CONSUMER FINANCE
2017 YEAR IN REVIEW

Mortgage Origination + Servicing | Credit/Debit/Prepaid Cards
Credit Reporting | Student Lending | Auto Lending
Payday/Small Dollar Lending | Debt Collection + Debt Settlement
Telephone Consumer Protection Act

GOODWIN

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OVERVIEW

The consumer financial services industry began 2017 with optimism, as well as considerable uncertainty with the new Administration in the White House, knowing only that the year would bring change. And change it did bring (along with some drama that the new Administration is known to stir). Looking back now at the leadership change at the Consumer Financial Protection Bureau (CFPB), the turnover experienced at various regulatory agencies, the continued rise of state-level actors, and the new rules, lawsuits, and enforcement actions of 2017, has provided the industry with lessons learned and portends what is ahead for 2018. In order to stay competitive—and to avoid government and public scrutiny and costly consumer litigation—lenders must stay on top and ahead of changes in the law, new regulatory interpretations, and shifting legislative and enforcement priorities. Through our LenderLaw Watch and Consumer Finance Enforcement Watch blogs, Goodwin's Financial Industry Practice analyzed key industry, legal, and regulatory developments and provided real-time reporting on a range of federal and state consumer finance enforcement activity, keeping our clients current and informed on the latest happenings and their impact on the industry. We also continued to develop and grow our proprietary database of information on enforcement actions, allowing us to provide interactive data and quantitative enforcement trend analysis in real-time.

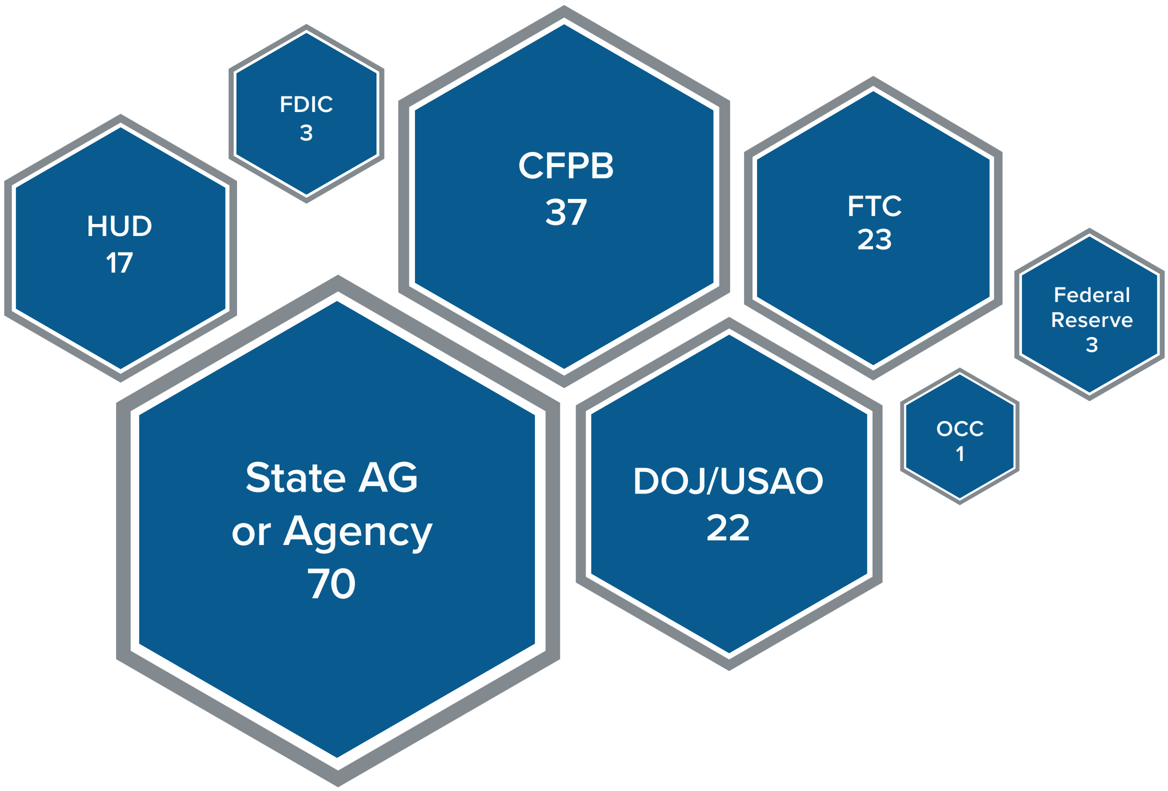
In this year-end review, we synthesize our prior coverage of the most significant developments from 2017, and offer some predications on what the industry might expect in 2018 in the mortgage, credit card, student lending, credit reporting, auto lending, payday lending, debt collection and debt settlement, and Telephone Consumer Protection Act (TCPA) areas, with a focus on changes we expect the new CFPB leadership and the current Administration will bring to bear on the industry.

KEY TRENDS

2017 began with optimism among the industry about the change in Administration, but uncertainty as to the Administration's legislative, regulatory, and enforcement priorities. As the year took hold, we observed that state enforcement activity held steady, while federal enforcement activity gradually trended downward. Total damages, penalties, and costs obtained through enforcement actions decreased even more significantly this past year. And although federal agencies—notably, the CFPB—continued their track record of industry reform through regulations and rules, many of those regulations were met with resistance or repeal by Congress, or were ignored by the Administration. The future of such regulations—some years in the making—may depend on the identity of the next director of the CFPB, and the results of the 2018 midterm elections.

We tracked a slight decrease in enforcement activity in 2017, largely attributable to the decrease in activity by several federal agencies, and a noticeable decline in actions related to auto lending. State enforcement was generally in line with 2015 and 2016 activity, but federal

TOTAL ACTIONS BY AGENCY



enforcement actions were fewer, and recoveries less. Notably, we observed a decrease in enforcement actions taken by 2015 and 2016's main federal actors—the CFPB, the Department of Justice (DOJ), and U.S. Attorneys. This likely is due to the near conclusion of financial crisis-related litigation and the new Administration. Consumer Finance Enforcement Watch will continue to track and monitor these agencies as we expect that this trend will continue in 2018.

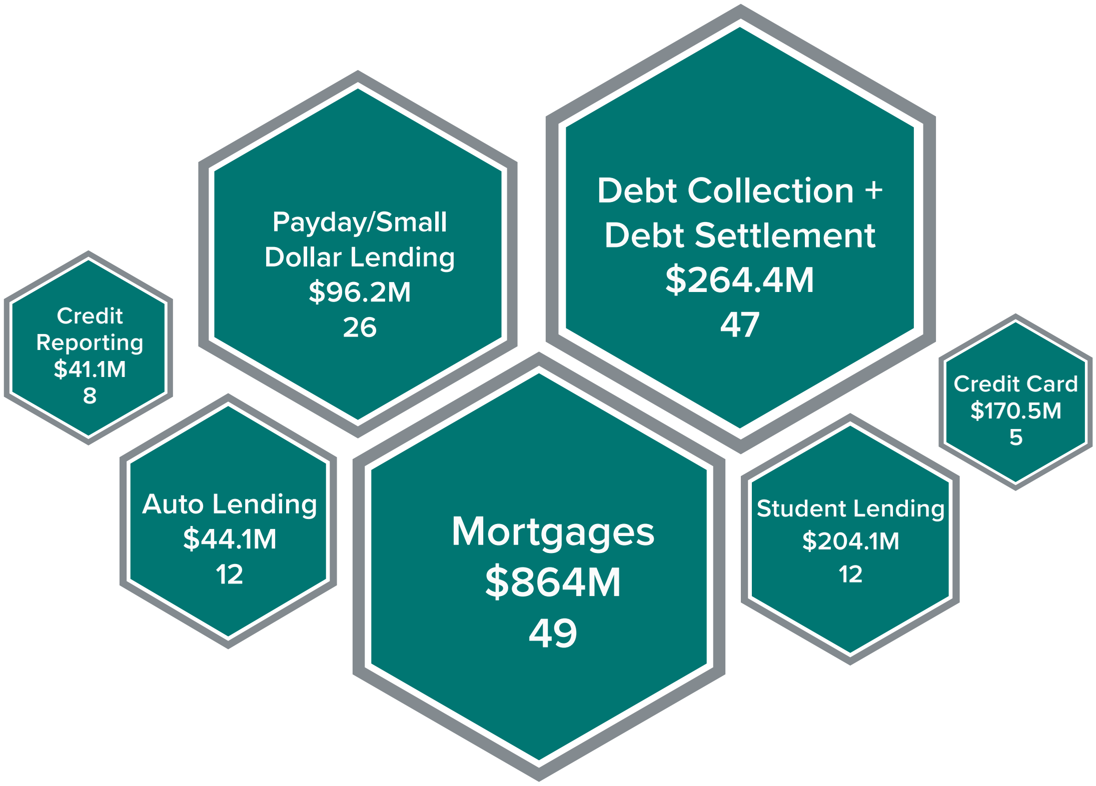
The Administration and Republican-controlled Congress made their mark in the regulatory arena in 2017. Although the CFPB continued to issue and implement significant new regulations, including expanding ability-to-pay requirements for payday and auto lending, those rules and proposals were met with opposition. Congress repealed the CFPB's arbitration rule, and has threatened to repeal several other significant CFPB rules through its powers under the Congressional Review Act (CRA).

Given turnover at the CFPB and conflict (and litigation) over its control following Director Richard Cordray's resignation—not to mention the influx of new appointees across all federal agencies—fewer federal enforcement actions and deregulation could be the new norm for the foreseeable future. This, combined with federal agencies continuing to adjust their enforcement and regulatory priorities as they transition away from their financial crisis-era focus and confront new technology, products, and services, means that it is more important than ever that consumer finance companies monitor this shifting landscape.

2017 HIGHLIGHTS

Several industries saw a marked decrease in enforcement activity in 2017, largely attributable to shifting Administration priorities and fewer actions arising from the financial crisis. Despite the recent turnover and turmoil at the agency, the CFPB's regulatory and enforcement branches remained active, proposing and finalizing several new rules and regulations. 2017's major developments included:

2017 TOTAL ACTIONS BY PRODUCT



New Rules Proposed or Implemented by the CFPB:

Arbitration Rule Rescinded. In July, the CFPB published a final rule banning companies from using mandatory arbitration agreements in contracts for specified consumer financial products. Congress swiftly passed a joint resolution disapproving of the final rule, which was signed by the President on November 1, 2017. The rule has since been removed from the Code of Federal Regulations (CFR).

Payday Lending and Small-Dollar Loans. In October, the CFPB issued a final rule requiring that payday lenders assess a borrower's ability to repay on "covered" small-dollar loans. The new rule was scheduled to take effect in January 2018, although compliance with some provisions was not to be required until August 2019. However, the CFPB has since announced its plans to reopen and reconsider the rule.

Auto Loans. As reported in last year's year-in-review, the CFPB proposed a new rule addressing auto title loans in June 2016, which was finalized in October 2017. The rule puts in place new ability-to-repay protections on certain short-term loans.

Home Mortgage Disclosure Act (HMDA). In April, the CFPB proposed amendments to clarify certain requirements under the HMDA. The amendments were set to take effect in January 2018 and require that certain lenders collect and disclose to the CFPB data points on mortgage lending activity to assist in the evaluation of community housing needs and discriminatory lending practices.

A Number of Significant Enforcement Actions, Including:

CFPB Files Lawsuit Against Largest U.S. Student Loan Servicer. In January, the CFPB filed a lawsuit against Navient, the country's largest servicer of private and federal student loans. The suit alleged that Navient employed certain deceptive servicing practices, including automatically enrolling borrowers in expensive forbearance programs, failing to alert borrowers to payment deadlines, allowing payment processing errors, and providing false information about repayment options.

U.S. Attorneys Obtain $296 Million Judgment Against Allied Home Mortgage for Origination of FHA Mortgages. In September, the U.S. District Court for the Southern District of Texas entered a judgment against Allied Home Mortgage and its CEO, awarding the Government treble damages and statutory penalties. In December 2016, a jury found that the defendants violated the False Claims Act (FCA) and Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) in underwriting FHA-insured loans through shadow branches and by falsifying quality control reports.

