# 2022 Year in Review

# Consumer Finance

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## I. Overview

2022 saw a flurry of regulatory activity by federal enforcement agencies — most notably, the Consumer Financial Protection Bureau (CFPB, or Bureau) — as the industry began to experience the full effects of the change in administration and the first full year of Rohit Chopra at the helm of the CFPB. Though the absolute number of publicly announced enforcement actions at the federal level declined this year, the raw numbers obscure the fundamental shift in activity that has occurred, and is continuing to occur, at the federal level.

Nowhere is this shift more evident than at the CFPB. During 2022, the Bureau released a slew of informal guidance materials that reinterpret existing authorities and lay the foundation for more aggressive supervisory and enforcement activity in the coming year. For example, the CFPB updated its Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs) examination procedures to instruct examiners to evaluate whether a company has engaged in discrimination or failed to put policies and procedures in place to prevent discrimination. The updated manual notes that a "discriminatory act or practice is not shielded from the possibility of being unfair, deceptive or abusive even when fair lending laws do not apply to the conduct." The CFPB also invoked a dormant provision of the Consumer Financial Protection Act (CFPA, otherwise known as Title X of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ), announcing its intention to examine nonbank financial companies — such as fintechs — that it believes "pose risks to consumers." Further, the CFPB published a circular "confirming" that financial companies may violate the CFPA — not merely data protection laws — when they fail to adequately protect consumer data. These are just a few examples of the Bureau's regulatory activity in 2022 that we discuss in this review.

At the same time, the CFPB remained very active in the enforcement space in 2022. The CFPB secured three consent orders with total monetary payments or other consumer relief each exceeding $150 million. But the focus of the Bureau's enforcement energies in 2022 was on "corporate recidivists" or "repeat offenders" — companies that the Bureau has accused of violating past consent orders with the Bureau or other agencies. In the most noteworthy of these actions to date, the Bureau sued TransUnion and a former executive officer, alleging that TransUnion had violated a 2017 consent order by misleading consumers into enrolling in subscription-based credit monitoring products and adopting measures that made it more difficult for customers to cancel such subscriptions. The Bureau has also signaled that it would only resolve such actions on more onerous and stringent terms, including personal liability for company officials and/or structural business changes designed to prevent further violations.

Though the number of publicly announced enforcement actions initiated or resolved by the Bureau was down in 2022, investigations that commenced after Chopra was confirmed as director on September 30, 2021 are likely only beginning to conclude. In other words, the number of public enforcement actions tracked in 2022 obscures just how active the Bureau was in the supervisory and investigatory context last year. Goodwin's experience in the examination and investigation space during 2022 confirms this activity anecdotally.

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The bombshell of 2022, the Fifth Circuit's decision in *Community Financial Services Association of America Ltd. v. Consumer Financial Protection Bureau*, 51 F.4th 616, 625 (5th Cir. Oct. 19, 2022) (*CFSA*), appears not to have had much impact on the day-to-day operations of the Bureau — at least not yet. But, as the CFPB argued in its petition for a writ of certiorari to the Supreme Court, the decision "threatens the validity of all past CFPB actions" and, indeed, the very existence of the Bureau itself. The Supreme Court appears likely to grant certiorari and may even decide the case this term. Though litigants across the county have sought to use the *CFSA* decision to their own advantage, no other court has yet to agree with the Fifth Circuit that the Bureau's funding mechanism violates the Appropriations Clause of the Constitution. Nonetheless, many courts have stayed Bureau-initiated litigation until the Supreme Court resolves this issue, which is likely to bring the Bureau's litigation efforts to a crawl until at least mid-2023. This reality may accelerate the Bureau's use of its in-house administrative adjudication process, which it has rarely used. Indeed, earlier in 2022, before the *CFSA* decision, the Bureau updated its administrative adjudication procedures, signaling an intention of bringing more enforcement actions through that forum in the future.

Other federal enforcement agencies remain busy, if less active than anticipated. Enforcement activity in 2022 for the US Department of Justice (DOJ) was consistent with 2021 levels, with the DOJ securing two multimillion-dollar settlements — including one in a joint CFPB action resolving allegations of race-based lending discrimination. The DOJ appears likely to remain focused on alleged discriminatory conduct in the coming year, particularly in the area of appraisals used in connection with government-backed mortgage loans. Publicly announced enforcement activity by the US Federal Trade Commission (FTC) in 2022 also remained consistent with prior years. Last year, the FTC targeted credit repair organizations and motor vehicle financing. With respect to credit repair organizations, the FTC brought four separate enforcement actions against credit repair companies, seeking to halt their operations. As to auto lending, the FTC laid the groundwork for more robust enforcement efforts to come, including by proposing a new rule that would ban certain fees and marketing practices in the automobile financing industry.

In terms of absolute numbers, state enforcement activity was also down in 2022, but state actors nonetheless remained busy, particularly when working in coordination with one another. For example, 39 state attorneys general collectively secured a $1.85 billion settlement with a student loan lender and servicer concerning allegedly deceptive and unfair practices. We expect states to be more aggressive in 2023, potentially spurred to action by the CFPB's issuance of an interpretive rule reinforcing states' authority to enforce federal consumer protection laws. As discussed further below, the CFPB's rule confirmed states' ability to enforce the CFPA and its implementing regulations and emphasized that the states may in fact bring CFPA claims against a wider range of entities than the CFPB, given the CFPB's limited authority.

In many ways, 2022 was a foundational year in the regulatory and enforcement space and a harbinger of what is in store in 2023 for the consumer finance industry.

## Key Trends

In 2022, Goodwin tracked 66 publicly announced federal and state enforcement actions related to consumer finance, representing a significant decrease from the 96 such actions tracked in 2021.

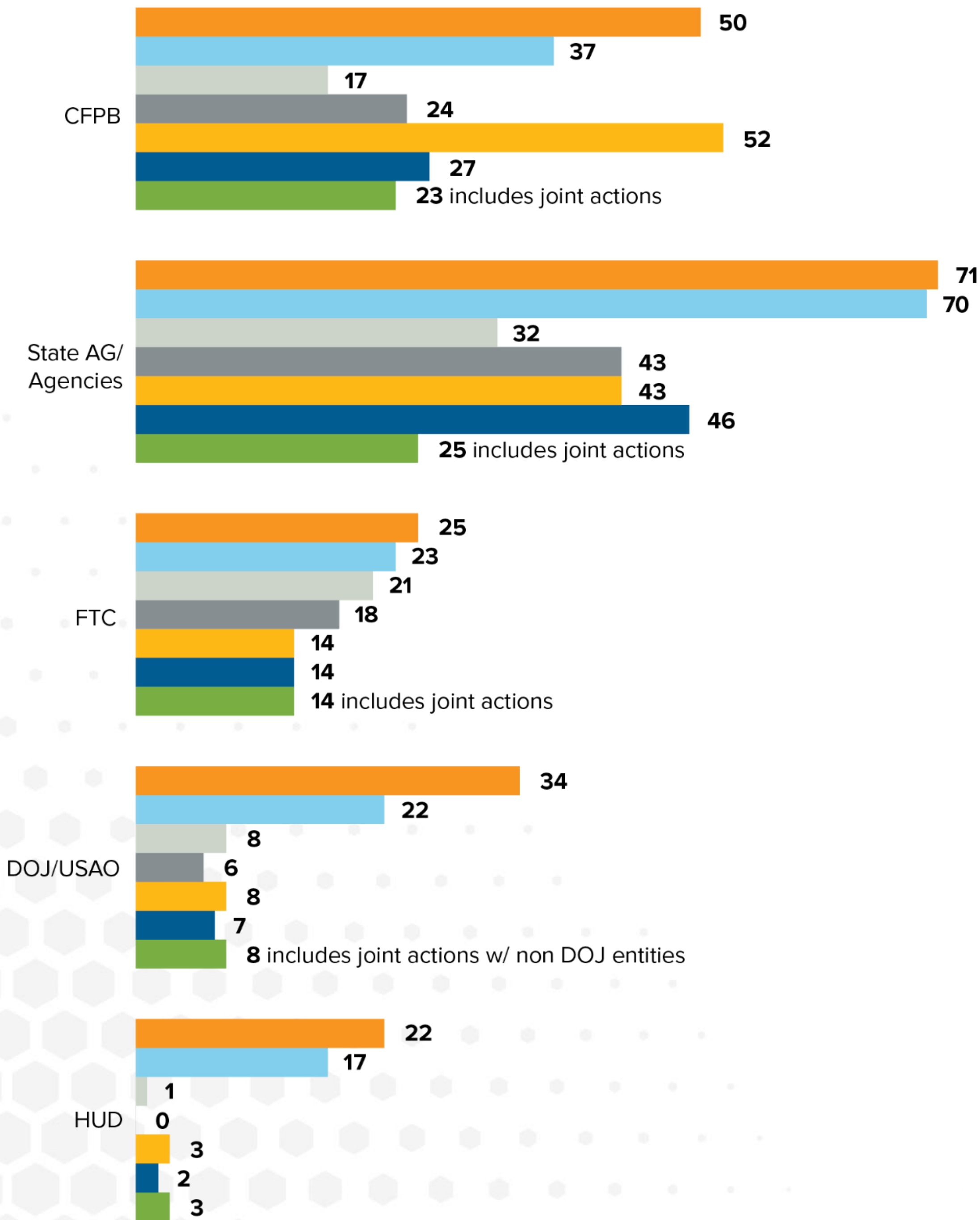
Of these, 25, or approximately 38%, were actions initiated or joined by state enforcement officials and agencies, representing a decrease from the nearly 50% of enforcement activity attributable to state actors in 2021. Although the number of actions was down, the number of states involved in the enforcement space remained constant, due in large part to two multistate actions. Massachusetts led state-level enforcement last year with seven tracked

actions, followed closely by New York with five tracked actions. State enforcement covered a variety of issues, but a majority of state actions concerned debt collection and debt settlement or auto lending. State efforts resulted in total recoveries of approximately $1.9 billion (including recoveries in joint state-federal actions), representing a dramatic increase over the approximately $55 million in state recoveries seen in 2021.

