020. It is too soon to tell whether this decline is the result of the perception that federal enforcement agencies will take a more active enforcement role under the Biden administration, causing the states to allocate their resources elsewhere, or whether this decline is an anomaly. However, the two publicly announced state actions in this space is the fewest number of such actions since Goodwin began tracking these numbers in 2015.

2021 Highlights

New York DFS Settles with Two State Banks Over Alleged Discrimination in Auto Lending

In June, the New York Department of Financial Services (DFS) entered into two separate consent orders with New York-based Adirondack Trust Company (**here**) and New York-based Chemung Canal Trust Company (**here**), resolving allegations that the banks had violated New York fair lending laws in their indirect auto lending practices. Specifically, the DFS alleged that the banks' practices resulted in minority borrowers paying higher interest rates for their automobile loans than non-Hispanic white borrowers, and that the banks failed to monitor auto dealers that were charging members of protected classes more in discretionary dealer markups. To resolve these allegations, Adirondack Trust agreed to pay a $275,000 civil money penalty to the State of New York, in addition to restitution to impacted consumers, and Chemung Canal Trust agreed to pay a $350,000 civil money penalty and restitution to impacted consumers.

DOJ Secures Consent Order with Santander and American Honda Finance Over Alleged SCRA Violations

DOJ publicly announced two new auto finance enforcement actions in 2021, both of which concerned allegations that the auto finance companies had violated the rights of servicemembers under the SCRA.

In September, the DOJ announced that American Honda Finance Corporation had entered into a **consent order** under which it agreed to pay up to $1.59 million in compensation to servicemembers in order to resolve allegations that it had violated the SCRA. The SCRA authorizes servicemembers to terminate auto leases early in the event that the servicemember enters active military service or receives orders to deploy after executing the lease agreement. The SCRA also requires that all lease amounts paid in advance be refunded to the servicemember. Here, the DOJ alleged that American Honda's customers often paid an up-front fee at the time of signing their lease agreement, in the form of either a cash payment, credit for a trade-in vehicle, or rebates and other credits, and that those amounts lowered the monthly payment on the vehicle. However, the DOJ alleged that American Honda failed to refund the vehicle trade-in credit that was applied toward reducing the monthly lease amount when servicemembers lawfully terminated their leases under the SCRA. As a part of the settlement, American Honda agreed to pay up to $1.59 million in compensation to 714 servicemembers, a $64,715 civil money penalty, and to adopt new SCRA-compliant policies and training procedures.

Also in September, the DOJ entered into a **consent order** with Santander Consumers USA Inc., pursuant to which Santander agreed to pay more than $134,000 to resolve allegations that the company had violated the SCRA. The DOJ began investigating Santander after receiving a complaint from U.S. Army Captain Eric McDowell, who said that after being deployed to Afghanistan, Santander denied his request to terminate his vehicle lease early and refund lease amounts that he had paid in advance. As a result of its investigation, the DOJ determined that Santander had also violated nine other servicemembers' rights under the SCRA. To resolve these claims, Santander agreed to pay $94,282 in compensation to ten servicemembers, a $40,000 civil penalty, and to update its SCRA procedures and training. Santander previously settled an SCRA lawsuit filed by the DOJ in 2015 concerning Santander's repossession of 1,112 servicemembers' vehicles.

Credit Acceptance Corporation to Pay More Than $27 Million to Resolve Unfair and Deceptive Practices Allegations

In September, the Massachusetts Attorney General announced that Credit Acceptance Corporation had agreed to pay more than $27 million to resolve claims that it engaged in unfair and deceptive auto loan practices. The Attorney General alleged that Credit Acceptance Corporation made high-interest auto loans that the company knew or should have known many borrowers would be unable to repay based on the borrowers credit score or debt-to-income ratios. The attorney general also alleged that Credit Acceptance Corporation did not expect borrowers to repay their loans in full and structured its operations to earn substantial profits on high-interest auto loans even when customers defaulted, including through how it scaled its payments to dealers and pooled the loans. The AG alleged that Credit Acceptance Corporation was able to profit off these defaulted loans because it did not expect borrowers to pay their loans in full and scaled its payments to dealers accordingly and pooled loans to further reduce its own risk. Under the settlement agreement, Credit Acceptance Corporation agreed to pay a total of $27.2 million to an independent trust to be used for consumer relief and to provide debt relief and credit repair to Massachusetts borrowers.