CFPB Settles with Private Equity Firm That Facilitated Private College's Participation in Federal Loan Programs. In August, the CFPB filed a complaint and proposed settlement with Aequitas Capital Management, an Oregon private equity firm. The CFPB claimed that the firm purchased or funded some of Corinthian College's private student loans to make it appear that Corinthian was eligible for federal student loan funds. Nearly 41,000 students are eligible for approximately $183.3 million in loan forgiveness and reduction under the settlement.

American Express Pays $95 Million in Consumer Relief in Connection with Credit Card Discrimination Claims. In August, the CFPB entered into a consent order with two American Express subsidiaries. The CFPB alleged that the companies discriminated against consumers in Puerto Rico, the U.S. Virgin Islands, and other U.S. territories.

Federal Trade Commission (FTC) and Illinois AG Settle With "Phantom" Debt Collectors for $47 Million. In November, the FTC and Illinois Attorney General reached a settlement with affiliated Chicago-based debt collectors that allegedly used false and misleading tactics to collect on payday or other small-dollar loans. The action was part of "Operation Collection Protection," a joint federal-state enforcement effort targeted at deceptive and abusive collection practices.

Virginia, Florida, and Georgia Attorneys General Obtain Over $80 Million in Settlements with Online Payday Lender Western Sky Financial and CashCall, Inc. Following several adverse rulings in various state courts against CashCall, Inc. and Western Sky Financial, LLC, the attorneys general for Florida, Virginia, and Georgia entered into consent orders with the online payday lender and their affiliated entities, resolving allegations that the companies used a "rent-a-tribe" scheme to skirt state Annual Percentage Rate (APR) interest caps and usury laws. All told, these settlements secured over $80 million in consumer relief.

Appellate Highlights

D.C. Circuit Issues *En Banc* Decision in *PHH Corp. v. CFPB*. In January, the U.S. Court of Appeals for the D.C. Circuit issued its long-awaited *en banc* decision, holding that the provision of the Dodd-Frank Act shielding the single director of the CFPB from removal without cause is constitutional. Although it remains unclear whether or not the separation of powers issue will be the subject of a petition for certiorari to the Supreme Court, the decision was a significant win for the industry because the court upheld the prior panel's opinion and interpretation of Section 8 of the Real Estate Settlement Procedures Act (RESPA), including the panel's interpretation of Section 8(c) as a "safe harbor" and the panel's holding that the CFPB could not retroactively apply its interpretations of RESPA without violating due process.

Courts Revise *Spokeo*'s Standing Analysis. Courts continue to wrestle with how to apply *Spokeo*'s two-part concreteness test for Article III statutory standing—"(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interest (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged . . . actually harm, or present a material risk of harm to, such interests." This has led to a blurred line demarcating whether an injury exists or not.

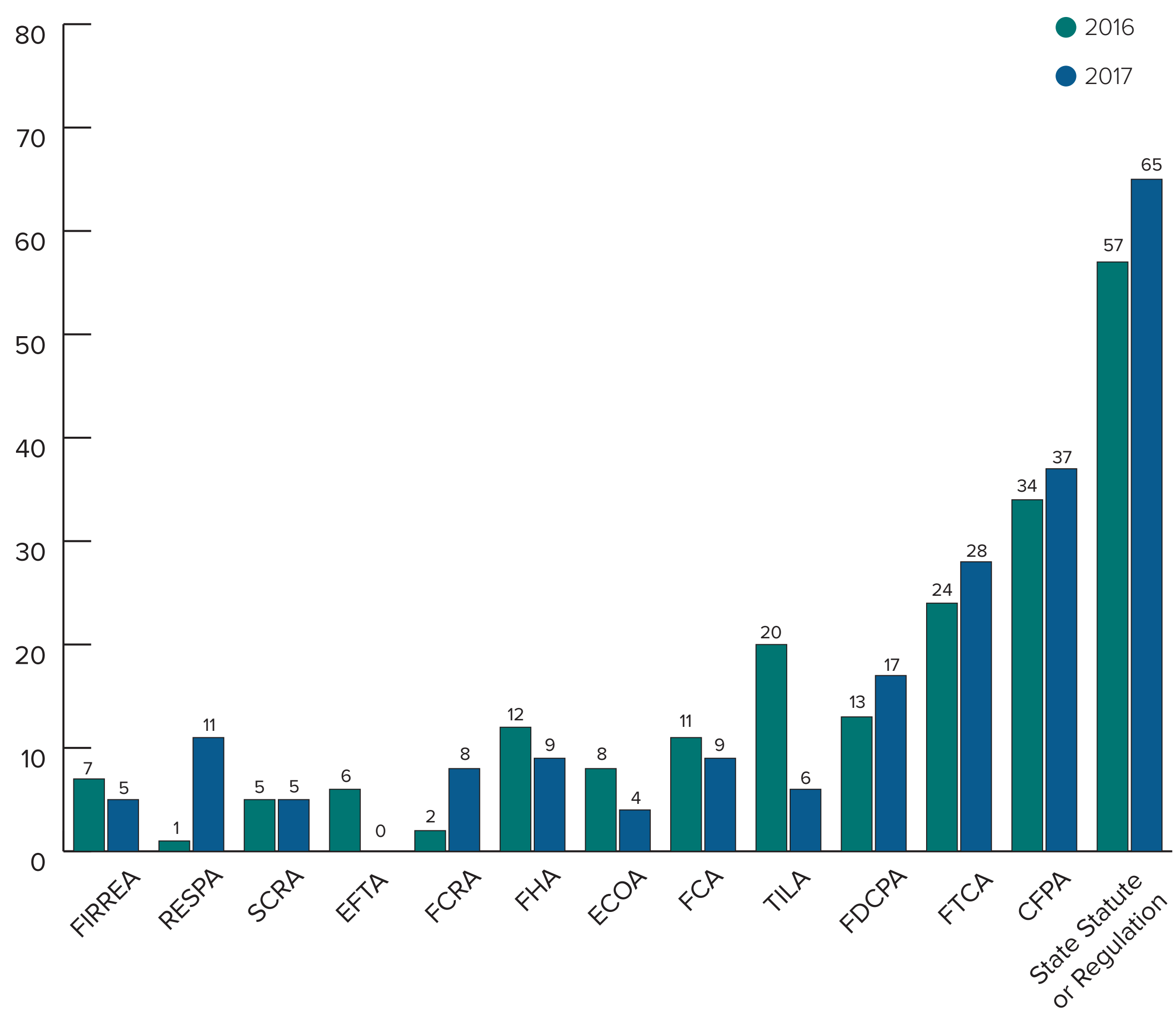
LOOKING AHEAD TO 2018

While federal agencies are likely to remain at the forefront of enforcement activity, state actors are expected to continue the trend, first observed last year, of increasing their enforcement footprint. In late December, Democratic leaders in Congress took notice of this shift toward the increase in state enforcement actions by introducing a bill—the Accountability for Wall Street Executives Act of 2017—which, if passed, would further arm state actors by permitting state attorneys general to issue subpoenas and investigate and examine national banks—actions otherwise prohibited by the Supreme Court's decision in *Cuomo v. Clearing House Association, LLC*, 557 U.S. 519 (2009).

The direction the CFPB will take in 2018 remains unclear as a result of the departure of former Director Richard Cordray and the subsequent conflict arising from Director Cordray naming Leandra English to fill his vacancy, and President Trump naming Mick Mulvaney as the acting Director. U.S. District Court Judge Timothy Kelly denied English's emergency request for relief and has ruled that English is not likely to prevail in her challenge to Mulvaney's appointment. English filed an amended complaint and moved for a preliminary injunction barring Mulvaney from serving as director, but on January 10, 2018, Judge Kelly denied English's request. This ruling set in motion an appeal to the D.C. Circuit. Until the court rules whether Dodd-Frank permits the outgoing Director to name a temporary replacement, the future of the director's seat remains uncertain. Regardless, however, a new Director will likely be nominated in the coming months.

Aside from determining the fate of CFPB leadership, courts may see a dwindling number of mortgage origination and auto lending cases, while enforcement agencies concentrate on loan servicing, credit lending, and credit reporting litigation. Meanwhile, the plaintiffs' bar is hopeful that courts will continue to refine and limit the application of *Spokeo*, which will determine the future course of private litigation under many consumer protection statutes. 2018 should also finally see a decision in a much-anticipated decision from the D.C. Circuit on the TCPA.

TOTAL ACTIONS BY STATUTE



MORTGAGE ORIGINATION + SERVICING

Goodwin tracked 49 federal and state enforcement actions related to mortgages in 2017. This matches the mortgage related actions in 2016, but remains a significant decrease from the 68 actions Goodwin tracked in 2015. The trend over the past two years suggests that actions arising directly from the financial crisis are dwindling, if not nearly extinguished, and also may be attributable to a new equilibrium between the mortgage industry and federal regulatory and enforcement agencies. The DOJ and U.S. Department of Housing and Urban Development (HUD) remained the most active federal agencies, initiating roughly half of the enforcement actions in 2017, although the CFPB remained a key player as well. State attorneys general combined to initiate one fifth of actions in 2017. The attorneys general of Massachusetts and New York remained particularly active, having brought eleven (11) and nine (9) actions, respectively, over the past three years.

The areas enforcers targeted in 2017 include alleged kickback schemes, Federal Housing Administration (FHA)-insured loans, discriminatory lending, mortgage modification and foreclosure relief services, and deceptive advertising. Enforcement agencies predicated these actions on a variety of statutes, including the FCA, Fair Housing Act, the Consumer Financial Protection Act (CFPA), and state consumer protection statutes. And enforcers secured civil money penalties and consumer relief in total of approximately $864 million (ranging from $5,000 to over $300 million), a drastic reduction from the $3.6 billion agencies secured in 2016 (ranging from $25,000 to over $1.2 billion).

KEY TRENDS

The DOJ continued to use the FCA to pursue national banks and non-bank lenders, alleging that during and after the financial crisis they recklessly or knowingly violated government guidelines when they underwrote FHA-insured loans. In 2016, DOJ secured 13 separate FCA settlements, and this past year 5 more lenders entered settlements with DOJ or HUD concerning FHA-insured loans.

DOJ and HUD also continued their aggressive approach to policing discriminatory lending practices, such as redlining and discretionary pricing policies.

While some of these actions netted significant recoveries, such as JPMorgan Chase Bank agreeing to pay $50 million over its discretionary pricing practices, most of these actions targeted state or regional lenders or insurers for “redlining” of minority neighborhoods or discriminating against individual loan applicants, resulting in small recoveries.

As Goodwin forecasted in 2016’s year-in-review, mortgage servicing became a focal point of the CFPB’s enforcement activity in 2017. According to the CFPB’s monthly complaint spotlight from January, mortgages continue to be the second most complained about topic (24%), and the vast majority of these complaints concern mortgage servicing (82%). Goodwin tracked seven enforcement actions related to mortgage servicing initiated by the CFPB this past year, compared to only one in 2016. These actions targeted misrepresenting required loss mitigation documentation, failing to consider borrowers for loss mitigation, and collecting improper fees.