On the federal side, the total number of publicly announced actions dipped to 45, including four that were joint state-federal actions. Consistent with the overall decline, the number of actions brought or settled by the CFPB also decreased from the 27 actions tracked in 2021, as Goodwin tracked only 23 such actions (four of which were joint federal-state or federal inter-agency actions).

This decline is consistent with the decrease in CFPB activity Goodwin observed last year. The number of publicly announced FTC actions (14, including two joint FTC-state actions), was consistent with last year. Similarly, Goodwin tracked only one enforcement action involving the Office of the Comptroller of the Currency (OCC) in 2022, whereas it tracked three such actions in 2021. Enforcement activity levels of both the DOJ and the US Department of Housing and Urban Development (HUD) were consistent with 2021 levels.

## Total Actions by Agency

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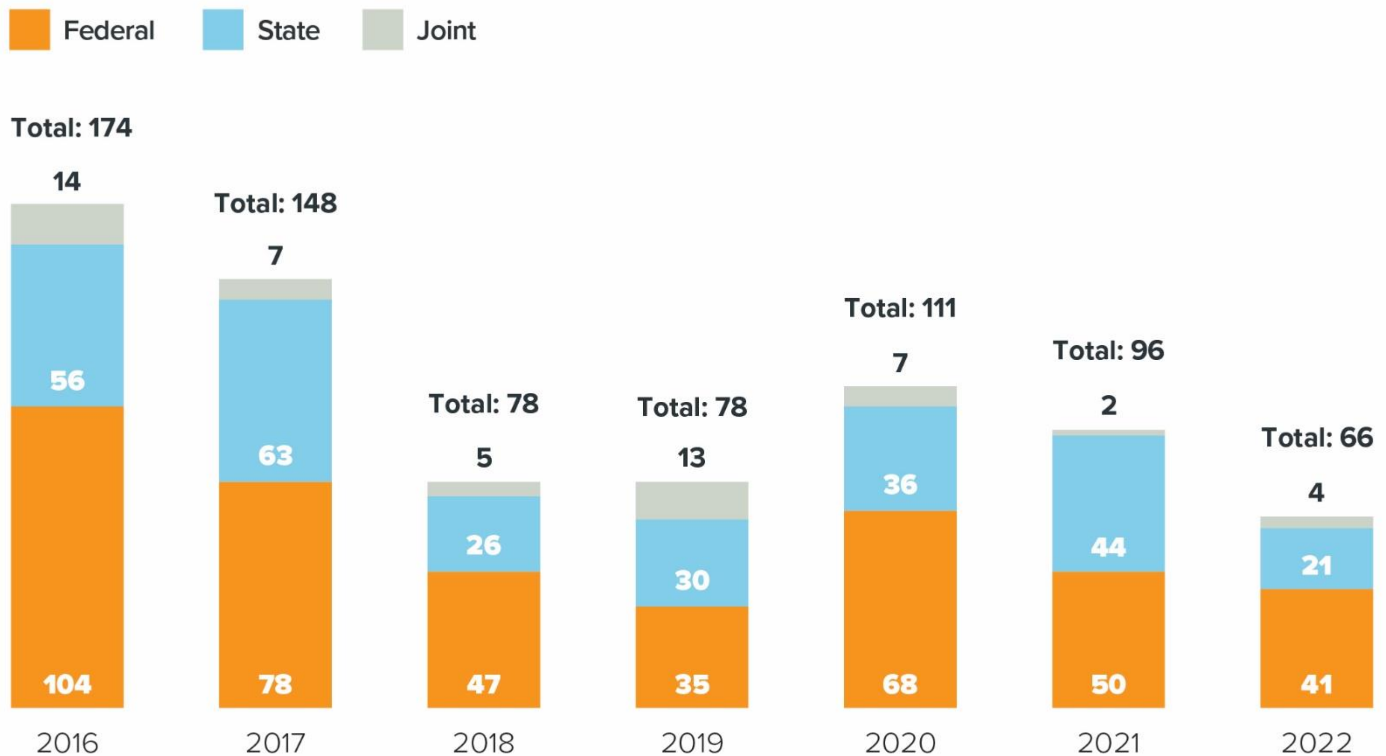
## Total Actions by Federal/State Government




## 2022 Highlights

*Significant Enforcement Actions*

**CFPB Reaches $3.7 Billion Settlement With National Bank Concerning Alleged Misconduct Related to Auto Loans, Mortgages, and Deposit Accounts**

In December, the CFPB and a national bank entered into a consent order to resolve widespread allegations that the bank had mismanaged auto loans, mortgage loans, and deposit accounts in violation of the CFPA. Specifically, the Bureau alleged that the bank: (1) incorrectly applied loan payments in its auto loan servicing, imposed improper fees, repossessed vehicles, and failed to properly issue refunds; (2) improperly denied loan modifications to qualified consumers in its mortgage servicing; and (3) improperly froze or closed deposit accounts, imposed overdraft fees, and failed to consistently waive certain fees in accordance with its disclosures with respect to those accounts. Under the terms of the consent order, the bank has agreed to pay more than $2 billion in consumer redress and a $1.7 billion penalty to the CFPB. The bank has further committed to developing a redress plan to remediate harmed consumers and agreed to engage in ongoing monitoring for compliance with the consent order.

**39 State Attorneys General Announce $1.8 Billion Settlement With Student Loan Servicer Navient Over Allegedly Unfair and Deceptive Origination and Servicing Practices**

In January, 39 state attorneys general announced a $1.85 billion settlement with Navient, one of the nation’s largest student loan servicers, to settle

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allegations of deceptive and unfair student loan origination and servicing practices. Specifically, the attorneys general alleged that Navient misled student loan borrowers into choosing costly long-term forbearance instead of counseling them to pursue more affordable income-driven repayment plans, and that it originated subprime private student loans knowing that a high percentage of borrowers would be unable to repay them. Under the settlement, Navient agreed to: (1) cancel the remaining balance on $1.7 billion in subprime private student loan balances; (2) pay $95 million in restitution to affected borrowers; and (3) implement policies that require it to explain consumer-friendly repayment options to borrowers, including income-driven repayment plans and the Public Service Loan Forgiveness Program.

### CFPB and DOJ Reach $24.4 Million Settlement with Trident Mortgage Over Alleged Lending Discrimination

In July, the CFPB and DOJ reached a joint settlement with Trident Mortgage Company (Trident), a nonbank mortgage lender, to resolve allegations of race-based lending discrimination in violation of the Fair Housing Act (FHA), the Equal Credit Opportunity Act (ECOA) and its implementing regulation (Regulation B), and the CFPA. The CFPB and DOJ alleged that Trident engaged in unlawful redlining when it avoided lending in majority-minority neighborhoods by locating its operations and concentrating its marketing activities in majority-white areas. Under the terms of the settlement, Trident agreed to pay a $4 million civil penalty and invest $20.4 million in revitalization efforts in minority-majority neighborhoods.

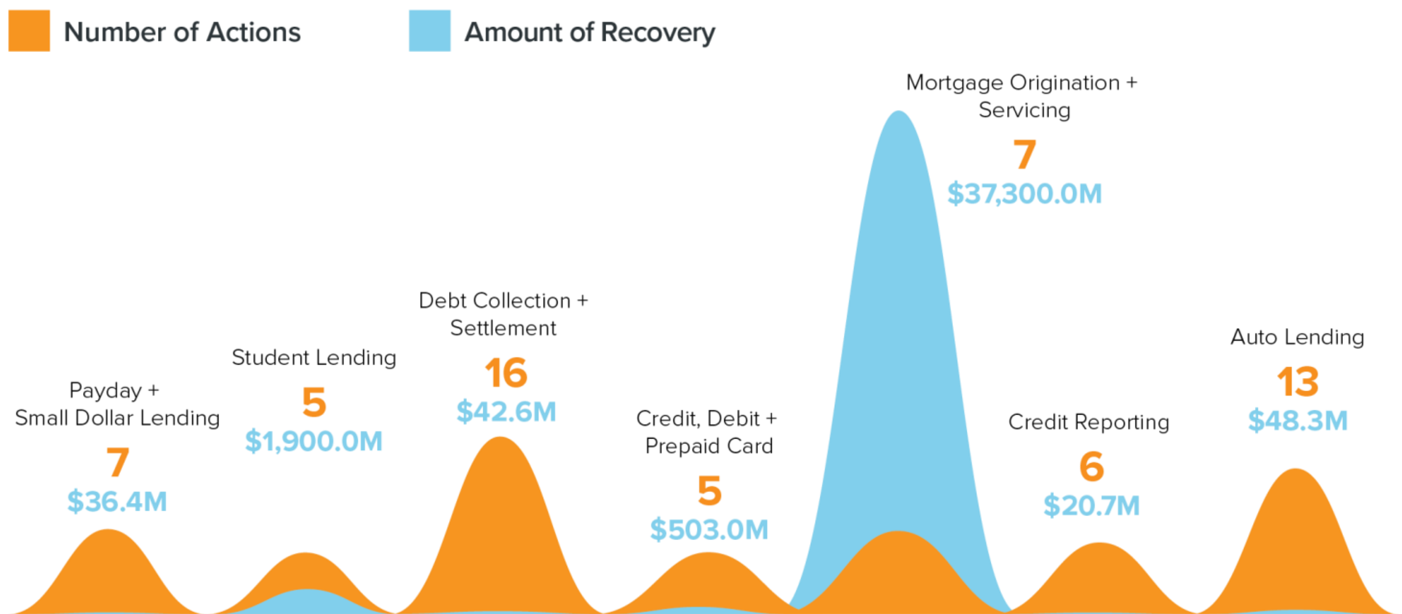
### Regions Bank Pays More Than $190 Million to Resolve Overdraft Fee Issues

In September, the CFPB announced that it had entered into a consent order with Regions Bank to pay more than $190 million to resolve allegations that it charged its customers "surprise" overdraft fees in violation of the CFPA. Regions Bank allegedly charged fees, known as authorized-positive fees, on certain ATM withdrawals and debit card purchases despite telling consumers that they had sufficient funds in their account at the time of the transactions. Under the order, Regions Bank agreed to pay a $50 million civil money penalty, to refund at least $141 million to consumers, and to cease charging authorized-positive overdraft fees.