CFPB Enters Into Consent Order with California Auto Finance Over Hidden Finance Charges

In May, the CFPB entered into a consent order with 3rd Generation, Inc., a California corporation doing business as California Auto Finance, to resolve allegations that the company had failed to disclose finance charges to consumers in violation of the CFPA. California Auto Finance services subprime auto loans originated by car dealerships and then purchased by California Auto Finance. The CFPB alleged that California Auto Finance charged consumers interest on late payments of loss damage waiver fees without disclosing those charges to borrowers. The CFPB alleged that California Auto Finance charged about 5,800 consumer accounts a total of $565,813 between 2016 and 2021. To resolve these claims California Auto Finance agreed to pay $50,000 in civil penalties to the CFPB. The consent order also prohibits the company from continuing to charge interest on loss damage waiver fees without first clearly and conspicuously disclosing those charges to borrowers.

Looking Ahead to 2022

Despite the blip in the number of publicly announced auto finance enforcement actions this year, there are several reasons why we fully expect auto lending to be a focal point for federal and state regulators and enforcement agencies over the coming year.

First, in its COVID-19 Prioritized Assessments Special Edition of Supervisory Highlights, the CFPB **observed** that the COVID-19 pandemic resulted in large numbers of payment assistance requests and expanded payment assistance programs geared to assist borrowers in re-paying their auto loans. However, at the same time, the CFPB's prioritized assessments of auto loan servicers identified practices that presented a risk of consumer harm associated with these increased payment assistance requests and accommodations, such as servicers failing to provide consumers with necessary information regarding interest accrual during deferred payment periods, withdrawal of funds for payments after deferments, and notices sent to consumers threatening actions (e.g., repossessions) that the servicer had in fact suspended. As in other areas, we expect the CFPB to keep a watchful eye on auto loan servicers' efforts to provide consumers with payment flexibility and accommodations as a result of the ongoing COVID-19 pandemic.

Second, prior to his confirmation as Director of the CFPB, then-Commissioner Chopra, **issued** a statement emphasizing the importance of a disparate impact analysis in uncovering discrimination in the auto lending space. Commissioner Chopra's comments came after the FTC announced a settlement with Bronx Honda, resolving allegations that Bronx Honda's pricing policies resulted in African-American and Hispanic customers paying more in fees and finance charges than similarly situated white customers. Commissioner Chopra urged the FTC to use its rulemaking authority to police "dealer markup" practices because "case-by-case enforcement is not sufficient to root out discrimination and other unlawful practices." He also urged the FTC to use "more data-driven detection of discrimination and a systemic approach to protecting Americans from auto market abuses."

Congress' 2018 repeal of the CFPB's indirect auto lending bulletin may prove to be a roadblock should now-Director Chopra seek to initiate a CFPB rulemaking in this space. Reinstating that bulletin would require congressional action, which is exceedingly unlikely before the upcoming mid-term elections. Though Director Chopra may still initiate other rulemakings in this space, it is also likely that a Director Chopra-led CFPB will engage in "rulemaking by enforcement" — *i.e.*, enforcing a new interpretation of an existing statute or regulation in the context of an enforcement action.

Finally, the CFPB may also turn its rulemaking and enforcement attention to subprime auto finance, and in particular the add-on products often associated with auto loan originations to subprime customers. In his statement, then-Commissioner Chopra raised the prospect of an FTC rulemaking that would address "add-on products," and during the course of this past years the CFPB settled one enforcement action related to loss damage wavers. Though to date the CFPB has primarily been focused on whether charges for such products are clearly and conspicuously disclosed to borrowers, a Director Chopra-led CFPB may take a more comprehensive approach toward protecting consumers from what he sees as the abuses inherent in the products.

What to Watch

- New federal guidance and/or investigations related to dealer markups/discretionary pricing practices;
- Continued federal and state enforcement activity designed to protect servicemembers; and
- New examinations and enforcement actions targeting auto finance companies related to COVID-19 servicing practices.

Major U.S. Supreme Court & Appellate Cases Decided In 2021

A number of highly anticipated cases were decided in 2021 that affect the consumer finance industry. Aside from *Facebook v. Duguid, et al.*, No. 19-511 discussed in the 2021 Year in Review's TCPA Section, the U.S. Supreme Court revisited Article III standing principles in *Transunion LLC v. Ramirez,* No. 20-297 and limited the authority of the Federal Trade Commission (FTC) in *AMG Capital Management, LLC v. Federal Trade Commission*, No. 19-508. Courts of Appeals decisions were impactful as well, ranging from setting parameters on actionable FDCPA claims to class certification requirements.