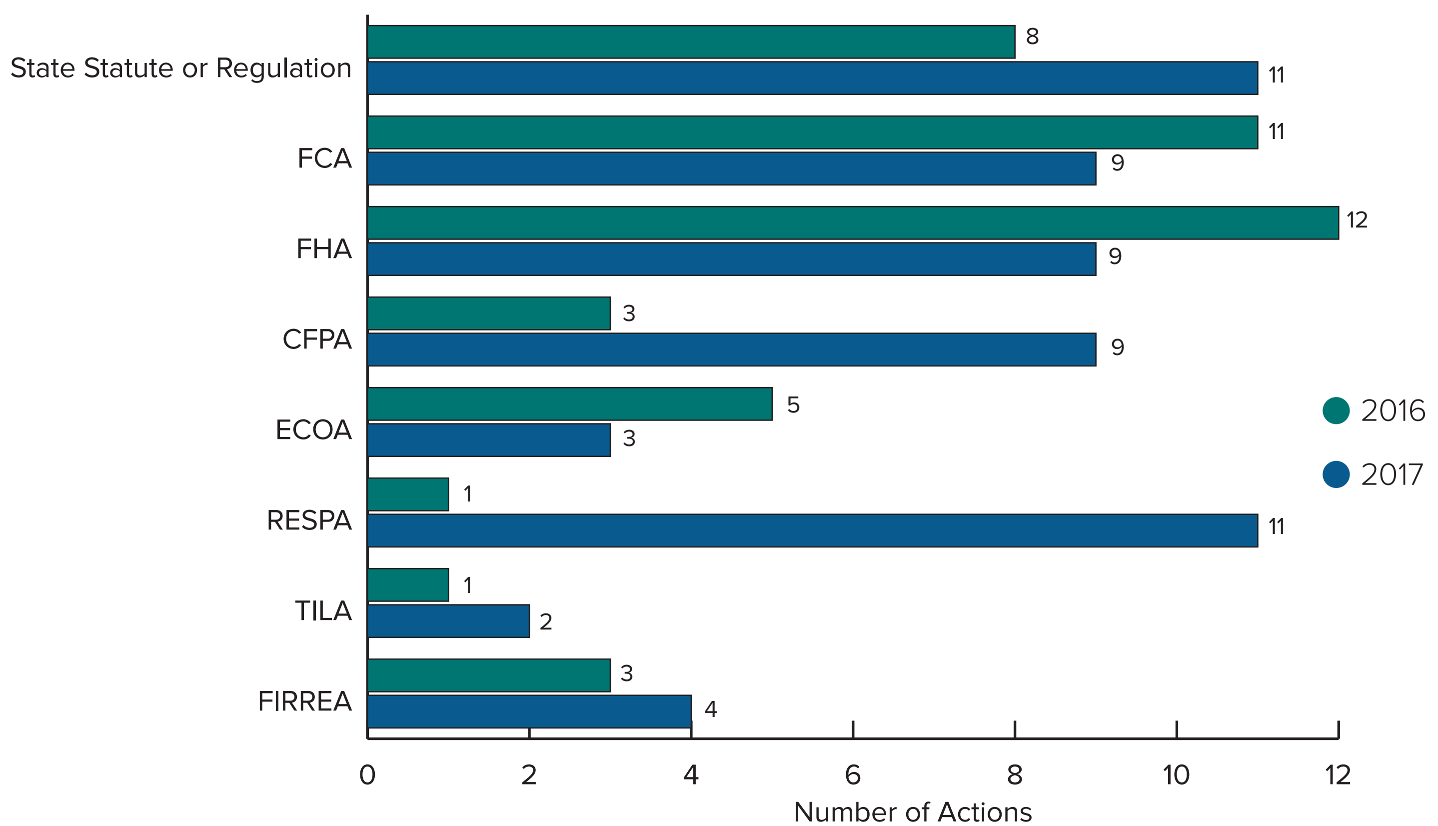
2017 HIGHLIGHTS

National Bank Pays Over $53 Million in Consumer Relief Over Discretionary Pricing Practices. In January 2017, the U.S. Attorney's Office for the Southern District of New York entered into a consent order with JPMorgan Chase Bank concerning loans originated between 2006 and 2009 through JPMorgan's wholesale loan channel. The consent order required that JPMorgan pay over $53 million in monetary damages, restitution, and disgorgement. The U.S. Attorney alleged that its data model projected that, as a result of JPMorgan's discretionary pricing practices, approximately 106,000 African-American and Hispanic borrowers paid higher rates and fees on mortgage loans than white borrowers did, and that therefore these practices violated Fair Housing Act and the Equal Credit Opportunity Act (ECOA).

CFPB Targets Marketing Service Agreements (MSAs). In January 2017 the CFPB announced that California real estate broker Willamette Legacy, LLC had agreed to pay a $3.5 million civil money penalty to resolve allegations that it had accepted payments under agreements with mortgage lenders that violated Section 8(a) of RESPA. While the CFPB released Compliance Bulletin 2015-05, which cautioned that MSAs may violate RESPA's anti-kickback provisions, this was the first action to also target desk-licensing agreements and co-marketing agreements. Zillow Group, Inc. announced this past year that the CFPB was also examining its digital co-marketing program with mortgage lenders for RESPA compliance.

CFPB Issues Proposed Amendments to HMDA. In April, the CFPB proposed amendments to clarify certain requirements under the HMDA. The HMDA requires certain lenders to collect and then disclose to the CFPB 42 data points on mortgage lending activity, with

ENFORCEMENT ACTIONS BY STATUTE



the goal of evaluating community housing needs and discriminatory lending practices. The proposed revisions include permitting some data fields to be marked as "not applicable" for loans originated before certain regulatory requirements took effect, clarifying the definitions of "temporary financing" and "automated underwriting system," and reiterating that financial institutions must report on purchased loans. Most HMDA provisions took effect on January 1, 2018.

Court Enters Judgment Against Mortgage Lender for Violating FHA Underwriting Requirements. In September, the U.S. District Court for the Southern District of Texas entered a $296 million judgment against Allied Home Mortgage, and a $25 million judgement against its CEO, after a jury found that they violated the FCA and FIRREA in underwriting FHA-insured loans through shadow branches and by falsifying quality control reports. This is the only case to go to trial so far concerning allegations that, during the financial crisis and its aftermath, a lender originated mortgage loans through HUD's direct endorsement program in violation of underwriting requirements.

CFPB Updates TILA-RESPA Integrated Disclosure Rule (TRID). In July, the CFPB finalized amendments to the "Know Before You Owe" mortgage disclosure rule, or TRID. These amendments allow a lender to exclude the finance charge from the total of payments calculation, clarify that a housing assistance loan's eligibility for a partial exemption for disclosure requirements is unaffected by the lender charging recording or transfer tax fees, and explain how a lender can provide separate disclosure forms to different parties to a transaction in order to protect privacy. Instead of fixing the compliance "Black Hole," where a closing delay results in a lender being unable to use the required Closing Disclosure form to reset fee tolerances, the CFPB issued a new proposal for public comment.

LOOKING AHEAD TO 2018

This year, the CFPB will be re-examining its mortgage-related regulations under the Dodd-Frank Act, as every five years the CFPB is required to review its regulations. The CFPB's 2018 review will encompass industry defining rules such as the ability-to-repay requirement. The CFPB has commented that it plans to examine whether the requirement has become too burdensome. It is far from certain that the requirement will survive the combination of industry pressure and a new CFPB director.

Mortgage servicing is likely to remain a focal point of the CFPB's enforcement energies. The Spring 2017 Supervisory Highlights noted that three mortgage servicing practices of particular concern were dual tracking, vague periodic statements, and errors in disbursing escrow funds. In October, the CFPB issued a proposed rule clarifying when servicers must provide periodic statements to borrowers in bankruptcy. That rule goes into effect in April 2018, so lenders should expect the CFPB to emphasize compliance with that rule during examinations or through enforcement actions.

Members of both political parties in Congress have introduced so-called "*Madden* fix" bills that would permit a nonbank entity that purchases loans from a national bank to charge the same rate of interest on the loans as the national bank. In 2015, the Second Circuit ruled in *Madden v. Midland Funding, LLC* that the National Bank Act did not preempt state law usury claims against nonbank assignees of a bank loan. Congress is likely to "fix" *Madden* by amending Section 85 of the Act to extend preemption of state law to third-party transfers.

Finally, trends observed in 2017, such as the CFPB's focus on RESPA or the DOJ's focus on discriminatory lending, are likely to continue. And to the extent federal enforcement begins to lag under new leadership, state attorneys general have indicated that they intend to pick up the slack to sustain, or even increase, enforcement. In December, a group of 17 Democratic state attorneys general, led by the New York and California attorneys general, informed President Trump that they intend to take enforcement into their own hands should the CFPB, under Director Mulvaney, fail to zealously enforce consumer protection laws.

WHAT TO WATCH

More HMDA updates from the CFPB | Increased RESPA activity | Continued focus on discriminatory origination and servicing practices

CREDIT/DEBIT/PREPAID CARDS

In 2017, Goodwin tracked 5 enforcement actions against credit card providers, vendors, and national banks, a slight decrease from the 7 tracked in 2016. The CFPB and the FTC brought two enforcement actions, with the U.S. Attorney for the Eastern District of Pennsylvania, the Florida Attorney General, and the New Mexico Attorney General each bringing one action. The enforcement agencies advanced matters using the Unfair, Deceptive, Abusive Acts or Practices (UDAAP) provision of the CFPA, the Unfair and Deceptive Acts or Practices (UDAP) provision of the FTCA, the ECOA, FIRREA, and state consumer protection laws. Despite the relatively small number of actions, the resulting proceeds were large, as the actions yielded in excess of $170 million in civil monetary penalties and consumer relief. Credit, debit, and prepaid card enforcement actions focused mostly on deceptive marketing practices.

Goodwin also covered multiple regulatory developments and identified a number of litigation risks for credit card providers, including the CFPB's spotlight report on credit cards and the now-rescinded CFPB final rule that would have limited pre-dispute arbitration clauses that prohibit consumers from participating in class actions.

KEY TRENDS

In 2017, enforcement authorities maintained an emphasis on deceptive marketing practices by credit card providers, vendors, and national banks. Unlike prior years, the actions were brought by a wider number of agencies and without a singular focus on any particular statute, with federal enforcers leading the charge. However, the Office of the Comptroller of the Currency (OCC) was notably absent in 2017 following their involvement in three large settlements in 2016.

While the volume and dollar value of actions decreased from 2016, enforcement agencies still recognized the high number of consumer complaints about credit cards and signaled strong interest in addressing such concerns. The CFPB, for example, featured a spotlight on credit card complaints in its March Monthly Complaint Report and that same month issued a notice and request for information on a number of credit card-related topics. And in December, the CFPB issued a report on the state of the credit card market, finding that the total amount of credit line, accounts, average amounts of card debt, and enrollment in online services have all increased over the past several years, signaling that the area has their attention.

2017 HIGHLIGHTS

CFPB Pre-Dispute Arbitration Rule Issued and Rescinded. In July, the CFPB issued and published a final rule to ban companies from using the pre-dispute arbitration agreements in contracts for specified consumer financial products, including credit cards and bank accounts. Mandatory arbitration provisions limit consumers' ability to bring class action lawsuits and instead require each individual to initiate a separate arbitration action. The rule officially took effect in September, but would have only applied to agreements entered into after March 19, 2018. That date will never come. Under the CRA, Congress passed a joint resolution disapproving of the final rule. The joint resolution was signed by the President on November 1, 2017. The Bureau's rule now has no force or effect, and the CFPB has since removed the final rule from the CFR.

CFPB Issues Notice and Request for Information on Thirteen Credit Card-Related Topics. In March, the CFPB sought commentary from the public about how the credit card market is functioning. The non-exhaustive list of topics spanned a wide range of issues, including the effectiveness of term disclosures; adequacy of protections against unfair, deceptive, or abusive acts and practices, or unlawful discrimination; deferred interest products; subprime specialist products; areas for technological innovation; secured credit cards; rewards programs; variable interest rates; and online and mobile account servicing. Respondents submitted 33 comments by the June 2017 deadline.

American Express Paid $95 Million for Consumer Relief in Connection with Discrimination Claims. In August, the CFPB entered into a consent order with two American Express subsidiaries following allegations that the companies discriminated against consumers in Puerto Rico, the U.S. Virgin Islands, and other U.S. territories. According to the CFPB, the subsidiaries engaged in discriminatory practices that included charging higher fees and interest rates; offering less advantageous promotional offers; denying credit to certain Puerto Rico applicants who would have been approved for comparable cards had they lived in the 50 U.S. states; and requiring more money to settle debts. The CFPB ultimately did not assess penalties because American Express self-reported the violations, self-initiated remediation for the harm done to affected consumers, and fully cooperated in the CFPB's review and investigation.