### CFPB Sues TransUnion and Former Executive Over Alleged Violations of 2017 Consent Order

In April, the CFPB filed a lawsuit against TransUnion and a former top executive of the company in the US District Court for the Northern District of Illinois, alleging that TransUnion had violated a 2017 consent order in which the company agreed to cease allegedly deceptive marketing practices related to credit scores and credit-related products. In the lawsuit, the CFPB claims that since the issuance of the consent order, TransUnion has used "digital dark patterns" to mislead consumers into unknowingly enrolling in subscription-based credit monitoring products and has also adopted measures making it more difficult for customers to cancel such subscriptions. CFPB's Director Chopra has characterized the Bureau's litigation against TransUnion as part of the Bureau's efforts to "rein in" "repeat offenders."

## Total Actions by Product (with Recoveries)




### FTC Targets Multiple Credit Repair Organizations for Unfair and Deceptive Practices

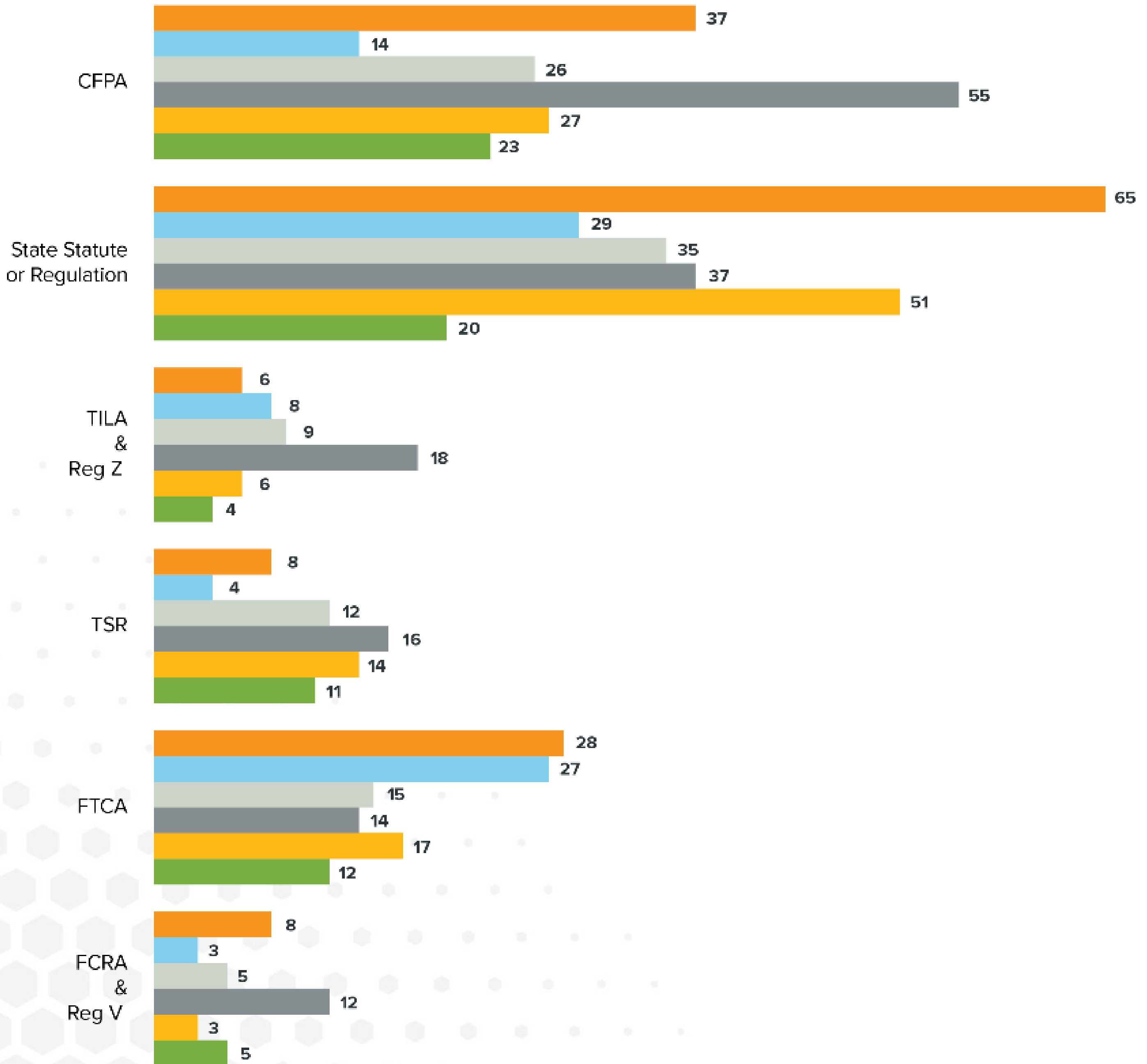
During 2022, the FTC initiated four public enforcement actions against credit repair companies, seeking to obtain injunctive relief to halt their credit repair operations. In each instance, the FTC alleged that the operations targeted vulnerable consumers with low credit scores and falsely claimed to be able to improve those scores after charging hundreds or thousands of dollars in advance fees. The FTC further alleged that the operations misled their customers on whether the services being offered were effective, legal, or refundable; filed false identity-theft reports; and induced customers to join pyramid schemes. In all four matters, the FTC succeeded in obtaining temporary restraining orders or permanent injunctions that ban the credit repair organizations from the industry.

*Significant Regulatory Developments*

### CFPB Publishes Updated Examination Manual Targeting Discriminatory Practices Not Otherwise Covered by Anti-Discrimination Laws

In March, the CFPB announced updates to its UDAAP examination manual to reflect its view that certain discriminatory practices not covered by existing fair-lending or anti-discrimination laws may nonetheless trigger liability as an “unfair” practice under the CFPA. In announcing the update, Chopra explained that the Bureau would be expanding its anti-discrimination efforts “to combat discriminatory practices across the board in consumer finance.” The updated manual notes that a “discriminatory act or practice is not shielded from the possibility of being unfair, deceptive or abusive even when fair lending laws do not apply to the conduct.”

## Total Actions by Statute

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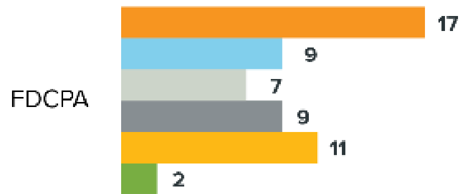
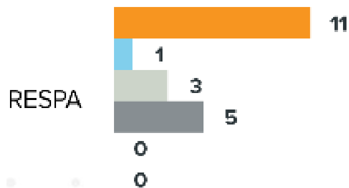
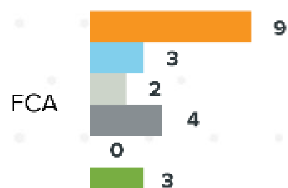
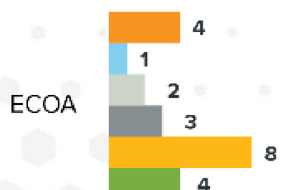
## Total Actions by Statute (Cont'd)

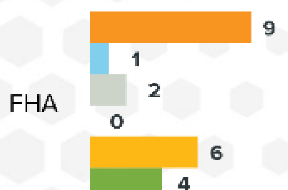
2017 2018 2019 2020 2021 2022

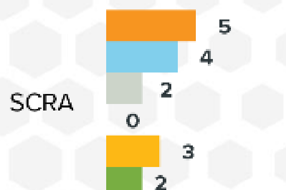


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Examiners are now instructed to evaluate whether a targeted entity has protections in place to prevent discrimination — including policies, procedures, and practices and robust compliance monitoring — and whether marketing or advertising practices target or exclude certain consumers on a discriminatory basis. Such practices may constitute an "unfair" practice if they cause "substantial injury to consumers" that they cannot "reasonably avoid" and that is not "outweighed by countervailing benefits to consumers or competition." Although the Bureau has instructed its examiners to evaluate covered entities' UDAAP compliance through this new rubric, the Bureau has yet to attempt to enforce its expanded view of unfairness through a contested litigation matter.

### CFPB Invokes Dormant Power to Examine Nonbank Companies Posing Risks to Consumers

In April, the CFPB announced that it would invoke a previously unused legal provision in the CFPA to examine nonbank financial companies that "pose risks to consumers" in order to "level the playing field between banks and nonbanks." The CFPB defines "nonbanks" as entities that do not have a bank, thrift, or credit union charter, and notes that many nonbanks brand themselves as fintechs. The authority invoked by the CFPB broadly authorizes the CFPB to supervise a nonbank covered person when the Bureau "has reasonable cause to determine . . . that such person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services."

### CFPB Issues Guidance on Illegal 'Junk' Fees for Deposit Accounts

In October, the CFPB issued guidance on two "junk" fee practices: "surprise" overdraft fees and depositor bounced-check fees. "Surprise" overdraft fees occur when a consumer has sufficient funds in an account to cover a purchase at the time made, but the financial institution nonetheless later charges the consumer an overdraft fee for that transaction. The targeted practice concerning bounced checks occurs when a bank charges a fee to a consumer who deposits a check that later bounces. According to the CFPB, this practice "penalizes" the depositor, who, unlike the check originator, "could not anticipate the check would bounce." According to the CFPB, both practices are likely unfair practices prohibited by the CFPA when they cannot be reasonably avoided by consumers. The CFPB's guidance on each practice explains when it views the fees as likely unlawful and provides examples of the targeted conduct. For example, the CFPB's circular on surprise overdraft fees states that overdraft fees are potentially unfair when the consumer had a sufficient balance to cover a transaction at the time the financial institution authorized it, but the consumer's balance is deemed insufficient at the time of settlement "due to intervening authorizations, settlement of other transactions … or other complex processes." As for depositor fees, the CFPB stated that these fees are likely unfair when charged "indiscriminately" without consideration of the underlying circumstances, but that financial institutions can generally avoid running afoul of the CFPA by charging such fees only when the depositor could have avoided it.