2021 Highlights

U.S. Supreme Court

Supreme Court Limits the Authority of the FTC

In April, the Supreme Court issued a unanimous decision in *AMG Capital Management, LLC v. Federal Trade Commission*, No. 19-508, that limited the authority of the FTC to seek equitable monetary relief. Section 13(b) of the FTC Act permits the FTC to obtain a permanent injunction in federal court for violations of any law the FTC enforces. The FTC had begun a practice of using Section 13(b) to seek equitable monetary awards, such as restitution and disgorgement, in federal district courts without the prior use of traditional administrative proceedings. The Supreme Court held that this was improper, holding that, as written, Section 13(b) does not permit the agency to seek monetary equitable relief.

Supreme Court Reinforces Limits on Federal Court Standing

In June, the Supreme Court issued a decision in *TransUnion LLC v. Ramirez*, No. 20-297 that expanded upon *Spokeo, Inc. v. Robins*, No. 13-1339. The Court reinforced limits on Article III standing to plaintiffs who have suffered a concrete harm and not just a "bare procedural violation." Consumers brought an action against a credit reporting agency, alleging that the agency failed to use reasonable procedures to ensure the accuracy of the consumers' credit files. The Supreme Court stated that "only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." The Court held that the class members whose alleged misleading credit reports were disseminated to third parties had been concretely harmed under Article III. The remaining class members were unable to demonstrate that the inaccurate alerts in their credit files "were ever provided to third parties or caused a denial of credit;" thus, the Supreme Court held that they had not suffered a concrete harm and lacked standing.

Supreme Court Finds FHFA Unconstitutionally Structured

In June, the Supreme Court issued a decision in *Collins v. Yellen*, No. 19-422, holding that the single director leadership structure of the Federal Housing Finance Agency (FHFA), who can only be removed "for cause," unconstitutionally restricted the President's removal power in violation of the separation of powers. The Supreme Court found that their 2020 decision in *Seila Law v. Consumer Financial Protection Bureau*, No. 19-7, dictated the results here. Shareholders argued that the FHFA exceeded its authority as a conservator under the Housing and Economic Recovery Act (the "Recovery Act") in adopting an amendment which replaced the fixed-rate dividend formula with a variable one. The Supreme Court held that, under the terms of the Recovery Act, the FHFA did not exceed its authority as a conservator; therefore, this claim was barred by the anti-injunction clause in Recovery Act which "prohibits courts from taking any action to restrain or affect the exercise of the powers or functions of the Agency as a conservator." The Supreme Court also held that while the leadership structure was improper, "there was no constitutional defect in the statutorily prescribed method of appointment;" therefore, there was "no reason to regard any of the actions" taken by the FHFA" in relation to the amendment as void.

Court of Appeals

Eleventh Circuit Holds Administrative Feasibility is Not a Requirement for Class Certification

In February, the U.S. Court of Appeals for the Eleventh Circuit issued a decision in *Cherry v. Dometic Corp.*, No. 19-13478, holding that a putative class representative does not need to establish an administratively feasible method to identify absent class members as a pre-requisite for class certification under Federal Rule of Civil Procedure 23. The Eleventh Circuit noted that manageability alone will rarely be sufficient to prevent class certification. This decision may lead to an increase of class actions certified in the Eleventh Circuit, which hosts a number of consumer financial services putative class actions.

Seventh Circuit Reaffirms that Bare FDCPA Violation is not Actionable

In May, in *Markakos v. Medicredi, Inc.*, No. 20-2351, the U.S. Court of Appeals for the Seventh Circuit issued a decision that a breach of the FDCPA does not alone cause an injury in fact. A debtor brought an action against a collection agency for violating the FCDPA, allegedly by sending debt collection letters with deficient information. The Seventh Circuit affirmed the district court's dismissal on the grounds that the debtor lacked standing to sue because she did not allege that the missing information in the letter caused her any harm. In coming to this conclusion, the Seventh Circuit acknowledged the "somewhat contradictor[y] decree[]" in *Spokeo, Inc. v. Robins*, No. 13-1339, that on the one hand "Article III standing requires a concrete injury even in the context of a statutory violation but on the other hand that the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." The Seventh Circuit also noted that this was the eighth time in 2021 that it had held a breach of the FDCPA does not alone cause an injury in fact.