NetSpend Settled with FTC for $53 Million Over Prepaid Debit Cards. In March, NetSpend entered into a stipulated final order to pay up to $40 million in consumer relief and $13 million in reimbursed customer fees arising from allegations that the prepaid card provider deceived customers about access to deposited funds. The FTC focused on the marketing materials and guarantees posted on the company's website, alleging a gap between services advertised and those offered.

LOOKING AHEAD TO 2018

The CFPB's arbitration rule would have made a big splash in 2018, but the recent Congressional resolution blocking the rule all but eliminates the initiative—for now. The move also signals that the CFPB's ongoing interest in regulating credit and prepaid card products could be met with strong resistance from Congress and the White House. The industry should pay attention to developments from the CFPB, in particular concerning trending consumer complaints highlighted in the CFPB's March Spotlight about dispute resolution, reward programs, late fees and servicing costs, and issues related to the issuance of credit cards.

WHAT TO WATCH

Tensions between CFPB and Congress on regulation of credit/prepaid cards |
Increasing CFPB focus on credit and debit card enforcement

CREDIT REPORTING

In 2017, Goodwin followed 9 enforcement actions related to credit reporting or credit repair services, representing a slight increase from the 7 tracked in 2016. Unlike other areas, credit reporting and repair continues to be a federal focus, as all nine actions were brought by federal agencies—the CFPB brought eight of the actions, while the FTC brought one. The actions generally targeted credit reporting agencies and credit repair companies for alleged violations of the Fair Credit and Reporting Act (FCRA), the UDAAP provision of the CFPA, and the FTC Act. The CFPB alone collected civil monetary penalties totaling $15.85 million, and obtained restitution or disgorgement totaling another $18.1 million. These enforcement actions mostly involved the illegal charge of advance fees and the misrepresentation of the ability to repair consumers' credit by repair companies, and the misrepresentation of the validity of credit scores and improper advertising practices by reporting companies. The CFPB has also increased its focus on monitoring the actions of furnishers of credit reporting information.

KEY TRENDS

As predicted in 2016's year-in-review, and as LenderLaw Watch further noted last spring, the CFPB, in contrast to state agencies, has continued its efforts to pursue enforcement actions against credit repair companies and credit reporting companies.

2017 saw the CFPB increase its enforcement efforts in the area of credit reporting and repair relative to 2015 and 2016. In 2017, the Bureau brought enforcement actions against credit repair companies for requiring illegal advance fees, for falsely advertising their ability to repair consumers' credit scores, and for misleading consumers about certain limitations of these companies' money back guarantees.

The CFPB also increased its focus on ensuring accurate credit reporting, bringing actions against both credit reporting agencies (CRAs) and furnishers of credit reporting information. The CRA and credit reporting actions involved alleged misrepresentation of the accuracy of the credit score reported, deceptive advertisement of credit monitoring services, and improper recordkeeping practices.

The $15.85 million in civil money penalties the CFPB collected over eight actions represents an increase over 2016.

2017 HIGHLIGHTS

The CFPB Imposes Civil Penalties Against Three Major Credit Reporting Agencies. In January and March 2017, the CFPB entered consent orders against TransUnion, Equifax, and Experian for alleged violations of the UDAAP provisions of the CFPA and the FCRA. In addition to $17.6 million in restitution, the CFPB imposed $8.5 million in civil monetary penalties. The alleged illegal activities included failing to inform consumers that the credit scores the CRAs marketed and sold were not the same scores that lenders used, and the purported use of misleading advertisements for the CRAs' credit monitoring services. The CFPB further alleged that the disclosures and disclaimers offered by the three CRAs in connection with their credit reporting and monitoring activities were not sufficiently clear and conspicuous.

The CFPB Obtains $4.6 Million Penalty from JPMorgan Chase Concerning Furnishing of Credit Reporting Information. In August, the CFPB entered into a consent order with JPMorgan Chase Bank, N.A. that imposed $4.6 million in civil monetary penalties against the bank. The CFPB alleged that JPMorgan failed to establish appropriate processes to ensure that accurate information was being provided to credit reporting agencies, inform consumers of their right to dispute inaccurate credit information, and provide key information to consumers concerning the bank's denial of their checking account applications.

LOOKING AHEAD TO 2018

Despite the recent changes to the Bureau, we anticipate that credit reporting and repair will remain a focus of the CFPB's enforcement activities in 2018. In March, the Bureau issued a Special Edition of its Supervisory Highlights Report, which focused on credit reporting. Former Director Cordray also delivered remarks on the topic. Both the report and the Director's remarks made clear that the CFPB's efforts regarding credit reporting would focus on three types of entities and their actions: (1) furnishers of credit reporting information and their credit recordkeeping and reporting procedures; (2) consumer reporting companies and their information vetting practices; and (3) entities that use credit reporting information to make credit decisions. We expect that the Bureau's scrutiny of the activities of these types of entities will continue in 2018, with a focus on accurate credit recordkeeping and reporting.

Additionally, we are tracking the potential expansion of FCRA liability beyond "traditional" credit reporting agencies to companies that handle or process consumer information. In July, a New Jersey federal district court considered whether a health insurance company qualified as a consumer reporting agency subject to the FCRA. The outcome of this case may inform whether such expansion of FCRA liability should be expected in the future.

WHAT TO WATCH

Scrutiny of credit repair services and credit reporting agencies | Increased focus on accuracy by furnishers of credit reporting information | Expansion of FCRA liability

STUDENT LENDING

During 2017, Goodwin tracked 12 federal and state enforcement actions related to student lending, representing a slight increase in comparison to the 10 actions Goodwin tracked in 2016. These actions included litigation, administrative actions, settlements, and investigations involving student loan servicers, a college accreditation organization, student loan debt relief providers, and a student loan trust securitizer. In bringing these actions, enforcers relied primarily on the CFPA and general state consumer protection statutes.

KEY TRENDS

In contrast to 2016, most student lending enforcement actions in 2017 were brought by the federal government, rather than the state attorneys general. The CFPB was the most active participant, having brought over half of the enforcement actions, either alone or in conjunction with another agency. As Goodwin noted in last year's issue, it was expected that the CFPB was likely to increase its enforcement activity in this area in 2017.

Student lending enforcement activity continued to shift in 2017 from a focus in recent years on private educational institutions to student loan servicing. The CFPB's 50-State Snapshot reported that, as of the end of 2016, student loan borrowers collectively owed more than $1.4 trillion in student loan debt. The CFPB kicked off the year by filing a lawsuit against student loan servicing giant Navient, and followed with three more lawsuits later in the year against student loan servicers.

States remained active in the student lending space through legislation rather than enforcement. The District of Columbia released a "Student Loan Borrower's Bill of Rights" under the District's student loan servicing act, which became effective in February 2017. The Bill "sets out the basic principles and protections that borrowers can rely on as they work to reduce their student debt." The Illinois Legislature recently enacted legislation over the governor's veto, which establishes a licensing regime for student loan servicers and prohibits a litany of servicing practices that the Illinois attorney general may sue to enforce. Similar bills were introduced in at least seven states.

2017 HIGHLIGHTS

CFPB Files Lawsuit Against Largest U.S. Student Loan Servicer. In January 2017, the CFPB filed a lawsuit in Pennsylvania federal court against Navient, the country's largest servicer of private and federal student loans, alleging that it employed deceptive servicing practices, including automatically enrolling borrowers in expensive forbearance programs, failing to alert borrowers to payment deadlines, allowing payment processing errors, and providing false information about repayment options. In August, the court denied Navient's motion to dismiss the CFPB's lawsuit, and the case proceeded to discovery. Navient services more than $300 billion in student loans. Lawsuits were also filed against Navient by the attorneys general of the states of Washington, Illinois, and Pennsylvania.

Federal Judge Allows Immigrant Lending Discrimination Case to Proceed. In January 2017, an immigrant authorized to work in the United States under DACA filed a putative class action in the Northern District of California, captioned *Perez et al. v. Wells Fargo & Co. et al.*, No. 17-454 (N.D. Cal. Jan. 31, 2017), alleging that Wells Fargo Bank, N.A. discriminated against her by denying her a student loan based on her citizenship status. In August, a federal judge held that the immigrant alleged claims under federal and California discrimination laws, and allowed most of the case to proceed. This decision is important because the court gives some weight to the theory that denying a loan based on a borrower's immigration status could be discriminatory where federal law protects that individual from deportation.

CFPB Settles with Private Equity Firm That Facilitated Private College's Participation in Federal Loan Programs. In August, the CFPB filed a complaint and proposed settlement with Aequitas Capital Management, an Oregon private equity firm, that the CFPB alleged purchased or funded some of Corinthian College's private student loans to make it appear that Corinthian was eligible for federal student loan funds by receiving external revenue. The CFPB alleged that, in fact, Corinthian Colleges paid Aequitas Capital to enact the charade in order to maintain its students' access to federal loan programs. Nearly 41,000 students could be eligible for approximately $183.3 million in loan forgiveness and reduction under the settlement.

Massachusetts Attorney General Sues Servicer Over Public Service Loan Forgiveness. In August, the Massachusetts Attorney General sued the Pennsylvania Higher Education Assistance Agency (PHEAA), one of the nation's largest servicers, alleging that it deprived public servants of relief under the Public Service Loan Forgiveness (PSLF) Program, a federal student loan forgiveness program. The lawsuit alleges that, among other practices, the loan servicer misprocessed borrowers' applications for income-driven repayment plans and miscalculated borrowers' qualifying payments. This action is a reminder that state attorneys general can and do enforce certain federal statutes, including the CFPA.

LOOKING AHEAD TO 2018

Student loan servicing is likely to remain in the crosshairs of the CFPB. The CFPB focused on student loan servicing in its April Supervisory Highlights, and noted that two student loan servicing practices were particularly concerning. First, it noted servicers sometimes receive incorrect information about students' enrollment status, causing premature termination of deferment status and a failure to reimburse fees and interest charges after the error is discovered. Second, the CFPB noted that some servicers provide misleading information about how interest is capitalized during successive deferment periods, and make it appear that all interest is capitalized at once, rather than at the end of each deferment period. The CFPB's focus on these issues may signal future enforcement actions as to lenders' treatment of accounts in deferral.

State attorneys general may also use new tools at their disposal to target student loan services. As more states pass student loan bills of rights, lenders may seek protection from these state laws. In July, the National Council of Higher Education submitted a letter to the U.S. Department of Education requesting guidance as to whether such laws were preempted for loans made under federal student lending programs. Regardless of the answer, student lenders are likely to challenge these new laws in federal court on preemption grounds. Even if such challenges are successful however, state enforcement agencies can rely on the CFPA and UDAP/UDAAP statutes to pursue student loan servicers.

WHAT TO WATCH

CFPB focus on student loan servicing | U.S. Department of Education's response on student loan bills of rights | Increased litigation over student loan forgiveness programs

AUTO LENDING

In 2017, Goodwin tracked 12 auto lending enforcement actions. This is a 25% decrease from the 16 auto loan actions tracked in 2016. Unlike last year, state attorneys general brought the majority of new actions, whereas federal enforcement in the area was virtually non-existent. The Massachusetts Attorney General was the most active regulator, bringing three auto lending actions in 2017. Single federal actions were also brought by the FTC, CFPB, and DOJ respectively.

2017 also saw the CFPB propose and finalize a new rule providing increased protections on short-term auto loans. However, the impact of the rule may be diminished by the GAO's determination that the CFPB's Bulletin relating to indirect auto lending and compliance with the ECOA was in fact a "rule," thereby making it subject to Congressional review and potential repeal. And as the CFPB announced in December 2016, the Bureau no longer intends to bring fair lending enforcement actions against auto lenders, and instead will focus on supervisory compliance, unless the CFPB changes course, we do not expect to see a recurrence of fair lending actions in auto lending.