### FTC Proposes Rule to Ban 'Junk' Fees and Certain Allegedly Deceptive Advertising Practices Related to Motor Vehicle Financing

Prompted by the receipt of more than 300,000 complaints related to car dealerships' practices, including financing, the FTC announced a proposed rule in June that would address certain allegedly unfair and deceptive practices in connection with the sale, leasing, or financing of motor vehicles. The multifaceted proposed rule seeks to: (1) prohibit certain misrepresentations in advertising and concerning add-on products; (2) impose disclosure requirements concerning pricing and financing information; and (3) prohibit charges for add-on services without express, informed consent or that provide no benefit.

**CFPB Announces That Failure to Safeguard Consumer Data May Violate CFPA**

In August, the CFPB published a circular "confirming" that financial companies may violate federal consumer financial protection laws when they fail to adequately protect consumer data as required by, among other authorities, the Gramm-Leach-Bliley Act (GLBA). The circular noted that "inadequate data security can be an unfair practice in the absence of a breach or intrusion." The Bureau highlighted several examples where failures to implement data security measures may violate the CFPA, including the failure to implement multifactor authentication, inadequate password management, and the failure to update software in a timely manner. According to the Bureau, these practices are likely to cause substantial, unjustifiable injury to consumers.

**CFPB Issues Guidance on Fair Lending Risks of Using Automated Models**

In February, the CFPB provided new guidance regarding automated algorithmic appraisals, based on its findings that such appraisals are susceptible to bias and inaccuracies in the absence of appropriate safeguards. The Bureau's primary concern in this regard is the "digital redlining" that may result from a lack of safeguards. As part of the same guidance, the Bureau clarified that adverse action notifications are required even if credit decisions are made using complex algorithms, including those employing artificial intelligence or machine learning.

**CFPB Issues Interpretative Rule Strengthening State Enforcement Authority Under CFPA**

In May, the CFPB issued an interpretive rule clarifying the scope of states' enforcement authority under the CFPA. The interpretative rule bolsters states' enforcement authority in several respects. First, the rule clarifies that states can enforce the CFPA, including the consumer protection laws enumerated therein, as well as "any rule or order prescribed by the CFPB under the Consumer Financial Protection Act, an enumerated consumer law, or pursuant to certain other authorities." It also reinforces state enforcement authority by emphasizing that a state's authority can be wielded against a broader range of companies, including companies not subject to CFPB jurisdiction. Finally, the rule confirmed that concurrent enforcement actions at the state and federal level are permissible — in other words, the Bureau's pursuit of an enforcement action does not limit the states' ability to bring enforcement actions against the same entity.

**CFPB Updates Administrative Adjudication Process to Favor CFPB**

In February, the Bureau issued updates to its rules of practice governing administrative adjudications, the first such update since the Bureau's inception. Under the new rules, the CFPB director is vested with additional oversight and authority, including ordering that administrative adjudications be bifurcated and providing that the director may rule directly on dispositive motions submitted to an administrative law judge. The updated rules of practice may signal the Bureau's intention of reviving administrative adjudications, which have been largely dormant since the Bureau's enforcement action against PHH Mortgage concerning captive reinsurance arrangements.

***Appellate Highlights***

**Fifth Circuit Holds CFPB's Funding Structure Is Unconstitutional; CFPB Seeks Expedited Review in Supreme Court**

In October, the US Court of Appeals for the Fifth Circuit issued its opinion in *CFSA*, holding that the CFPB's funding mechanism violates the Appropriations Clause and, as a result, vacated the Bureau's Payday Lending Rule. Litigants throughout the country quickly seized on the Fifth Circuit's decision, seeking to invalidate rules promulgated by the Bureau, pending enforcement actions, and administrative subpoenas. The CFPB quickly filed a petition for certiorari with the US Supreme Court asking the Court's expedited consideration of the Fifth Circuit's decision this term.

### Supreme Court Decision in *West Virginia v. EPA* Holds Major Ramifications for Federal Consumer Finance Regulations

In June, the Supreme Court held in *West Virginia v. EPA*, 142 S.Ct. 2587 (2022) that the Environmental Protection Agency (EPA) exceeded its authority under the Clean Air Act by limiting the carbon emissions of existing power plants. The Court invoked the "major questions" doctrine, which provides that agency regulations that implicate "major policy decisions" must be based on "clear congressional authorization." The Court, however, provided little guidance as to the specific "decisions" that would trigger the doctrine, or how "clear" the congressional authorization must be. Though the court's decision concerned the EPA, the decision will have broad ramifications for all federal administrative agencies — including the CFPB, the FTC, and HUD — that make "major policy decisions" that have not been clearly delegated to the agency. Indeed, in the six months since the court decided the case, multiple agencies, including the US Department of Education and Department of Health and Human Services, have already faced challenges under the "major questions" doctrine. See, e.g., *Brown v. U.S. Dep't of Educ.*, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022); *Louisiana v. Becerra*, 2022 WL 4370448 (W.D. La. Sept. 21, 2022).

### Supreme Court Hears Case That Will Decide When Administrative Actions Can Be Challenged by Enforcement Targets

In November, the Supreme Court heard oral arguments in *Axon Enterprise, Inc. v. FTC*, No. 21-86, a case that will determine whether federal district courts have jurisdiction to hear a challenge to FTC administrative adjudication proceedings prior to resolution of the administrative adjudication process. If the court affirms the Ninth Circuit's decision, litigants challenging the structure, procedures, or existence of FTC administrative adjudications on constitutional grounds will have to first raise — and exhaust — those arguments in administrative proceedings before raising the challenge in federal court. Axon's argument focused on the practical implications of requiring administrative exhaustion where the FTC's vast authority — as prosecutor, judge, and court of appeals — may deprive litigants, who overhwlmingly overwhelmingly settle before obtaining an appealable order, of a meaningful opportunity to pursue claims that the agency's structure, procedure, or existence was not authorized by Congress or the Constitution. The timing and extent to which such actions may be challenged have implications for challenges to other agencies' administrative adjudications, including, particularly, the CFPB, if such proceedings are revived there.

### Fifth Circuit Holds SEC Administrative Actions Unconstitutional, Potentially Threatening CFPB Adjudication Process

In May, a panel of the Fifth Circuit held in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), that the administrative adjudication of fraud claims by the Security and Exchange Commission (SEC) violated three constitutional principles: the Seventh Amendment's guaranteed right to trial by jury, the Non-Delegation Doctrine, and the Take Care Clause. If widely adopted, this decision will have significant implications for the CFPB's administrative adjudication process, which is largely based on SEC procedures. The Fifth Circuit held that the right to trial by jury was violated because a fraud claim was the type of claim that, at common law, implicated the right to trial by jury, rather than a public right that can be adjudicated through an administrative process. Bureau administrative action would suffer from the same infirmity, to the extent the action is premised on or analogous to a right that would exist at common law. As to the Non-Delegation Doctrine, the court held that the decision itself of whether to bring an action in federal court or through an administrative adjudication violated the Constitution because Congress had not provided the SEC any "intelligible principle" by which to make that determination — it was left entirely to the SEC's

discretion. Likewise, the Bureau has discretion to decide which forum to bring an action in – power that has not been validly delegated by Congress.

### Looking Ahead to 2023: Predictions

All signs point to the CFPB continuing to expand its authority and take an aggressive stance on enforcement in 2023, including wielding its power over an expanded population of potential targets, particularly fintechs and other nontraditional financial companies, and employing its previously underused administrative adjudication process. Notably, this year, the Bureau announced that it was invoking its previously dormant authority to supervise nonbank financial companies whose activities the CFPB has reasonable cause to determine "pose risks to consumers" and proposed a rule that requires certain nonbank entities to register with the CFPB when they become subject to enforcement orders. Together, these developments seem to signal that the CFPB intends to be even more aggressive in the coming year in its supervision and enforcement activity in these less traditional spaces. Given Chopra's expressed concerns over recidivism, we expect that the Bureau will continue to focus on "repeat offenders" across the board, with the CFPB likely to seek the imposition of enhanced penalties and expanded individual liability, particularly in high-priority areas.

We further expect that efforts aimed at protecting consumers from housing discrimination and misuse or public disclosure of their data will remain key areas of focus across federal enforcement agencies over the coming year. Consistent with its view that lax data security practices may constitute a UDAAP, we anticipate that the CFPB will increase its scrutiny of how consumer finance companies protect and disseminate consumer data. 2023 is also likely to see the FTC finalize its rule-making on commercial surveillance and lax data security practices. Both agencies are likely to assess and enforce compliance with these authorities immediately.

On the state side, we expect states to increase enforcement activity in 2023, bolstered by the CFPB's recent rule demonstrating an expansive interpretation of the scope of states' enforcement authority under the CFPA.

Last, but certainly not least, 2023 should see pivotal judicial decisions resolving lawsuits that threaten the very existence of federal consumer protection agencies. Critically, we anticipate that the Supreme Court will decide whether the CFPB's funding mechanism violates the Appropriations Clause and fundamental separation of powers principles, in review of the Fifth Circuit's decision in *Community Financial Services Association of America, Ltd. v. CFPB*, 51 F.4th 616, 625 (5th Cir. Oct. 19, 2022). As litigants facing the CFPB (and other agencies) across the country seek to use the *CFPA* decision to invalidate the Bureau's enforcement authority, all eyes will be on the Court.