Second Circuit Dismisses Legal Challenge to OCC Fintech Charter Program

In June, the U.S. Court of Appeals for the Second Circuit dismissed the New York State Department of Financial Services' (DFS) action against the Office of the Comptroller of the Currency (OCC) in *Lacewell v. Office of the Comptroller,* No. 19-4271. DFS sued the OCC, challenging the OCC's decision to begin accepting applications for "special-purpose national bank" charters from financial technology companies "engaged in the business of banking, including those that do not accept deposits." DFS argued that the OCC had exceeded its authority under the National Bank Act because, they believed, the "business of banking" required that national banks take deposits. The Second Circuit found that DFS lacked standing to sue because it did not allege that the OCC's decision had or would cause it to suffer an actual injury in fact. It also found that the claims were constitutionally unripe for judicial review because the OCC had not yet received or granted any applications. The Second Circuit expressed no view as to whether the "business of banking" requires the receipt of deposits.

Second Circuit Holds Settlement Offer Collection Notices Need Not Advise Consumer of Accruing Interest to Comply with FDCPA

In June, the U.S. Court of Appeals for the Second Circuit issued a decision concerning required information in debt collection letters in *Cortez v. Forster & Garbus, LLP*, No. 20-1134. A debtor received a collection notice that did not state whether interest and fees were accruing on the debtor's account. The Second Circuit held that a debt collector is not liable for failing to disclose accruing interest "so long as the notice clearly states that the holder of the debt will accept payment of the amount set forth in full satisfaction of the debt if payment is made by a specified date." The Court held that because the debtor's collection notice extended a settlement offer that, if accepted, would have cleared the debtor's account, the collection notice was not in violation of the FDCPA.

Fifth Circuit Holds That Waiver of Right to Arbitrate is Claim Specific

In September, the U.S. Court of Appeals for the Fifth Circuit held in *Forby v. One Technologies, L.P.*, No. 20-10088, that an operator of a website did not waive its right to compel arbitration of a consumer's federal claim even though the operator had previously waived its rights to arbitrate the consumer's state claims based on the same underlying conduct in *Forby v. One Technologies, L.P.,* No. 17-10883. The Fifth Circuit stated that waiver of arbitration is evaluated under a two-step test: (1) "whether a party substantially invoked the judicial process" and (2) "whether it caused the other party prejudice." The Fifth Circuit held that, because the operator had never tried to litigate the consumer's federal claims, it did not waive its right to compel arbitration. The Fifth Circuit noted that "a party only involves the judicial process to the extent it litigates a *specific claim* it subsequently seeks to arbitrate."

What to Watch

- Appellate courts following *TransUnion LLC v. Ramirez*, No. 20-297, and affirming reinforced limits on Article III standing to plaintiffs who have suffered a concrete harm;
- *Seila Law* challenges to government agencies with single director leadership structures; and
- Additional challenges to the OCC's Fintech Charter Program.


STICE · UNDER · LAW
LEX

What We're Watching: 2022 Emerging Issues

Enforcement & Regulatory Trends

Although enforcement in the mortgage space may have been down in 2021 relative to years' past, a number of agencies — most notably the CFPB and DOJ — have indicated that mortgage lenders and servicers will be under enhanced scrutiny in the year ahead. First, the CFPB issued policy guidance urging servicers to dedicate sufficient resources and staff to assist borrowers with their post-forbearance payment and loss mitigation options, and signaled it will resume a pre-pandemic enforcement posture. Additionally, in June of 2021 the CFPB issued its final amendments to Regulation X, establishing new protections for borrowers as the CARES Act provisions and other Federal and State foreclosure moratoria are phased out over the summer.

Fair lending will also be an area of federal regulatory scrutiny. In October, Attorney General Garland stated that combatting redlining will be a top DOJ priority in the year to come. Similarly, CFPB Director Chopra made public remarks signaling fair lending issues a focus for his agency. Director Chopra noted the Bureau will pursue bad actors, but also plans to watch practices that may result from implicit biases or oversight, raising the specter of enforcement exposure where lenders rely on stale or incomplete data, artificial intelligence, or algorithms to drive lending decisions.