2017 TRENDS

There was a substantial decrease in auto lending enforcement actions in 2017, as the CFPB became largely inactive in the area, bringing only one action—down from eight in 2016 and seven in 2015. The FTC and DOJ also contributed to the overall decrease in auto loan enforcement, as they generally remained inactive in the area. The overall decrease in auto lending enforcement likely corresponds with the CFPB's finding, in a recent quarterly report, that auto lending activity has cooled over the last year.

Despite the overall decrease in enforcement activity, 2017 did see continued activity by state attorneys general and agencies. State actions accounted for 90% of civil penalties, 80% of consumer relief, and 77% of restitution assessed in auto lending enforcement actions in 2017. State attorneys general pursued auto lenders for various violations of state consumer protection statutes, including misleading advertisements, lease offers, and disclosures; usurious interest rates; and unlicensed state activity.

In addition, although federal regulators brought far fewer actions in 2017, the CFPB demonstrated its willingness to enforce prior consent orders where auto lenders failed to properly adhere to the terms. For example, the CFPB determined that an auto lender provided worthless credits rather than refunds to consumers affected by its illegal debt collection practices, and ordered the lender to provide proper credits in the amount of nearly $1.1 million.

2017 HIGHLIGHTS

CFPB Passes Final Auto Title Loan Rule. Last year, the CFPB proposed a new rule addressing auto title loans. The rule was finalized in October, and puts into place new ability-to-repay protections on certain short-term loans. Under the new rule, lenders must conduct a "full-payment test" upfront and determine that borrowers can repay all or most of the debt at once. For single-payment auto title loans in particular, lenders must determine that the borrower has sufficient income to pay the loan and to meet major financial obligations and basic living expenses during the term of the loan and for 30 days after paying off the loan.

CFPB Auto Finance Bulletin Is Subject to Congressional Review. In December, the Government Accountability Office (GAO) issued a determination that CFPB Bulletin 2013-02 ("Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act") is a "rule" subject to the CRA. The bulletin set forth the CFPB view that certain lenders that offer auto loans through dealerships are responsible for "dealer markups" charged to consumers. Pursuant to the CRA, the indirect auto finance bulletin can now be disapproved by a simple majority vote in Congress, thereby enhancing congressional oversight over auto lending and ECOA enforcement by the CFPB.

Joint Investigation by State Attorneys General Results in $25.8 Million in Settlements. In March, the Massachusetts and Delaware Attorneys General announced settlements with Santander Consumer USA Holdings Inc., resolving allegations that Santander originated unfair and usurious automobile loans in violation of Massachusetts and Delaware consumer protection laws. According to the AGs, Santander originated subprime loans to more than 2,000 Massachusetts and Delaware consumers despite knowledge that the income reported on the loan applications was inflated or otherwise incorrect. Santander then sold the subprime loans to investors on the secondary market. The settlements were the result of a joint investigation conducted by the Massachusetts and Delaware AGs.

Under the Massachusetts settlement, Santander was to pay $16 million in loan relief to affected consumers and a $6 million payment to the Commonwealth. Under the Delaware settlement, the bank must pay $2.875 million into a trust for the benefit of harmed Delaware consumers and just over $1 million dollars to the Delaware Consumer Protection Fund.

DOJ Reaches $907,000 SCRA Settlement with CitiFinancial Credit Company. In September, the DOJ settled claims that CitiFinancial Credit Company violated the Servicemembers Civil Relief Act (SCRA) by failing to obtain court orders prior to repossessing vehicles owned by covered active duty servicemembers. The settlement also resolved claims that the lender failed to properly use a Department of Defense provided database that allows lenders and servicers to confirm whether servicemembers are SCRA protected.

This settlement arose out of a 2015 DOJ investigation into an auto loan servicer that purchased loans from the lender. According to the DOJ, that investigation led to the discovery of the lender's alleged SCRA violations. The lender agreed to pay allegedly affected servicemembers a total of $907,000 in compensation and to delete negative trade lines on their credit report.

LOOKING AHEAD TO 2018

In July, a bill was introduced in Congress that would amend the CFPA to allow the CFPB to enforce certain sections of the SCRA as "enumerated consumer laws." If the bill passes, the CFPB may join the DOJ in enforcing the SCRA in the auto lending context.

The CFPB's November Quarterly Consumer Credit Trends report confirmed that there has been a decrease in auto lending activity in general. The report also noted that the industry has seen an increase in the use of longer-term auto financing. The Bureau concluded that such longer-term loans are riskier because they cost more, are used by consumers with lower credit scores to finance larger amounts, and often have higher rates of default. As a result, auto lenders may see regulators pay increased attention to such longer-term loans in 2018.

WHAT TO WATCH

CFPB enforcement of SCRA and short-term auto loans | Continuing trends in state v. federal enforcement | Congressional oversight over CFPB enforcement of ECOA

PAYDAY/SMALL DOLLAR LENDING

In 2017, Goodwin monitored 26 federal and state enforcement actions related to payday and small-dollar personal loans (compared with 30 such actions in 2016). 2017 also saw significant regulatory developments affecting the small dollar lending industry, including the CFPB's implementation of the payday lending rule in October. Federal and state agencies pursued lawsuits and settlements concerning allegedly illegal or usurious interest rates, deceptive lending and debt collection practices, and tribal affiliations—resulting in total settlement payments by financial entities of over $95 million.

KEY TRENDS

In October, the CFPB issued its final rule regulating payday lending. For the past five years, the CFPB had been researching and seeking comments from the industry on how to address its concerns with what it calls "lending traps" associated with small-dollar lending. Following this process, it finalized a rule, which, most significantly, would require lenders to determine a borrower's ability to repay various types of small-dollar loans, including covered payday loans, auto title loans, deposit advance products, and longer-term loans with balloon payments. However, in January 2018, the CFPB announced that it intended to reopen the rulemaking process and reconsider the payday lending rule. Given that CFPB Director Mulvaney is a known opponent of the rule, its status is in doubt.

Throughout 2017, federal and state agencies directed their enforcement attention to online payday lenders having affiliations with tribal or out-of-state banks in order to lend in states in which they were unlicensed or where their loans would otherwise exceed maximum APR. Several state attorneys general settled lawsuits brought in 2016 where they alleged that this practice was an unlawful attempt to avoid state usury and licensing laws.

2017 HIGHLIGHTS

CFPB Issues Final Rule on Small-Dollar Lending. In October, the CFPB issued its final rule regulating payday lending, 12 CFR Part 1041. However, the CFPB, under the leadership of Director Mulvaney, announced in January 2018 that it was reopening the rulemaking process and reconsidering the previously final rule.

As written, the Rule would require lenders to assess a borrower's ability to repay "covered" small-dollar loans. Covered payday loans would have a repayment term of less than 45 days and require borrowers to either post-date a check for the full balance, including fees, or allow lenders to directly debit a borrower's account for the full balance of the loan. To determine a borrower's ability to repay, the lender would be required to conduct a "full payment test," showing the borrower can afford the loan and her or his existing financial obligations. However, lenders would be able to avoid this requirement by offering an option which allows borrowers to pay debts more gradually under a principal payoff option. In addition, the Rule specifically exempts less risky credit extensions offered by community banks or credit unions. The Rule also would exclude certain advances of earned wages made under wage-advance programs offered by employers or their business partners.

Additionally, the Rule has components that would cover payday loans and loans "with terms of more than 45 days that have (1) a cost of credit that exceeds 36 percent per annum; and (2) a form of 'leveraged payment mechanism' that gives the lender a right to withdraw payments from the consumer's account." These provisions would prohibit lenders from making more than two unsuccessful attempts to debit a borrower's account without additional borrower authorization. Lenders would also be required to give consumers written notice before the first attempt to debit the consumer's account to collect payment for any loan covered by the Rule.

The new Rule, which the CFPB first proposed in June 2016, and which received more than one million comments, was to be effective January 2018, although compliance with some provisions is not required until August 2019. In January 2018, the CFPB announced that it was reopening the rulemaking process and would reconsider the Rule. It remains to be seen how the Rule's provisions will be affected, but given the turnover at the CFPB and that Director Mulvaney (and other Administration officials) are known opponents of the Rule, it is unlikely to remain as once envisioned.

Virginia, Florida, and Georgia Attorneys General Settle with Online Payday Lender. In January, the Florida Attorney General's office and the Florida Office of Financial Regulation, in conjunction with a pending Florida class action, entered into consent orders with online payday lender Western Sky Financial, LLC, CashCall, Inc., and their affiliated entities, resolving allegations that the companies used a "rent-a-tribe" scheme to skirt Florida's APR interest caps. That same month, in the largest settlement secured by the Virginia Attorney General's Predatory Lending Unit to date, the Virginia Attorney General's office entered into a settlement agreement with CashCall, Inc. and its president and CEO, concerning the company's efforts to avoid state usury laws. And in February, the Georgia Attorney General's office also reached a settlement with CashCall, Inc. and Western Sky Financial, LLC over similar claims. These settlements resolve the state enforcement actions brought in 2016 against CashCall, Inc. involving payday lending. The CFPB action initiated against CashCall, Inc. in 2016 remains pending. All told, these state settlements secured over $80 million in consumer relief.

Operator of Online Payday Lending Firm Convicted of TILA and RICO Violations. In November, Richard Moseley, operator of a network of online payday lenders and loan servicers, was convicted of violating RICO and TILA by charging consumers illegal interest rates on payday loans and by making deceptive and misleading disclosures to borrowers. The loan agreements materially understated the total cost of the loans and the length of repayment. For example, the loan agreements represented that a $100 loan would cost the borrower $30 in interest, but in fact, the lender charged a $30 "finance fee" each month and did not apply any of the payment to the principal, causing the borrower to pay an additional $30 each pay period. According to the acting U.S. Attorney prosecuting the case, Moseley's network of companies obtained $220 million from consumers by burying key loans terms in fine print.

FTC Obtains $4.1 Million Judgment Against Operation That Sold Lists of Fake Payday Loan Debts to Debt Collectors. In October, a federal court entered a default judgment against Joel Jerome Tucker and others for selling lists of fake payday debts to debt collectors, who then attempted to collect on the debts. The lists included the names of millions of consumers who were subsequently harassed for debts they did not owe. This judgment follows the $1.3 billion judgment the FTC obtained against Tucker's brother (a well-known racecar driver) last year related to a purported payday lending scheme.

Fourth Circuit Rejects Arbitration Request Under Payday Loan Agreement. In a loss for payday lenders affiliated with tribal entities, the Fourth Circuit affirmed a North Carolina district court's refusal to compel arbitration under the terms of a payday loan agreement that would have required the arbitrator to employ the Otoe-Missouria tribal law rather than state or federal law. In *Dillon v. BMO Harris Bank, N.A.*, the Fourth Circuit held that the arbitration clause at issue was unenforceable because it amounted to a prospective waiver of the borrower's federal law rights. The decision extends a trend in the Fourth Circuit (*Hayes v. Delbert Services Corporation*) and Eleventh Circuit (*Jessica Parm v. National Bank of California, N.A.*) of refusing to enforce similar tribal-law arbitration provisions.

DOJ Says Operation Choke Point Is Over. In 2016, a consortium of payday lenders sued the FDIC, the Federal Reserve, and the OCC, alleging due process claims arising from the agencies' pressuring banks to sever ties with the payday industry—an enforcement initiative called "Operation Choke Point." *Advance America, Cash Advance Centers Inc., et al., v. Federal Deposit Insurance Corporation et al.*, Case No. 14-953 (D.D.C.). In July, the court denied the government's motion for summary judgment, allowing the lenders' lawsuit to continue. One month later, in August, United States Assistant Attorney General Stephen Boyd sent a letter to the House Judiciary Chairman Bob Goodlatte referring to the program as "a misguided initiative" and stating: "All of the Department [of Justice]'s investigations conducted as part of Operation Chokepoint are now over, the initiative is no longer in effect, and it will not be undertaken again."