## II. Mortgage Origination and Servicing

In 2022, Goodwin tracked seven publicly announced mortgage origination and servicing enforcement actions at the state and federal levels, resulting in total recoveries of $37.3 billion — far outpacing the $271 million in 2021. This drastic increase in recovery is largely attributed to a $3.7 billion recovery against a national bank that encompassed claims related to the bank's mortgage servicing practices.[1] Though the recovery amount drastically increased, there were far fewer publicly tracked actions in 2022 as compared to the 13 actions observed in 2021. Federal agencies initiated six of the seven mortgage origination and enforcement actions this year, several of which were inter-agency actions.

The decline in activity in this space is somewhat unexpected, given the anticipated boom in enforcement activity from heightened regulatory scrutiny following the expiration of COVID-19-related mortgage payment forbearances in August 2021. To date, the CFPB has brought one action related to COVID-19 forbearance practices, although it continues to signal a focus on forbearances in its supervisory examinations. The majority of actions in 2022 involved issues of fair lending, including the joint DOJ-CFPB action, discussed below, that resulted in a $24.4 million recovery.

### Key Trends

As Goodwin correctly predicted, the majority of actions brought in 2022 relate to fair lending practices. One major action related to a mortgage servicer's CARES Act compliance. And, while the anticipated uptick in the number of enforcement actions in the mortgage space has yet to materialize, the CFPB's fall 2022 issue of Supervisory Highlights suggests that more enforcement actions in the mortgage space may be imminent.

[1] This action also resolved allegations that the Bank engaged in violations related to auto loan servicing and its handling of consumer deposit accounts. However, for purposes of this review, the entire recovery amount is attributed to mortgage servicing.

Though the number of mortgage origination and servicing enforcement actions declined in 2022, federal agencies remained active in the regulatory space. Regulatory activity in 2022 centered around CARES Act compliance, mortgage servicer compliance with Regulation X, and fair lending practices, with a particular focus on appraisal discrimination and potential bias in algorithmic or automated modeling. The focus on fair lending further signals a likelihood that such practices will be subject to continued scrutiny in 2023.

### 2022 Highlights

**CFPB's Fall 2022 Issue of Supervisory Highlights Identifies Notable Violations by Mortgage Servicers**

The fall 2022 issue of Supervisory Highlights focused broadly on deceptive mortgage lending and servicing practices, including illegal fees, ensuring access to loss-mitigation options, and CARES Act compliance.

According to the Bureau, lenders have engaged in deceptive practices in violation of Regulation Z by using loan security agreements that contained provisions waiving borrowers' rights to initiate or participate in class actions. Regulation Z prohibits waivers of federal claims in mortgage agreements. Examiners found waiver provisions misleading because reasonable consumers could have

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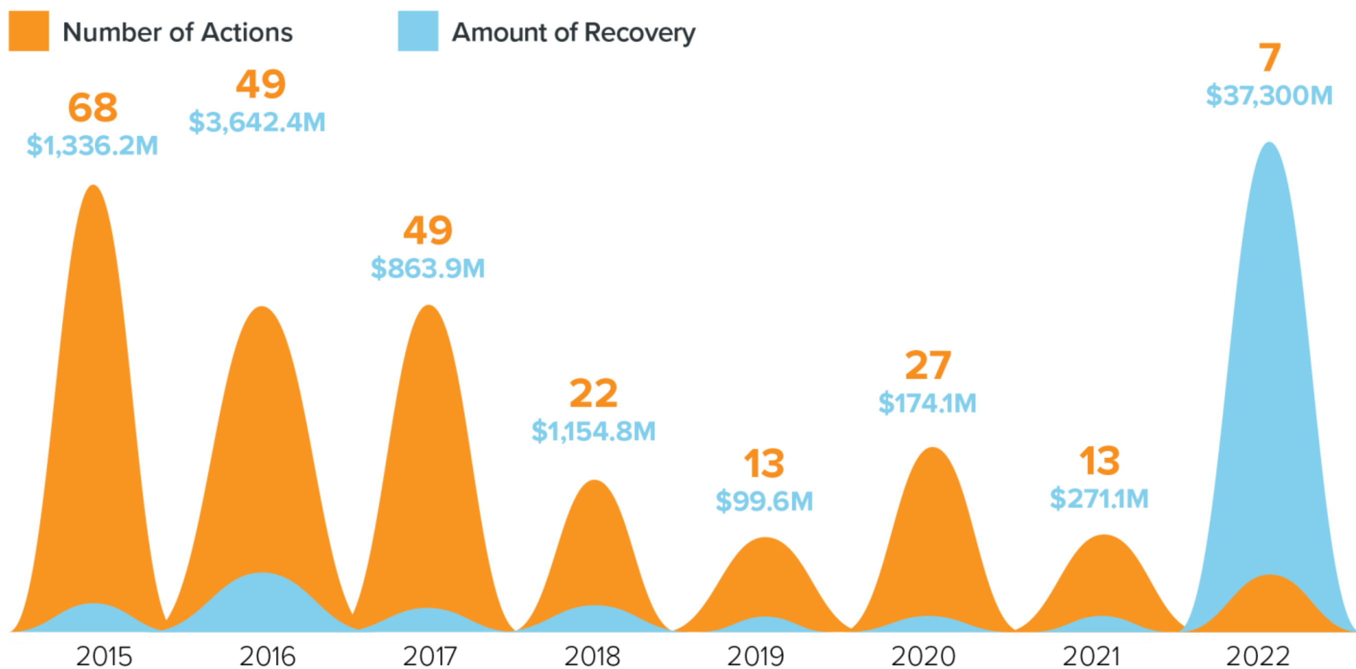


interpreted the provision as barring them from bringing a class action on any claim, including federal law claims. Examiners also found that mortgage servicers engaged in deceptive acts and practices by charging consumers a $15 fee to make payments by phone without adequately disclosing the existence or amount of this fee during the calls. The CFPB found disclosures that consumers “might” incur a fee for paying by phone were insufficient to inform consumers of the “material cost” of making a phone payment.

Additionally, examiners found that mortgage servicers engaged in deceptive acts or practices when they indicated that certain payment amounts were sufficient for customers exiting forbearances to accept deferral offers when those amounts were not, in fact, sufficient. According to the CFPB, consumers were sent documents allowing them to accept a post-forbearance deferral offer by making a payment that was often higher than their previous monthly payments, but when customers contacted the servicer to verify the payment amount, they were incorrectly told a payment in the amount of their prior mortgage payment would be sufficient to accept the offer.

Servicers also were found to have violated Regulation X in connection with loss-mitigation options, including by failing to maintain policies and procedures to ensure customers were made aware of all loss-mitigation options, or to properly evaluate customers for all available loss-mitigation options.

Finally, examiners found that mortgage servicers engaged in deceptive acts or practices by charging fees prohibited by the CARES Act to those in forbearance, and for failing to process requests for forbearances as required by the CARES Act.

### Federal Agencies Signal Renewed Concerns Over Appraisal Discrimination

The CFPB and DOJ have both signaled an intent to more closely scrutinize appraisal discrimination. In February, following the final report of the Interagency Task Force on Property Appraisal and Valuation Equity, CFPB Director Rohit Chopra emphasized that the CFPB will begin exercising its authority to ensure that algorithmic valuations are fair and accurate and to address potential bias in automated models. Director Chopra also signaled that appraisal equity will be a focus in the supervisory examinations of financial institutions and their service providers and may result in enforcement actions.

Appraisal discrimination has similarly been on the DOJ's radar. In August, the DOJ filed a statement of interest in a lawsuit alleging FHA violations in connection with a residential home appraisal. In the statement, the DOJ explained its authority to enforce the FHA, which includes prohibiting appraisal discrimination, and cited several cases to support its position that lenders that use appraisals infected by an appraiser's bias or other aspects of discrimination may also be liable under the FHA.

As a result, mortgage lenders should redouble their efforts to ensure that their appraisal practices fully comply with anti-discrimination laws, and to engage in careful oversight of their third-party service providers' compliance with such laws.

### CFPB Issues Guidance on Fair Lending Risks of Using Automated Models

In February, the CFPB provided new guidance regarding automated algorithmic appraisals, based on findings that such appraisals are susceptible to bias and inaccuracies if appropriate safeguards are not implemented. The guidance strengthens the CFPB's oversight of such models, with the stated goals of ensuring confidence in their value estimates, protecting against the manipulation of data, and avoiding conflicts of interest. The CFPB also indicated that it will require random sample testing and reviews of data used in automated and algorithmic models. One of the Bureau's key concerns is that automated and algorithmic appraisals could "digitally redline" neighborhoods and perpetuate the wealth gap.

Outside of the appraisal context, the CFPB's guidance clarified that adverse action notifications are still required for credit decisions made using complex algorithms, including those employing artificial intelligence or machine learning. The CFPB emphasized that the legal requirements of the ECOA and its implementing regulation, Regulation B, are the same regardless of whether conventional methods or complex algorithms are used to evaluate a credit application. Specifically, the CFPB emphasized that creditors cannot avoid compliance with ECOA or Regulation B by claiming the technology used for evaluations is "too complicated or opaque." Thus, creditors using complex algorithms should prepare to provide the same specific statement of denial reasons to applicants reviewed through an algorithmic model that they would to an applicant evaluated using conventional methods.

### CFPB Reaches $3.7 Billion Settlement with National Bank to Resolve Alleged UDAAP Violations

In December, the Bureau announced that it had entered into a consent order with a national bank to resolve alleged violations of the CFPA's prohibition on unfair, deceptive, and abusive acts or practices across a host of product lines. As to mortgages, the CFPB alleged the bank improperly denied loan modification applications and charged incorrect fees to borrowers. Under the consent order, the bank will pay more than $2 billion in consumer redress and a record-breaking $1.7 billion civil penalty to the CFPB. Additionally, the bank agreed to develop a redress plan to remediate harmed customers and engage in compliance monitoring.