Director Chopra likely also will bring renewed federal regulator interest into payday lending. Director Chopra announced that his agenda will also include re-evaluation of rules eased under the Trump administration, such as the rules applicable to payday lending. In addition to revisiting Director Kraninger's efforts at regulator relief, we anticipate increased Bureau activity under UDAAP that would target those practices — such as misrepresentations in connection with the collection of debt or the extension of credit — that are often identified by the Bureau in the course of its supervisory examinations. The CFPB is likely to continue to focus on certain billing and collection practices related to pay day lending, such as erroneous debiting or unauthorized, duplicative debits.

Finally, towards the end of 2021, the CFPB expressed interest in expanding the scope of payment processing-related regulation. In October 2021, the CFPB issued an information request to several major technologies in the payment services sector, seeking information on their business and process. The orders indicate the Bureau's increasing interest in big tech's management of payment systems and utilization of consumer information, and a focus on fintech markets. The orders were issued under the CFPB's rulemaking authority under the CFPA, as opposed to its enforcement or supervisory authorities. Although only an initial step, the move signals the Bureau's interest in rulemaking related to payment processing amid industry growth, which could ultimately bring about a future increase in related enforcement actions..

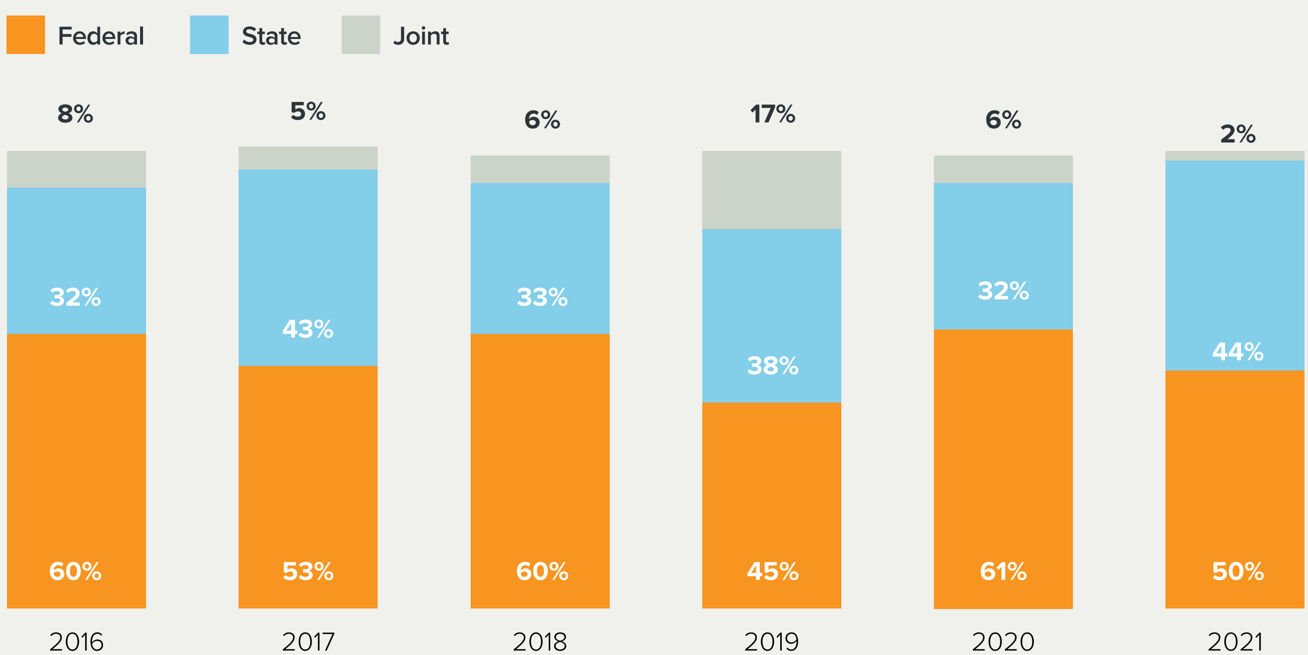
Consumer Data Rights in Financial Services

In July, President Biden issued an **Executive Order** on Promoting Competition in the American Economy in July 2021 (Order) impacting privacy and data security in the financial services industries. Two goals of the Executive Order are to ensure an open and competitive economy, but also to protect consumers' privacy rights with respect to new industries and technologies. In October 2020, the Consumer Financial Protection Bureau (CFPB) had issued advance notice of proposed rulemaking (ANPR), asking the public how the CFPB might most efficiently and effectively develop regulations to implement Section 1033 of the CFPA which governs consumers' rights to access their records from financial service providers. The President's Order directs the CFPB to consider rulemaking "to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products," and also to enforce the UDAAP prohibition in the CFPA "to ensure that actors engaged in unlawful activities do not distort the proper functioning of the competitive process or obtain an unfair advantage over competitors who follow the law." The CFPB is analyzing both the benefits to consumers in accessing their data, as well as the costs to the consumer in terms of privacy and data security, and expects to commence a rulemaking process in the spring of 2022.