LOOKING AHEAD TO 2018

After the CFPB issued its final payday lending rule, a bipartisan effort began in Congress to rescind the rule using the CRA. Such a move would not have been without precedent, as Congress overturned another CFPB regulation—the Arbitration Rule—in 2017. The rule is now subject to further doubt, as the CFPB recently announced that it plans to reopen the rulemaking process and reconsider the previously-final payday lending rule. Even if attempts to repeal or revise the rule fail, the new leadership at the CFPB may affect whether, and if so how, the CFPB decides to enforce the rule. Legal challenges to the rule, including challenges to the CFPB's authority to regulate payday lending, also loom on the horizon. It is far from certain that the rule will survive.

WHAT TO WATCH

CFPB's payday lending rule | Lawsuit challenging Operation Choke Point | Challenge to usurious loans under state law

DEBT COLLECTION + DEBT SETTLEMENT

During 2017, Goodwin tracked 47 federal and state enforcement actions related to debt collection and debt settlement relief services—nearly matching the 50 tracked in 2016. Debt collection actions primarily focused on misleading or harassing communications (such as stating that consumers could face criminal sanctions if they failed to repay their debts) and collecting on debts with no attempt to verify they were actually owed. Debt settlement actions targeted false promises to reduce consumer debt, charging up-front fees, and misrepresenting affiliations with government agencies.

The total number of actions tracked in 2017 represents a slight decrease in overall enforcement activity related to debt collection and debt settlement services. All told, these actions resulted in federal and state agencies securing just over $260 million in consent judgment and court judgments, representing a significant decrease in this category from the 2016 figure of over $400 million. The most active enforcement entities in this area were the state attorneys general, which is consistent with the general trend towards increased state enforcement over the past year.

KEY TRENDS

State attorneys general and agencies represented the most significant player in this space in 2017, having brought 26 out of the 48 enforcement actions, including two joint actions filed by state attorneys general and the FTC. These actions were often brought under state analogue fair debt collection practices acts or under general state unfair or deceptive acts and practices statutes, and tended to focus on companies engaged in the collection or settlement of debts owed on personal loans and payday lending. Debt collection and settlement of student loans also remained a frequently targeted activity.

Federal enforcement was spearheaded by the FTC and the CFPB. The DOJ and U.S. attorneys were notably absent from the debt collection and settlement enforcement, as they brought only 2 actions in 2017, as compared to 11 in 2016. As in 2016, a large number of federal debt collection actions involved collections on debts allegedly not owed, as well as debts owed on student and payday loans. Notably, 2017 saw a significant decrease in actions concerning protections owed to military members under the SCRA.

Last year, we wrote that 2017 would prove whether the DOJ intended to become a dominant actor in this space. 2017 appears to have preliminarily answered that question with a “no.” Instead, 2017 reinforced the significance of state attorneys general and state agencies in debt collection and settlement enforcement, while the DOJ avoided the area altogether.

2017 HIGHLIGHTS

We tracked four significant actions in the area of debt collection and settlement that each garnered over $10 million in consumer relief, restitution, civil money penalties, and other costs. Of the four, three involved state attorneys general, and two involved the FTC.

FTC and Illinois AG Settle with "Phantom" Debt Collectors for $47 Million. In November, the FTC and Illinois Attorney General announced that they reached a settlement to resolve a joint enforcement action brought against affiliated Chicago based debt collectors that allegedly used false and misleading tactics in attempting to collect on payday or other small-dollar loans. The orders imposed a judgment against the companies and their principals of more than $47 million, which was to be partially suspended upon their surrender of $9 million in assets. The orders also banned the defendants from the industry. The action was part of "Operation Collection Protection," a now-defunct joint federal-state enforcement effort targeted at deceptive and abusive collection practices.

North Carolina Attorney General Secures Over $35 Million in Settlement with Debt Relief Providers. In March, the North Carolina Attorney General announced that it settled a lawsuit filed in the Wake County, North Carolina Superior Court against three debt relief companies (Orion Processing, Swift Rock Financial, and World Law South) and two individuals. The complaint, brought by the AG and the North Carolina State Bar in June 2014, alleged that companies ran an illegal debt relief scheme by charging advanced fees to over 1,400 consumers in exchange for promising to reduce consumers' credit card debt through settlements with creditors or debt collectors. As a result of the litigation and settlement, the AG secured a total of $6.6 million in consumer relief, and $30 million in civil monetary penalties ($6 million dollars against each company and individual).

Debt Collector Ordered to Pay $25 Million to State of Texas for Illegal Debt Collection Practices. In July, Texas Attorney General Ken Paxton secured a $25 million judgment and permanent injunction against Samara Portfolio Management, LLC and a small law office for violations of the Texas Debt Collection Act, the Texas Deceptive Trade Practices-Consumer Protection Act, and the Identity Theft Protection and Enforcement Act. A jury in the District Court of Harris County determined that the defendants violated the Texas Deceptive Trade Practices-Consumer Protection Act when they filed nearly 900 consumer debt collection cases against debtors who did not live in Harris County at the time of suit and who did not enter into the underlying loan contracts in that county. In its final judgment, the Texas state court ordered the defendants to pay the State of Texas $25.16 million in civil monetary penalties and over $559,000 in attorneys' fees and investigative costs.

FTC Secures $19.4 Million in Judgments Over Mortgage Relief Scheme. In January, the FTC announced that it agreed to two stipulated orders with individuals who participated in an alleged fraudulent mortgage relief scheme. According to the FTC, the individuals promised consumers "at least $75,000" or complete relief on their mortgages through a "mass joinder lawsuit." The FTC alleged, however, that consumers never obtained such relief, nor were they ever likely to do so. Under the terms of the stipulated orders, both individuals consented to lifetime bans from the debt relief industry. In addition, the FTC secured an $18.3 million judgment as compensatory contempt relief against one individual, and a $1.1 million judgment as equitable monetary relief against the other.

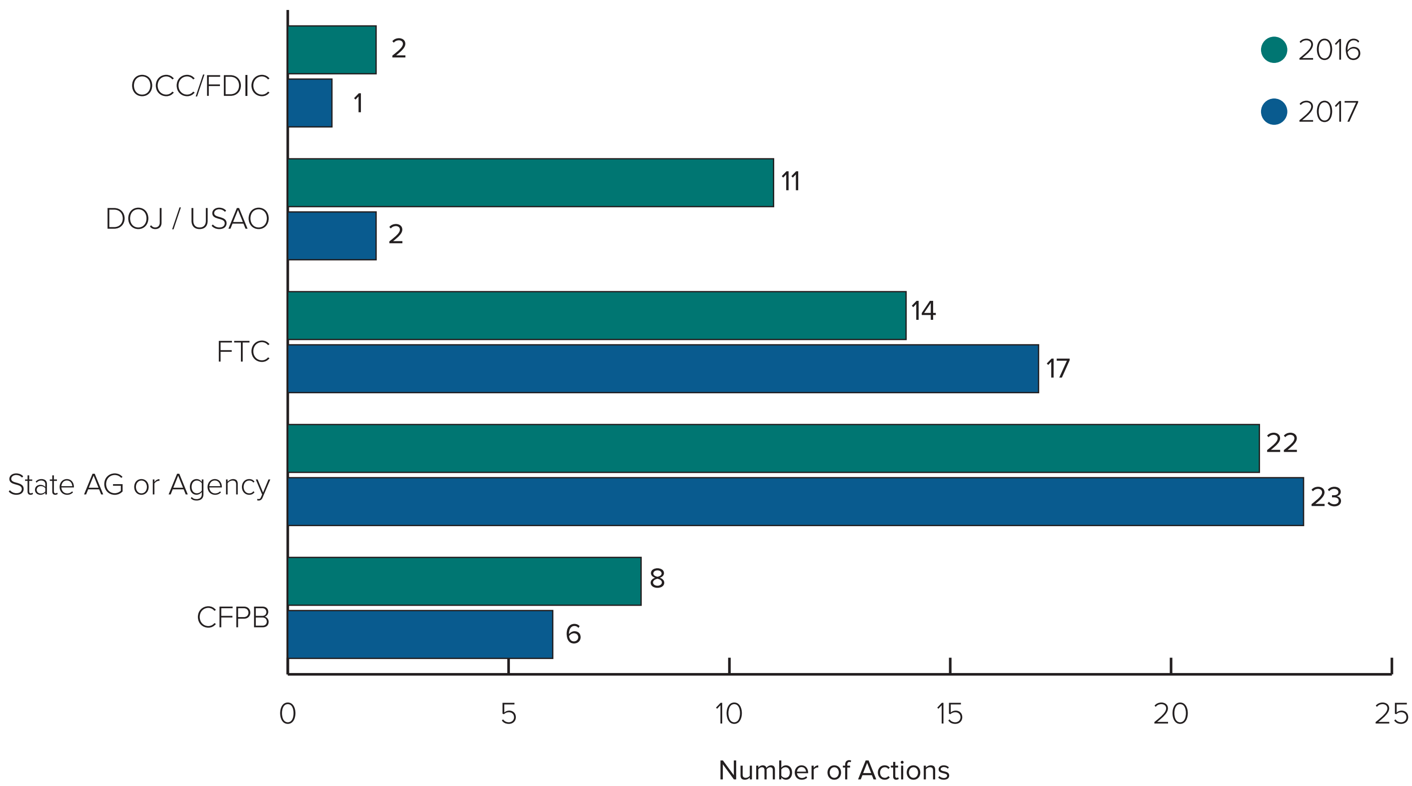
U.S. Department of Defense Issues Interpretive Rule on Military Lending Act. In December, the Defense Department amended its interpretive guidance on the Military Lending Act, which provides strict consumer protections to military servicemembers, including by limiting the maximum APR a lender may charge and requiring additional disclosures. Purchase money transactions are exempt from the Act, and the new rule clarified that hybrid transactions, where additional credit is extended beyond the purchase price, are exempt if the financing is related to the property being purchased. The new rule also clarified that while a lender may take a security interest in connection with a loan, the Act does not preempt any other state or federal laws to the contrary.

LOOKING AHEAD TO 2018

On November 14, the CFPB published in the Federal Register its plans to conduct an 8,000 person survey to better understand debt collection disclosures. This survey is likely to lead to a rulemaking process by the CFPB later in 2018 or early 2019, which may foreshadow a renewed effort by the CFPB to increase its regulation and enforcement of the debt collection process.

Last year, we noted a significant level of cooperation in this area exemplified through federal agencies working in partnership with state attorneys general and agencies. 2017 saw that trend come to a halt, as state agencies provided a substantial amount of the enforcement activity and often acted alone. This is likely due, in part, to the fact that the FTC's federal/state partnership program "Operation Collection Protection" ended at the close of 2016. We are watching whether the states, acting alone, will continue to provide the largest number of enforcement actions, or whether federal agencies will seek to reassert themselves in the area.

NUMBER OF DEBT COLLECTION ACTIONS



WHAT TO WATCH

Trend towards state enforcement | Scrutiny over student loan and pay day lending debt collectors and relief providers

TELEPHONE CONSUMER PROTECTION ACT

In 2017, Goodwin monitored litigation developments affecting the TCPA throughout the year. Of note this past year, court cases recognized the individual nature of TCPA claims in putative class actions and continued to address whether bare violations of the TCPA constitute injuries-in-fact.

KEY TRENDS

In the wake of the Supreme Court's 2016 decision in *Spokeo v. Robins*, litigants and courts alike continued to struggle with whether TCPA plaintiffs have suffered sufficient injury to have Article III standing. Defendants in TCPA cases successfully advanced arguments that the cases were incompatible with class adjudication where named and class plaintiffs may have given varying levels of consent to be contacted or may have revoked such consent to varying degrees. Finally, the D.C. Circuit overturned an FCC interpretation of 47 U.S.C. § 227(b)(2)(D), concluding that the FCC does not have authority under the TCPA to mandate that senders of solicited fax advertisements include opt-out notices in their fax advertisements.