**CFPB and DOJ Reach $24.4 Settlement with Trident Mortgage Company for Alleged Redlining**

In July, the CFPB and DOJ announced that they had reached a settlement with Trident Mortgage Company (Trident), a nonbank mortgage lender, to resolve allegations of race-based lending discrimination in violation of the FHA, the ECOA and its implementing regulation (Regulation B), and the CFPA. The agencies alleged that Trident had engaged in unlawful redlining when it “avoided providing home loans and other home mortgage services in majority-minority neighborhoods” in the Philadelphia metropolitan statistical area (MSA). According to the agencies, Trident did so by locating all of its offices and loan officers in majority-white neighborhoods, concentrating its marketing efforts exclusively in majority-white neighborhoods, and distributing internal communications to its employees with racist language and messages about certain majority-minority neighborhoods. Under the consent order, Trident agreed to invest $20.4 million in revitalization efforts in majority-minority neighborhoods in the Philadelphia MSA, including a loan subsidy program, minority advertising and outreach, consumer education services, and community development partnerships. The proposed consent order also would have the lender pay a $4 million civil penalty.

**DOJ Settles Racial and Sex Discrimination Allegations Against Evolve Bank & Trust**

In September, the DOJ announced that it had reached a settlement with Evolve Bank & Trust, resolving alleged violations of the FHA, ECOA, and Regulation B arising from the company’s mortgage origination practices. Specifically, the DOJ’s complaint alleged that the bank’s loan pricing practices resulted in Black, Hispanic, and female borrowers paying higher amounts in “discretionary pricing” components of mortgage loans than white or male borrowers, and that the higher prices were unrelated to the borrowers’ creditworthiness. The consent order, if entered by the United States District Court for the Western District of Tennessee, will have the bank establish a $1.3 million settlement fund to compensate affected borrowers. The bank will also pay a $50,000 civil money penalty and engage in compliance monitoring. In reaching this settlement, the bank denied liability and any and all wrongdoing relating to its pricing of residential mortgage loans.

**HUD Settles Racial Discrimination Allegations Against Movement Mortgage LLC**

In June, HUD announced that it had reached a settlement with Movement Mortgage LLC (Movement Mortgage), a nonbank residential mortgage lender, to resolve allegations of race-based lending discrimination in violation of the FHA. The settlement arose from a complaint made by a fair housing organization, the National Community Reinvestment Coalition (NCRC), alleging that during phone tests the lender treated minority testers seeking mortgage loans less favorably than white testers. Under the settlement, Movement Mortgage agreed to pay the NCRC $65,000 and contribute an additional $10,000 to a Seattle-area nonprofit organization specializing in financial literacy, housing education, and counseling for persons in majority-minority census tracts in the Seattle-Tacoma-Bellevue area. Movement Mortgage also agreed to host an event designed to improve homeownership rates for Black homebuyers and provide additional fair lending training to employees.

**CFPB Takes Action Against Carrington Mortgage for Alleged CARES Act Violations**

In November, the CFPB announced that it had entered into a consent order with Carrington Mortgage Services (Carrington), resolving allegations that the lender engaged in deceptive acts or practices under the CFPA in connection with processing mortgage loan forbearances. The CFPB found that Carrington misled certain homeowners who had sought a forbearance under the CARES Act into paying improper late fees, deceived consumers about forbearance and repayment options, and inaccurately reported the

forbearance status of borrowers to credit reporting agencies. Under the terms of the agreed-upon order, Carrington must repay any late fees not already refunded to consumers, adjust its business practices, and pay a $5.25 million civil money penalty.

## Looking Ahead to 2023

In 2023, we expect that federal agencies will continue to focus on fair lending. In particular, CFPB Director Rohit Chopra's remarks and guidance on appraisals indicate not only an increased focus on appraisal accuracy but also a renewed emphasis on ensuring that appraisals are free from discrimination. This could result in lenders facing FHA liability when they rely on appraisal methodologies that are found to be discriminatory. In addition, we expect that by invoking its dormant authority to examine nonbank mortgage lenders and their service providers, the Bureau is preparing to initiate examinations and enforcement actions in this area.

Proposed regulatory changes may also be forthcoming. In May, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), and the OCC announced a joint proposal to amend the regulations of the Community Reinvestment Act (CRA). Under the proposal, the agencies would evaluate banks' activities to ensure they operate in a way that addresses inequities in access to credit, including through smaller-value loans and investments. In addition, the joint proposal would expand CRA assessment to include online and mobile banking, branchless banking, and hybrid banking activities. It would also clarify eligible CRA activities and adopt a metrics-based approach to CRA evaluations of retail lending and community development financing. If the proposal is adopted, mortgage originators and servicers should expect federal agencies to pay additional attention to the provision of banking services to low- and moderate-income communities.

Finally, we anticipate increased CARES Act enforcement in 2023 based on the late-2022 increase in such actions and the focus on the CARES Act in the fall 2022 issue of the CFPB's Supervisory Highlights.

## What to Watch

- Continued focus on fair lending practices, with a particular emphasis on appraisal practices
- Increased activity related to enforcement of CARES Act violations

## III. Fintech

In 2022, fintech companies continued to face increased scrutiny from state and federal regulators. The number of legal challenges to fintech businesses grew, and regulators have sought to increase transparency throughout the fintech sector.

### Key Trends

At the federal level, regulatory supervision of lending partnerships between traditional banks and fintechs has remained active. For example, the OCC conditionally approved an application from a large fintech company, SoFi, to create a full-service bank, noting that its decision to bring the fintech inside the federal bank regulation perimeter will likely increase transparency and compliance. The CFPB, the FDIC, and the California Department of Financial Protection and Innovation (DFPI) developed guidance applicable to fintech-related compliance issues, such as misleading advertising and reasonable remediation of consumer complaints. And fintech companies offering "buy now, pay later" (BNPL) services were also subject to continued regulatory focus throughout the year, with new BNPL services continuing to emerge despite attention from regulators.

Traditional bank regulators also turned their attention to the continually evolving cryptocurrency space, increasing their focus on consumer protection for crypto and crypto-adjacent products and services. The bankruptcy announcement from cryptocurrency exchange FTX in the latter part of 2022 caused waves in the bitcoin and crypto markets, which are virtually certain to increase the call for cryptocurrency regulation by government players and could lead to more crypto market turmoil in 2023.

### 2022 Highlights

*Regulatory Updates and Guidance*

**CFPB Will Examine Nonbank Companies Posing Risks to Consumers**

In April, the CFPB announced that it would invoke a rarely used legal provision in the Dodd-Frank Act to examine nonbank financial companies that "pose risks to consumers" in order to "level the playing field between banks and nonbanks." The CFPB's press release defines "nonbanks" as entities that do not have a bank, thrift, or credit union charter, and notes that many nonbanks brand themselves as fintechs. The CFPB's authority to examine nonbanks is not specific to any particular consumer financial product or service, and the provision at issue authorizes the CFPB to supervise a nonbank covered person when the Bureau "has reasonable cause to determine . . . that such covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services." Additionally, the CFPB sought public comment on a procedural rule issued in connection with the press release that would make this process more "transparent." Nonbank entities subject to supervision under this provision will be given notice and an opportunity to respond to the CFPB's determination that the entity has engaged in conduct that poses risks to consumers.

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The procedural rule further provides that the CFPB may authorize the public release of certain information about any final determinations made as a result of its examination, such as decisions or orders issued by the Bureau. The CFPB's invocation of this dormant provision is part and parcel of its increased scrutiny in 2021 of nonbank fintech companies that offer bank-like products and services.

### CFPB Proposes Registry for Nonbanks to Detect Repeat Offenders

Relatedly, in December, the CFPB proposed a rule that would require nonbank financial institutions to register with the CFPB when they become subject to certain final public orders by a federal, state, or local government agency in connection with the offering or provision of a consumer financial product or service. The CFPB proposed to publish the orders and company information via an online registry. Additionally, larger companies would be required to designate a senior executive officer to attest to whether the company is adhering to registered law enforcement orders pursuant to the proposed rule. The Bureau's stated goal in establishing this registry is to "more effectively [ ] monitor and [ ] reduce the risks to consumers posed by entities that violate consumer protection laws."

### CFPB and FDIC Issue Circular and Final Rule Regarding Misuse of FDIC Name and Logo

In May and June, the CFPB and FDIC issued guidance regarding deceptive representations involving the use of the FDIC's name or logo or availability of deposit insurance. Specifically, the CFPB issued a circular stating that covered persons or service providers are likely to violate the CFPA's prohibition on deception if they "misuse the name or logo of the FDIC or engage in false advertising or make misrepresentations to consumers about deposit insurance," regardless of whether such conduct is engaged in knowingly.

The CFPB focused its circular on "new financial products or services," particularly products or services involving newer technologies (including crypto-assets). The FDIC approved a related final rule implementing its statutory authority to prohibit misrepresentations about FDIC deposit insurance or misuse of the FDIC's name or logo. According to the FDIC, the rule was motivated by a recent uptick in such misrepresentations.

### CFPB Publishes Report Regarding Buy Now, Pay Later Credit Products

In June, the CFPB published a report regarding BNPL products and credit reporting. Although the mechanics of BNPL plans vary, the general concept is that BNPL plans allow consumers to pay for purchases over a period of time, typically in equal installments, rather than traditional lump sum payments. According to the CFPB, BNPL products are "nearly ubiquitous at the point of purchase online and, increasingly, in brick-and-mortar stores." The CFPB's report states that, until recently, few BNPL lenders furnished information about consumers to nationwide consumer reporting companies (NCRCs). The CFPB "believes that when BNPL payments are furnished it is important that lenders furnish both positive and negative data" to NCRCs. The Bureau specifically identifies three changes that it would like the credit reporting industry to make: (1) adopt standardized BNPL furnishing codes and formats appropriate to the unique characteristics of the product by the industry; (2) incorporate BNPL data into core credit files as soon as possible; and (3) create models that account for BNPL loans' unique characteristics by scoring companies and lenders. In December 2021, the CFPB issued an inquiry to five BNPL firms, ordering them to provide information and data on key areas of consumer impact, including data furnishing by BNPL firms, to consumer reporting companies for inclusion in credit reports.