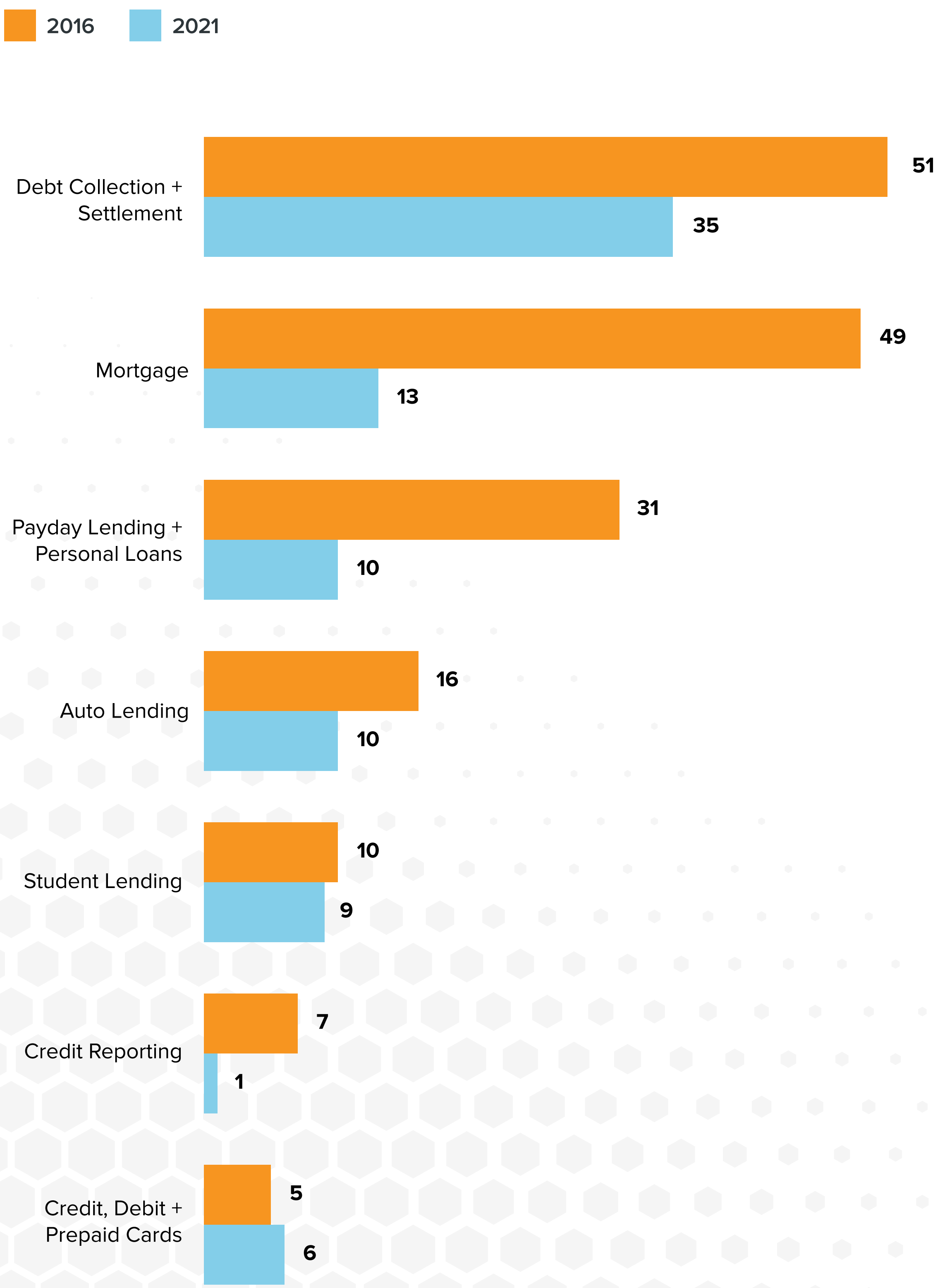
The *Madden* Fix Lawsuits

As noted in Goodwin's 2020 Year In Review, in June 2020 the OCC and Federal Deposit Insurance Corporation (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" Doctrine — that a transaction valid when made remains valid upon transfer. In early June 2020, 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" Doctrine.