2017 HIGHLIGHTS

Clarification of Distinction Between Advertising and Informational Calls. In January 2017, a ruling from a federal district court in California provided clarity on which pre-recorded calls are advertising (and therefore require prior express written consent from the consumer before being placed) and which are purely informational calls (requiring only prior express consent, which the plaintiff had provided when she gave her cellular telephone number to the defendant as the best way to contact her). The court held that a prerecorded call from a consumer's insurance company, which stated that the borrower's policy would be automatically renewed and directed the consumer to the company's website, was purely informational. The court concluded that the call was not advertising despite the reference to the insurance company's website and despite that the call was placed to retain customers. *Smith v. Blue Shield of Calif.*, No. 8:16-cv-00108, Dkt. No. 73 (C.D. Cal. Jan. 13, 2017).

Courts Continue to Develop Application of *Spokeo* to TCPA. After the decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), courts were initially split on whether a purely statutory violation of the TCPA, without evidence of any actual harm to the consumer, satisfied Article III's standing requirement that the plaintiff have suffered an "injury in fact." In 2017, though several courts held that a statutory violation of the TCPA, without more, does satisfy the concrete injury requirement for standing, courts continued to refine how *Spokeo* should apply to TCPA cases under various facts.

Ninth Circuit Adopts Broad Interpretation of *Spokeo* and Article III Standing Requirement. In January, the Ninth Circuit ruled that a plaintiff, who had signed up for a gym membership but subsequently canceled his membership and later received two calls from the gym, had standing under *Spokeo* to bring a TCPA class action against the gym. The court observed that "[u]nsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients, so "[a] plaintiff alleging a violation under the TCPA 'need not allege any *additional* harm beyond the one Congress has identified.'" The Court thus held that *Spokeo*'s requirements had been satisfied without specific allegations of harm to the consumer. The case was ultimately dismissed because the plaintiff had given prior express consent when he provided his phone number to the gym and had not effectively revoked the consent. *Van Patten v. Vertical Fitness Group, LLC*, No. 14-55980 (9th Cir. Jan. 30, 2017).

District Court Denies TCPA Suit on Standing Grounds. In November, the Southern District of California dismissed a case in which the plaintiff's mortgage servicer allegedly placed automated calls to the plaintiff concerning her default on her mortgage payments. The plaintiff sued under the TCPA, alleging that the calls disrupted her life and prevented her from receiving other calls. The court found these alleged injuries insufficient and held that the plaintiff lacked standing because she had failed to allege a concrete injury. The court distinguished the *Van Patten* case above because the debt collection calls at issue in this case did not implicate the same consumer interests the TCPA was intended to protect. *Selby v. Ocwen Loan Servicing*, No. 3:17-cv-00973 (S.D. Cal. Nov. 16, 2017).

Putative Class Denied Certification Under *Spokeo*. The Northern District of Illinois denied class certification in August in a TCPA case in which the plaintiffs had adopted pets from the defendant's partner animal shelters and then received telephone calls advertising pet insurance from the defendant. The court held that, because some of the named plaintiffs consented to receive communications from the defendants in some form, those plaintiffs would need to show more than a mere technical violation of the TCPA under *Spokeo*. Thus, the court concluded that class adjudication was inappropriate where class members gave varying levels of consent to receive communications and resolving that consent was too individualized to decide at a class level. *Legg v. PTZ Ins. Agency, Ltd.*, No. 14-C-10043 (N.D. Ill. Aug. 15, 2017).

Illinois Court Finds TCPA Claims Incompatible with Class Litigation. The Northern District of Illinois struck a TCPA plaintiff's class allegations against a medical services provider and a debt collector. Though the court rejected the defendants' motion to dismiss the entire case based on lack of standing under *Spokeo*, the court held that one of the proposed classes (consumers who had originally provided prior express consent to be called but had later revoked such consent) was not viable. The court concluded that the individualized issues associated with determining which consumers had initially provided consent and which had later effectively withdrawn that consent made class treatment unsuitable. *Cholly v. Uptain Group, Inc.*, No. 1:15-cv-05030, Dkt. No. 149 (N.D. Ill. Feb. 1, 2017).

D.C. Circuit Holding Limits Authority of Federal Communications Commission. In March, the D.C. Circuit held that the FCC does not have authority under the TCPA to mandate that senders of solicited fax advertisements include opt-out notices in their fax advertisements. The decision overturned an FCC interpretation of 47 U.S.C. § 227(b)(2)(D) requiring the inclusion of opt-out notices in fax advertisements even if they were solicited. *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir. Mar. 31, 2017).

LOOKING AHEAD TO 2018

Industry members following developments in the TCPA field will likely see additional rulings applying *Spokeo* in various legal and factual contexts. Also, the scope of the TCPA may be altered significantly in 2018, based on the much anticipated D.C. Circuit ruling in *ACA Int'l v. FCC*, No. 15-211 (D.C. Cir.), in which industry members sued to overturn FCC Order 15-72, an order that dramatically changed the TCPA landscape in 2015. If the court agrees with the plaintiffs, it could unwind many of the broad rules and definitions introduced by the FCC's July 2015 order.

WHAT TO WATCH

Continued efforts to correctly apply *Spokeo* to the TCPA | Forthcoming ruling from the D.C. Circuit in *ACA Int'l v. FCC*

THE D.C. CIRCUIT'S *EN BANC* HOLDING IN *PHH V. CFPB*, AND OTHER MAJOR APPELLATE CASES DECIDED IN 2017

The appellate courts opined on a variety of issues in 2017 affecting consumer financial services. Standing issues continued to make their regular appearance in the courts post-*Spokeo*, and the Fourth Circuit considered whether parties could compel arbitration. Finally, the Supreme Court decided *Midland Funding, LLC v. Johnson* in favor of creditors, which we identified in last year's publication as a case to watch in 2017.

HIGHLIGHTS

PHH v. CFPB. The D.C. Circuit, sitting *en banc*, recently issued its long-awaited decision in *PHH Corp. v. CFPB*. As we reported in 2016's year-in-review, in October 2016 a panel of the D.C. Circuit held that the CFPB's single-director structure, under which the director can be removed only for-cause, violates the separation of powers and is unconstitutional. The panel also decided a number of important issues under RESPA and the CFPB's administrative-enforcement statute. The D.C. Circuit granted the CFPB's petition for rehearing *en banc* and heard reargument on May 24, 2017.

On January 31, 2018, the *en banc* D.C. Circuit held that the provision of the Dodd-Frank Act shielding the single director of the CFPB from removal without cause is constitutional. In all, the court published seven separate opinions (the majority, three concurrences and three dissents) that totaled 250 pages. Significantly, although the *en banc* court reversed the three-judge panel on the constitutional question before the court, it reinstated that panel's prior opinion with respect to the proper interpretation of Section 8 of RESPA.

While the constitutional issue is the public focus, in an important win for the industry, the majority opinion specifically reinstated "the panel opinion insofar as it related to the interpretation of RESPA and its application to [the parties] to this case." Opinion at 17.

First, the three-judge panel had held RESPA Section 8 permits reasonable payments for goods and services – the standard under RESPA Section 8(c) that the industry had always understood as the central benchmark for RESPA Section 8 compliance but which the Director had upended. As to the captive reinsurance arrangements at issue in the case, the panel upheld such arrangements "so long as the amount paid by the mortgage insurer for the reinsurance does not exceed the reasonable market value of the reinsurance." Importantly, the panel held that RESPA Section 8(c) creates a "safe harbor," a ruling which expressly overruled the Director's conclusion that Section 8(c) clarified, rather than limited, Section 8(a)'s prohibition on kickbacks.

Second, the panel held that even if the CFPB's interpretation of Section 8 in the *PHH* decision was permissible, the CFPB could not retroactively apply that interpretation to PHH's past conduct without violating the due process clause because prior HUD guidance about the legality of captive reinsurance arrangements had been different. This acceptance of the principle that regulated companies can safely rely on administrative guidance is very important, at least when such guidance is clear enough to justify reliance.

Third, the panel had held that RESPA's three-year limitations period applies to administrative enforcement actions just as it does to actions in court. The CFPB's contrary position was that no limitations period applied to its administrative enforcement actions (though it ultimately argued for the application of the default, five-year federal rule). The panel did not decide whether each "above-reasonable-market value" payment for reinsurance "triggers a new three-year statute of limitation for that payment," leaving that question for remand.

It remains yet to be seen whether either the RESPA or the separation of powers holdings will be appealed to the Supreme Court, or whether the Supreme Court would grant cert if either side were to appeal. We will continue to monitor this case throughout 2018.

Statutory Standing. 2017 saw Part II of the *Robins v. Spokeo* case. On remand from the Supreme Court, the Ninth Circuit (again) found that the plaintiff had standing to pursue his FCRA claims. The plaintiff had filed a putative class action against Spokeo alleging that the company's publicly-available report about him contained incorrect information regarding, his age, marital status, and employment status. He claimed that this violated FCRA's requirement that consumer reporting agencies must follow reasonable procedures to ensure the accuracy of information they report. The Supreme Court had concluded that the Ninth Circuit did not fully analyze whether plaintiff suffered a concrete injury. In reaching this conclusion, the Court distinguished concrete injuries from mere "procedural violations" and noted that "not all inaccuracies cause harm or present any material risk of harm." The Ninth Circuit's decision on remand articulated a two-part concreteness test to determine standing: "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interest (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged . . . actually harm, or present a material risk of harm to, such interests." This decision is noteworthy not only because of the case's protracted history in the Ninth Circuit and the Supreme Court, but because it shows the evaluation of individual claims that courts must undertake in determining whether plaintiffs have standing. Spokeo filed another petition for certiorari, which the Supreme Court denied on January 22, 2018.

The Seventh Circuit in *Groshek v. Time Warner Cable, Inc.* and *Groshek v. Great Lakes Higher Education Corp.* tackled the issue of standing after *Spokeo*. The plaintiff alleged that the defendants violated FCRA by failing to provide sufficient disclosures informing him that they were pulling his credit report in connection with his job application. Plaintiff claimed that the disclosures were not "clear and conspicuous" as required by the statute and that he had thus suffered a concrete injury by receiving a non-compliant disclosure. But the court found that the alleged withholding of information was not the kind of injury that FCRA was designed to protect. Rather, Congress intended to protect privacy by ensuring that employers received authorization from prospective job applicants prior to pulling their reports. Like the Supreme Court's decision in *Spokeo*, the decision stands for the proposition that an alleged statutory violation does not per se satisfy the concreteness requirements of Article III.

Contractually Compelled Arbitration. In *Dillon v. BMO Harris Bank*, the Fourth Circuit held that an arbitration clause was unenforceable because it amounted to a prospective waiver of the borrower's federal law rights. The plaintiff had entered into a payday loan agreement in which he agreed to allow the lender to automatically withdraw payments from his bank account. He also agreed to arbitrate any claims he might have under "the law of the Otoe-Missouria Tribe of Indians." The agreement further specified that the parties were not subject to the laws of the United States—state or federal. The plaintiff eventually sued the processor of the automatic withdrawals, BMO Harris, alleging federal RICO violations. BMO Harris moved to compel arbitration. The District Court denied that motion, and the Fourth Circuit affirmed. The Fourth Circuit held that while there is a strong federal policy favoring arbitration, the agreement was unenforceable because it operated as a "prospective waiver" of the plaintiff's "right to pursue statutory remedies." The Fourth Circuit's decision solidifies and extends a trend in the Fourth and Eleventh Circuits of rejecting arbitration agreements that seek to apply exclusively tribal law in payday loan cases.

The Supreme Court. Goodwin reported in its 2016 Year in Review that *Midland Funding, LLC, v. Johnson*, No. 16–348, was a case to watch in 2017. The Supreme Court issued its opinion in that case, holding that the FDCPA does not prohibit a debt collector from asserting a time-barred claim in a Chapter 13 bankruptcy proceeding.