The FTC published a related blog post in September covering "basic consumer protection ground rules" in the FTC Act that apply to the marketing of BNPL payment plans, including three principles relevant to BNPL compliance. These principles are similar to the principles laid out by the CFPB in its report — both the FTC and the CFPB encourage transparency in the BNPL market and fair treatment of consumers.

### OCC Conditionally Approves Fintech Application to Create Full-Service National Bank

In January, the OCC conditionally approved applications from a large fintech lending company, SoFi, to create a full-service national bank. SoFi acquired a national bank insured by the FDIC as part of the transaction, and, after consummation of the transaction, it will provide a fully digital, "mobile-first" national lending platform for consumers across the country. The OCC imposed certain conditions that will, in relevant part, require SoFi to adhere to an operating agreement and agree that it will not engage in any crypto-asset activities or services. The bank has also applied to the Federal Reserve to become a bank holding company. In the accompanying press release, the Acting Comptroller of the OCC stated that the decision to bring the fintech inside the federal bank regulation perimeter "levels the playing field and will ensure that SoFi's deposit and lending activities are conducted safely and soundly, including limiting the bank's ability to engage in crypto-asset activities."

### DFPI Seeks Comment on Oversight Related to Crypto Asset-Related Financial Products and Services.

In June, California Governor Gavin Newsom issued an executive order to create "a transparent and consistent business environment for companies operating in blockchain, including crypto assets and related financial technologies, that harmonizes federal and California laws, balances the benefits and risks to consumers, and incorporates California values, such as equity, inclusivity, and environmental protection." The executive order directed the DFPI to solicit input from stakeholders and the public to develop a comprehensive regulatory approach to crypto assets under the authority of the California Consumer Financial Protection Law (CCFPL). Following this order, the DFPI sought comments on regulatory priorities, CCFPL regulation and supervision, and market-monitoring functions. The executive order also directed the DFPI to (1) initiate enforcement actions to stop CCFPL violations; (2) enhance its collection and review of consumer complaints pertaining to crypto asset-related financial products and services; (3) work with companies that provide crypto asset-related products to remedy complaints; and (4) consult with law enforcement agencies regarding criminal activity in this industry. The executive order and DFPI's request for public comment demonstrate the DFPI's continued interest in regulating and supervising fintech companies operating in California.

## *Enforcement Actions and Legal Challenges*

### BNPL Company Agrees to Cease Illegal Loans and Pay Refunds as Part of DFPI Settlement

In August, Four Technologies, Inc. (Four Technologies), a BNPL company, entered into a settlement with the DFPI whereby the company agreed to stop making loans, pay $2,500 in penalties, and refund $13,065 in fees. The refund represents fees consumers paid in transactions that the DFPI concluded were illegal loans. Four Technologies also agreed to obtain a California Financing Law license and to make loans, deferred payment products, or extensions of credit to California residents in compliance with that license. According to the DFPI's accompanying press release, this settlement is a continuation of the

DFPI's efforts to "lead the way on oversight" for BNPL products after clarifying in 2021 that BNPL products are loans and that companies offering BNPL products must comply with California state lending rules.

**DFPI Issues Desist and Refrain Orders Against Crypto-Asset Entities**

In September, the DFPI announced that it had issued desist and refrain orders against 11 entities for violations of California securities laws. The recipients of the orders include crypto-asset trading platforms, decentralized finance (DeFi) platforms, metaverse software development companies, and foreign exchange trading platforms. According to the DFPI, each of the subject entities offered and sold unqualified securities, and 10 of the entities made material misrepresentations and omissions to investors. The DFPI alleged that all of the entities operated Ponzi-like schemes by using investor funds to pay purported profits to other investors. Additionally, the DFPI alleged that each entity had a referral program that operated much like a pyramid scheme — the entities promised to pay commissions to investors who recruited new investors, with additional commissions if those recruited investors, in turn, recruited new investors. The DFPI also pointed to the May 2022 executive order signed by Governor Newsom, emphasizing that the agency intends to investigate and, where necessary, take action against other "crypto scams and frauds."

**CFPB Rejects Challenge to Its Authority to Investigate Crypto-Lender**

In November, the CFPB issued a decision and order on a petition filed by a crypto-lender challenging the Bureau's jurisdiction to investigate crypto-lender products. Previously, in December 2021, the CFPB served the crypto-lender with a civil investigative demand (CID) — the CFPB's first public action against a crypto-currency company. The crypto-lender filed a petition to modify the CID in March, arguing that the CID should be modified to exclude the crypto-lender's "Earn Interest Product" because the CFPB lacks authority over that product. Specifically, the crypto-lender asserted that because the SEC and state securities regulators have asserted jurisdiction over the product, the Dodd-Frank Act and the CFPA make clear that the CFPB lacks investigative authority or jurisdiction. The CFPB rejected the petition, reasoning that the crypto-lender "is trying to avoid answering any of the Bureau's questions about the Earn Interest Product (on the theory that the product is a security subject to SEC oversight) while at the same time preserving the argument that the product is not a security subject to SEC oversight." The CFPB's investigation of this crypto-lender may signal an increased willingness on the part of the Bureau to investigate other crypto-related products and services.

**Bitcoin and Crypto Lending Market Affected by Cryptocurrency Exchange Bankruptcy Announcement**

FTX, a major cryptocurrency exchange, announced in November that it was filing for bankruptcy. The announcement caused waves in the bitcoin and crypto-lender market and led some regulators to reconsider bitcoin and/or crypto-lender licenses. The DFPI, for example, suspended at least two such lending licenses in the wake of the bankruptcy announcement. After the bankruptcy filing, these lenders announced that they would need to limit platform activity, including by pausing client deposits and withdrawals. And at least one such lender reported to the DFPI that it had ceased offering loans in California and asked clients to stop making deposits. The DFPI is investigating at least one lender affected by the bankruptcy for compliance with the California Financing Law. Ramifications from the bankruptcy filing will continue into 2023.

## Looking Ahead to 2023

Despite heightened scrutiny from regulators, the fintech industry continued to innovate and evolve in 2022. The BNPL market will continue to evolve — for example, one fintech company has launched an “eat now, pay later” service that allows consumers to divide payments for groceries or takeout into smaller installments — as will regulatory supervision of that market. The ramifications of the failed cryptocurrency exchange will likely reverberate throughout 2023 as additional bitcoin and crypto lenders are forced to scale back their capabilities, and as state and federal regulators continue to scrutinize that portion of the industry.

## What to Watch

- Additional challenges to fintech companies with “buy now, pay later” marketing payment plans
- Continued enforcement activity by federal and state regulators, with increased scrutiny on crypto-focused fintechs

## IV. Telephone Consumer Protection Act

In 2022, the Ninth Circuit was a major player in the adjudication of Telephone Consumer Protection Act (TCPA) lawsuits, handing down a number of precedential decisions regarding mixed-use cellphones for do-not-call claims, excessive statutory damages awards, and the definition of an automatic telephone dialing system (ATDS). TCPA lawsuits overall continued to decline, while state mini-TCPA statutes gained momentum, with many states enacting new laws and amending existing ones this year, following Florida's lead from last year. Pennsylvania's attorney general also fired a warning shot to all companies when it filed an enforcement action against a lead generator under a novel theory of liability under the Telemarketing Sales Rule (TSR) regarding the transferability of consent obtained by telemarketers. And, in 2022, the Federal Communications Commission (FCC) issued a declaratory ruling confirming that the TCPA applies to ringless voicemails.

### Key Trends

TCPA litigation was down in 2022, with only 1,162 suits filed between January 1 and September 30.[2] That number is nearly 17% less than the number of TCPA lawsuits filed during the same period of 2021, suggesting that the plaintiffs' bar is still feeling the effects of the Supreme Court's landmark decision in *Facebook, Inc. v. Duguid, et al.*, 141 S. Ct. 1163 (2021) (*Facebook*), in which the high court resolved the issue of what constitutes an ATDS under the TCPA. By taking a narrow construction of the statute, the Court made it more difficult for plaintiffs' lawyers to survive the motion-to-dismiss stage in TCPA lawsuits alleging an ATDS claim — a complaint would have to plead sufficient factual allegations to render it more plausible than not that the caller used technology to randomly or sequentially conjure the recipient's telephone number. The *Facebook* holding thus had a chilling effect on the ability of the plaintiffs' bar to sustain its high number of annual TCPA lawsuits.

On the other hand, in the wake of *Facebook*, a number of states have enacted or amended existing "mini-TCPA" laws, which purport to offer consumers more protections than the TCPA. As a result of new legislation popping up across the country, lawsuits filed in state courts alleging violations of those state statutes are on the rise, as we predicted. Another consequence of this growing patchwork of varying (and often inconsistent) state mini-TCPA laws is the increasing compliance challenge for companies that communicate with customers nationwide. That challenge is further complicated by the fact that cellphone area codes are not a reliable indicator of where a given customer lives or receives a call, and therefore companies cannot be certain which state's law applies to its communications with that customer.

[2] Data as of September 2022, per WebRecon.

## 2022 Highlights

**Ninth Circuit Issues Three Significant TCPA Decisions Concerning Mixed-Use Cellphones, Excessive Statutory Damages Awards, and the Definition of an ATDS**

In October and November, the Ninth Circuit issued three significant decisions concerning the TCPA, including the do-not-call list's protections over cellphones used for both personal and business use, and the constitutionality of excessive aggregate statutory damages awards for violations of the law.