Proportion of State-Federal Actions



Tracking Action by Production 2016 + 2021



In August 2020, seven states — California, Illinois, Massachusetts, Minnesota, New Jersey, New York, and North Carolina — and the District of Columbia filed suit against the FDIC in the U.S. District Court for the Northern District of California, captioned *People of the State of California, et al. v. FDIC*, No. 20-5860 (FDIC Action), regarding the FDIC's "valid when made" doctrine. In July 2020, a smaller group of states — California, Illinois, and New York — also filed suit in the Northern District of California against the OCC, captioned *People of the State of California, et al. v. The OCC*, No. 20-5200.

The states in both actions argue that the rules violate the Administrative Procedures Act (APA). The states claim that they, like many states, impose maximum interest rate caps to prevent lenders from charging excessive rates on consumer loans, which are intended to protect consumers from excessive interest rates that make it difficult for consumers to repay loans. The states also assert that the FDIC and OCC rules are an impermissible attempt to overturn *Madden*. The states claim the agencies failed to meaningfully consider the rules' inevitable facilitation of predatory "rent-a-bank" schemes by permitting lenders to evade state law by partnering with national banks. Further, the states argue that the FDIC's new rule impermissibly extends this preemption to non-FDIC Banks.

The parties' respective motions for summary judgment have been fully briefed in both actions for some time, and the U.S. District Court for the Northern District of California is likely to rule in 2022. The outcome of these lawsuits may significantly impact the secondary market for loans originated by national banks.

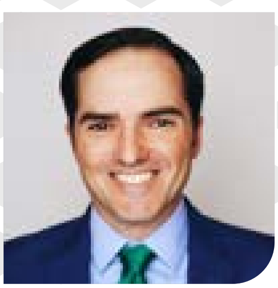
Authors

Anthony Alexis, *Partner*
aalexis@goodwinlaw.com

Tony Alexis is a partner in Goodwin's Complex Litigation & Dispute Resolution Practice and serves as the head of the firm's Consumer Financial Services Enforcement Practice. His practice focuses primarily on consumer financial services and government and regulatory investigations. Prior to joining Goodwin in 2017, Mr. Alexis served as Assistant Director and Head of the Office of Enforcement at the CFPB, where he developed and managed the CFPB's enforcement strategy, consumer financial investigations and litigation. He also coordinated strategy, investigations and litigation in areas such as payday/short-term loans, mortgages, credit cards, credit reporting, debt collection, student and automobile lending, and payments systems with leaders of the enforcement and regulation departments. Mr. Alexis also served as a member of the CFPB's Executive Committee and its Civil Penalty Fund Governance Board. He joined the CFPB as the Deputy Enforcement Director for Field Litigation, and was responsible for enforcement work conducted by enforcement's four regional offices.

Sabrina M. Rose-Smith, *Partner Chair, CRED@Goodwin*
srosesmith@goodwinlaw.com

Sabrina Rose-Smith is a partner in Goodwin's Complex Litigation & Dispute Resolution and Consumer Financial Services Litigation practices. Her nationwide practice includes both defending financial institutions against consumer class actions and government enforcement actions, and regulatory compliance counseling for banks, credit card issuers, mortgage lenders and specialty finance companies. She is the lead editor of Goodwin's **LenderLaw Watch** blog, a firm blog that monitors and chronicles legal developments in the consumer financial services industry. Ms. Rose-Smith defends her financial services clients in cases involving the TILA, FDCPA, FCRA, RESPA, FHA, ECOA, FIRREA, TCPA, state and federal UDAP statutes and other alleged violations of law arising from her clients' lending, servicing and/or collections activity.



W. Kyle Tayman, *Partner*
ktayman@goodwinlaw.com

Kyle Tayman is a partner in the firm's Complex Litigation & Dispute Resolution and Consumer Financial Services Litigation practices, and is also a member of the Government Investigations + Enforcement, Fintech and Antitrust practices. Mr. Tayman concentrates his practice on representing and defending banks and financial institutions in government investigations and enforcement actions, False Claims Act litigation, consumer class actions and complex litigation. He is the lead editor of Goodwin's **Consumer Finance Enforcement Watch** blog, which is the marketplace's first resource for real-time reporting on the full range of public federal and state consumer finance enforcement activity. Mr. Tayman regularly represents clients in government investigations brought by the CFPB, DOJ, FTC, HUD, and state attorneys general, and defends clients in complex commercial litigation and class action matters at the trial and appellate levels of federal and state courts.