WHAT TO WATCH IN 2018

Of interest to litigators in the class action space is *China Agritech, Inc. v. Resh*, No. 17-432, in which the Supreme Court will decide whether the filing of a putative class action tolls the statute of limitations for all the absent class members to bring their *own* putative class actions. The Supreme Court held in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), that the pendency of a putative class action tolls the limitations period for absent class members to bring individual lawsuits. In *China Agritech*, the plaintiffs were unnamed putative class members in two securities lawsuits against China Agritech. Class certification was denied in each suit, so the plaintiffs filed their own class action. The district court dismissed the case, holding that the limitations period had run because the statute had only been tolled as to absent class members' individual claims, not class claims. The Ninth Circuit reversed and held that, under *American Pipe*, the limitations period was tolled even as to class claims that would have been untimely had the first lawsuit not been filed. If affirmed, the Ninth Circuit's ruling would result in the statute of limitations in some cases being tolled for significantly longer periods of time, as class actions could be stacked on top of class actions.

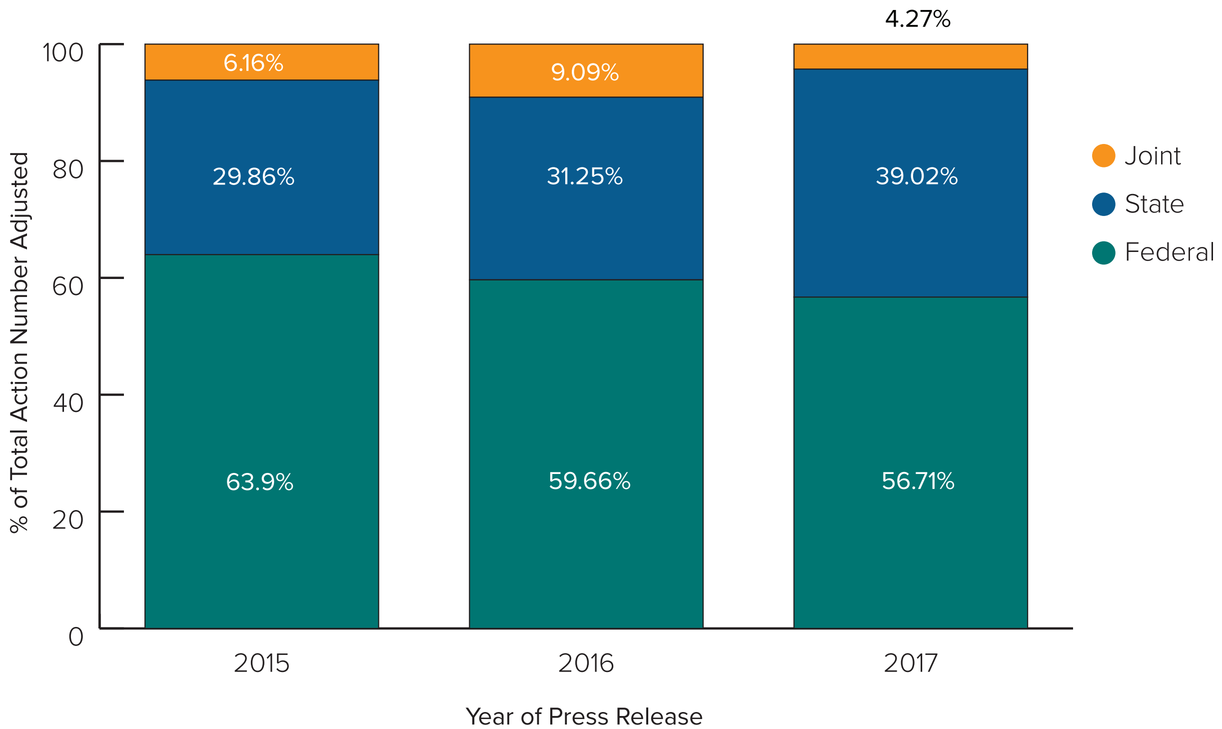
WHAT WE'RE WATCHING: 2018 EMERGING ISSUES

ENFORCEMENT TRENDS – INCREASING ROLE FOR STATE ACTORS

Goodwin predicted in 2017 that state actors, including state attorneys general and regulatory agencies, might redouble their efforts to enforce consumer protection laws if the pace of federal enforcement actions were to decelerate under the Trump Administration. In line with this anticipated outcome, several state actors (some of which are vocal opponents of the Administration) have exercised increasing regulatory and enforcement pressure on financial institutions, including Massachusetts, New York and Florida.

In 2017, just over 37% of enforcement actions were driven by state actors. This represents a 5% increase from 2016, and a nearly 10% increase from 2015.

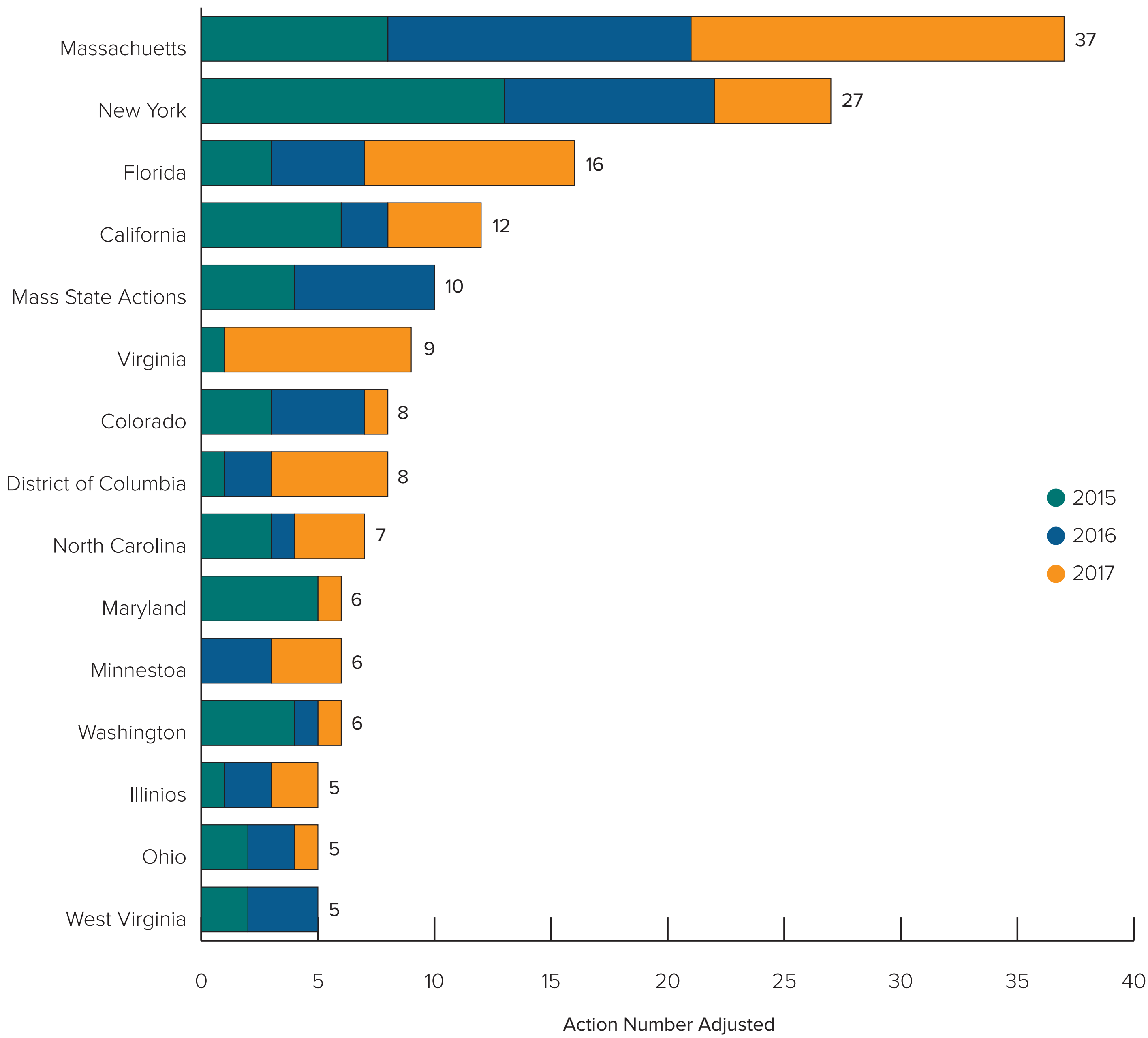
PROPORTION OF STATE-FEDERAL ACTIONS



Since 2015, three states—Massachusetts, New York and Florida—have represented nearly 50% of all state enforcement actions taken, solidifying their role as spearheading the state enforcement trend. Massachusetts led or had a significant role in nearly 20% of all enforcement matters during this time period. New York (18%) and Florida (12%) also led or had a significant role in many actions.

Goodwin further analyzed the underlying data and determined that Massachusetts brings a higher number of enforcement actions per capita than the other two states. Data also reveals that Massachusetts actions have resulted in a lower average recovery amount than New York and Florida, which possibly suggests Massachusetts' willingness to bring smaller enforcement actions that other states may forego.

STATE ACTIONS BY STATE



By contrast, California was involved in only ten enforcement actions, but recovered $347.5 million, indicating that it pursues a small number of cases with larger payouts.

The subject matter of state enforcement actions has generally aligned with national trends. The top two targets of such enforcement trends have related to debt collection/settlement and mortgages. Following behind are pay day lending, auto lending, personal loans and student lending. However, Massachusetts has been an outlier, focusing primarily on mortgage origination and servicing actions. This drive could be the result of Massachusetts' historically large banking sector.

LOOKING AHEAD TO 2018

The direction the CFPB will take in 2018 remains uncertain following the departure of former Director Cordray and the Trump Administration's subsequent appointment of Acting Director Mulvaney. One thing appears clear though: at least until midterm elections are held, CFPB rules and regulations will likely be met with resistance from both the Administration and Congress. The future of such regulations—some years in the making—may depend on the identity of the next director of the CFPB, and the results of the 2018 midterm elections.

In light of this, we expect the upward trend in state enforcement actions that has grown over the past several years to continue. After Director Mulvaney was named the acting head of the CFPB, 17 state attorneys general wrote to President Trump and stated their intent to fill the void should federal agencies fail to zealously enforce consumer protection laws. Also in December, Democratic leaders in Congress introduced a bill—the Accountability for Wall Street Executives Act of 2017—which, if passed, would further arm state actors by permitting state attorneys general to issue subpoenas and investigate and examine national banks. Thus, financial institutions should be mindful of the historical targets of state enforcement actions and gaps in federal enforcement that states may fill.

FINANCIAL TECHNOLOGY (FINTECH)

As we reported in last year's year-in review, the OCC announced in December 2016 that it was considering granting special purpose national bank (SPNB) charters to FinTech companies as a way to uniformly regulate this emerging segment of the financial services industry. The OCC's 2016 white paper explored and sought input on the proposed SPNB charter process, as well as the supervisory and regulatory expectations of FinTech companies that may be granted special-purpose national bank status.

Although the rule has yet to be finalized, the proposed SPNB charter application process has already been subject to challenge, as the New York Department of Financial Services (NYDFS) and the Conference of State Bank Supervisors (CSBS) each sued the OCC regarding the prospective regulatory development. The NYDFS and CSBS argued that the OCC does not have the authority to regulate FinTech entities, and that this regulation will weaken existing consumer protections. The NYDFS case was dismissed without prejudice on December 13, 2017 based on the court's finding that the agency lacked standing. The court ruled that because the OCC has not issued a final decision on whether to regulate FinTech companies by awarding them SPNB charters, there was no Article III injury. As of today, a ruling on the motion to dismiss in the CSBS case is pending.

LOOKING AHEAD TO 2018

The OCC's new Comptroller, Joseph Otting, assumed office on November 27, 2017. The Comptroller has not yet taken a public position on the charter issue. However, Mr. Otting, a former banker, commented at a December 20, 2017 press conference that FinTech firms are generally serving a segment of the market that larger banks were forced out of due to burdensome regulation. He further noted that FinTech firms serve a role in a fast-evolving financial marketplace, but that more research must be done on the issue before any final decisions are made. Thus, although the expansion of regulation in this area in the future is likely, the OCC's role in that regulation remains uncertain as the regulatory approach the OCC may support under its new leadership remains unclear.

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LENDERLAW WATCH BLOG

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