For more information, please visit **www.lenderlawwatch.com** or **www.enforcementwatch.com**

Matt Riffee, *Partner*

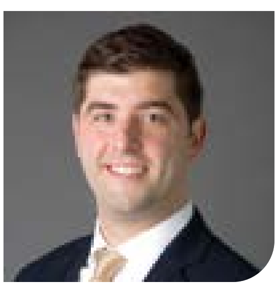
mriffee@goodwinlaw.com

Matt Riffee is a partner in Goodwin's Financial Industry group and ERISA Litigation and Consumer Financial Services Litigation practices. Mr. Riffee's practice focuses on ERISA litigation, class actions, and counseling and representing banks and financial institutions in government investigations and enforcement actions. He regularly litigates class actions and derivative actions under ERISA, and counsels and represents financial services companies in litigation and enforcement matters concerning an array of financial services and products, including mortgages and ERISA-covered retirement plans.

Levi Swank, *Partner*

lswank@goodwinlaw.com

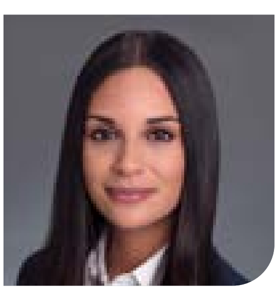
Levi Swank is a partner in the firm's Financial Industry group and Consumer Financial Services Litigation practice. Mr. Swank represents banks, non-bank financial institutions, and fintech companies in complex litigation, appellate, and government enforcement matters. He has served as counsel of record in federal and state courts around the country, including the United States Supreme Court, and has represented numerous banks and fintech companies in investigations and administrative enforcement proceedings initiated by the Consumer Financial Protection Bureau and the Department of Housing and Urban Development.



Andrew Bastnagel, *Associate*

abastnagel@goodwinlaw.com

Andrew Bastnagel is an associate in Goodwin's Complex Litigation & Dispute Resolution and Financial Industry Litigation practices. He joined Goodwin in 2017.



Stella Padilla, *Associate*

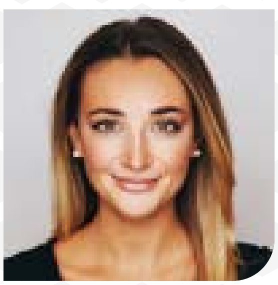
spadilla@goodwinlaw.com

Stella Padilla is an associate in Goodwin's Complex Litigation & Dispute Resolution, Financial Industry Litigation and Consumer Financial Services Litigation practices. Her practice focuses on the representation of financial services institutions in litigation matters, including class action litigation and enforcement actions brought by the Consumer Financial Protection Bureau and state attorneys general.

Contributors

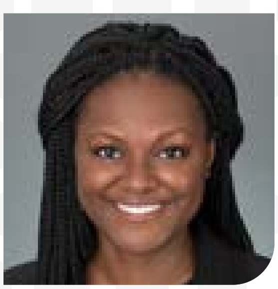
Courtney Hayden, *Counsel*
chayden@goodwinlaw.com

Laura S. Craven, *Sr. Attorney*
lcraven@goodwinlaw.com



Tierney Smith, *Associate*
tierneysmith@goodwinlaw.com

Virginia McCorkle, *Associate*
vmccorkle@goodwinlaw.com



Angelica Rankins, *Associate*
arankins@goodwinlaw.com

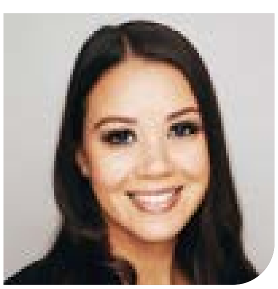
Samantha Becci, *Associate*
sbecci@goodwinlaw.com

Kelsey Pelagalli, *Associate*
kpelagalli@goodwinlaw.com

Jacqueline Odum, *Associate*
jodum@goodwinlaw.com

Amelie Hopkins, *Associate*
arankins@goodwinlaw.com

Collin Grier, *Associate*
arankins@goodwinlaw.com



Viona Harris, *Associate*
vharris@goodwinlaw.com

Kelly Grosshuesch, *Associate*
kgrosshuesch@goodwinlaw.com


GOODWIN
goodwinlaw.com/cfs