First, in *Chennette, et al. v. Porch.com, Inc., et al.*, a divided panel of the Ninth Circuit reversed and remanded a dismissal decision from the United States District Court for the District of Idaho, holding that plaintiffs — who were home improvement contractors — had statutory standing to sue under TCPA §§ 227(b) and (c) where the defendants sent text messages to their mixed-use cellphones registered on the national do-not-call registry. No. 20-35962 (9th Cir. Oct. 12, 2022). In *Chennette*, plaintiffs alleged that the defendants mined websites such as Yelp.com for their contact information and sent more than 7,000 automated text messages to their cellphones, offering them client leads for home improvement services, in violation of TCPA §§ 227(b) and (c). The United States District Court for the District of Idaho dismissed the complaint for lack of statutory standing, finding that the plaintiffs, as businesses, fell outside of the statute's "zone of interest."

On appeal, the Ninth Circuit disagreed, finding that the text of the TCPA permits recovery for any "person or entity," and "under the most natural reading of the term, 'entity' includes business." Therefore, plaintiffs were within the TCPA's protected "zone of interest" and had standing under TCPA § 227(b). Further, the Ninth Circuit held that plaintiffs had statutory standing to sue under Section 227(c), even though the FCC regulation implementing that provision proscribes only those telephone solicitations made to "a residential telephone subscriber." The Ninth Circuit noted that the FCC has deliberately not provided any guidance on when a mixed-use phone "ceases to become a residential phone," and that in the absence of any such guidance, plaintiffs' registered mixed-use cellphones are presumptively residential at the motion-to-dismiss stage. The Ninth Circuit then set forth multiple factual considerations about the use of a cellphone and how it is held out to the public in order to assess whether the presumption that the number is entitled to do-not-call protections can be rebutted. The decision has significant consequences for do-not-call class action cases because it is clear that individual fact inquiries are necessary to determine the claims of any mixed-use cellphone owner.

Next, in one of the more closely watched TCPA cases in recent years, the Ninth Circuit in *Wakefield v. ViSalus, Inc.*, vacated a jury's $925,225,000 verdict against a defendant for violations of the TCPA as "excessive," and sent it back to the lower court for reconsideration. No. 21-35201 (9th Cir. Oct. 20, 2022). In *Wakefield*, the plaintiff alleged that a multilevel marketing company that sells weight loss products violated the TCPA by making unsolicited, automated telemarketing calls featuring an artificial or prerecorded voice message to her and a class of similarly situated consumers without their prior express consent. A jury found that the defendant had made more than 1,850,440 calls in violation of the TCPA and set the total damage award at $925,220,000, consistent with the TCPA's minimum statutory damages requirement of $500 per call. In a post-trial motion, the defendant argued that the nearly $1 billion statutory damage award was unconstitutionally excessive, but the district court refused to reduce it.

On appeal, the Ninth Circuit held that even where the per violation penalty is constitutional, the aggregated statutory damages are subject to constitutional limitation in extreme situations; for example, "when they are 'wholly disproportioned' and 'obviously unreasonable' in relation to the goals of the statute and the conduct the statute permits."

The Ninth Circuit vacated the district court's decision assigning the award, and remanded with instruction for the district court to determine whether the award is "so severe and oppressive that it violates [defendant's] due process rights."

Finally, in *Borden, et al., v. eFinancial, LLC*, the Ninth Circuit affirmed the district court's dismissal of a TCPA action alleging that the defendant used a "sequential number generator" to pick the order in which to call customers who had provided their phone numbers. No. 21-35746 (9th Cir. Nov. 16, 2022). A panel held that under the TCPA's plain text rule, that system did not qualify as an ATDS, which must generate and dial random or sequential *telephone* numbers, not just any number to decide which pre-selected phone numbers to call. The decision effectively put an end to a popular theory among the plaintiffs' bar that in footnote 7 of the Supreme Court's decision in *Duguid*, the Court had left open a viable path to ATDS claims where the number itself was not randomly or sequentially generated.

**State Mini-TCPA Statutes Gain Momentum**

Since becoming law in July 2021, Florida's Telephone Solicitation Act (FTSA), Fla. Stat. § 501.059(8)(a), has been a favorite of plaintiffs' lawyers seeking to take advantage of its ambiguous restrictions on certain "automated" sales calls and text messages to Florida residents, and its substantial and disproportionate penalties of up to $1,500 per violative call or text. In that time, plaintiffs have filed dozens of FTSA class actions challenging calls and texts made by a wide range of companies based inside and outside of Florida. The prevalence of these FTSA lawsuits highlights that the statute effectively seeks to unwind the US Supreme Court's April 2021 ruling in *Facebook*, in which the Court held that an ATDS required the use of a random or sequential number generator to store or produce numbers to text or call. Florida, in turn, amended the FTSA just a few months later, implicitly rejecting the *Duguid* decision. As we wrote in Goodwin's 2021 Review, the amended statute is not limited to texts or calls made using an ATDS. It instead applies to certain sales calls or texts made using an "automated system" — a term nowhere defined in the FTSA — for the "selection or dialing" of the number.

In response, companies have asserted multiple constitutional challenges to the FTSA, as occurred in *Turizo v. Subway Franchisee Advertising Fund Trust Ltd.*, Case No. 21-61493 (S.D. Fla. May 18, 2022). In *Turizo*, the court rejected each of the challenges defendant made to the FTSA in its motion to dismiss, including the statute: (1) should be interpreted coextensively with the TCPA and limited to text messages made with an ATDS (i.e., technology that uses a random or sequential number generator); (2) was preempted by federal law; (3) violated the Commerce Clause of the US Constitution; (4) violated the First Amendment; and (5) was unconstitutionally vague. Notably, the court declined to interpret the FTSA's "automated system" to mean the same thing as the TCPA's ATDS definition, holding that the Florida legislature nowhere defined the term to mean only systems that use a random or sequential number generator. It also rejected the defendant's argument that the term was unconstitutionally vague, finding the legislature need not define every term to clearly express its will, and noting that the defendant used the same term (i.e., "automated system") to describe its messaging software on its own website. Finally, with respect to preemption, the court found that the TCPA was not meant to occupy the field of autodialer regulation and that the FTSA was within the scope of the TCPA's savings clause.

But Florida was not the only state to gain momentum in its telemarketing restrictions last year. Two other states enacted or amended mini-TCPA statutes in 2022 — Washington and Oklahoma — and Michigan's state legislature proposed its own TCPA analogue. The amended Washington law is less rigorous than the FTSA, governing "telephone solicitation[s]," which are defined as "unsolicited initiation of a telephone call … for the purpose of

encouraging the person to purchase property, goods, or services or soliciting donations …" H.B. 1497 (Wash. 2022). The Oklahoma statute,however, like the FTSA, applies to telephonic sales calls that involve "an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called" — and is thus not limited to equipment that would qualify as an ATDS under the TCPA. H.B. 3168 (Okla. 2022). The Michigan statute, if passed, would prohibit the use of an "automatic dialing and announcing device, defined to include any device or system of devices that is used, whether alone or in conjunction with other equiequipment, for the purpose of automatically selecting or dialing telephone numbers, for a telephone solicitation that otherwise violates the statute." H.B. 6307 (Mich. 2022). Finally, in late 2022, New York updated its telemarketing law to require telemarketers to give customers the option to be added to the company's do-not-call list at the outset of certain telemarketing calls, before the caller begins the marketing aspect of the call. S.8450-B/A.8319-C (N.Y. 2022).

**Pennsylvania Attorney General Brings Suit Claiming That Consent to Be Called Cannot Be Obtained From Lead Generator**

In November, the Pennsylvania Office of Attorney General filed a lawsuit in federal court alleging that a group of companies offering lead-generation services violated the TSR (the regulation upon which the TCPA is largely based) by engaging in improper advertising practices. *Pennsylvania v. Fluent LLC et al.*, No. 2:22-CV-01551 (W.D. Pa. Nov. 2, 2022). According to the complaint, the defendants used deceptive online ads to trick customers into providing contact information and survey responses, which defendants then sold to telemarketers unlawfully, including contact information for customers on state or national do-not-call lists. The complaint also alleges that, regardless of any purported deception, consent obtained by the telemarketers to call these customers is illegitimate under the TSR because in order to waive one's registry on a do-not-call list and allow a telemarketer to start sending messages, there needs to be a direct agreement between the telemarketer and the customer. That is, according to the Pennsylvania attorney general, consent obtained by a lead generator does not permit a separate telemarketer to call a consumer.

The attorney general's office purported to base its theory for TSR liability (i.e., that consent to call persons on the do-not-call list cannot be obtained on behalf of third-parties) on the FTC's Statement and Basis of Purpose of the 2008 Amendments to the TSR published in the Federal Register. There, the FTC said that "a consumer's agreement with a seller to receive calls delivering prerecorded messages is nontransferable," and "[a]ny party other than that particular seller must negotiate its own agreement with the consumer to accept calls delivering prerecorded messages." 73 Fed. Reg. 51163, 51182 (Aug. 2008). The FTC then concluded that "[p]rerecorded calls placed to a consumer on the National Do Not Call Registry by some third party that does not have its own agreement with the consumer would violate the TSR." Although the attorney general relied on this 2008 Statement and Basis of Purpose in its suit against the lead-generation companies, the Statement does not address the separate legal question of whether a consumer can contractually agree to request and give consent for communications from third parties, which is the basis for the attorney general's theory. The lead-generation industry and telemarketers alike should be aware that this theory could gain traction among the plaintiffs' bar.

**FCC Issues Declaratory Ruling That "Ringless Voicemails" Are Subject to TCPA**

In November, the FCC released an order confirming that the delivery of "ringless voicemails" to wireless phones constitutes a "call made using an artificial or prerecorded voice" such that it requires consumer consent pursuant to TCPA § 227(b)(1)(A)(iii). Relying on its 2015 order that internet-to-phone text messages are the same as phone-to-phone text

messages and thus subject to the TCPA, the FCC concluded that the ringless voicemail process is similar to internet-to-phone text messaging in that it "direct[s] the messages by means of a wireless phone number and [depends] on the transmission of a voicemail notification alert to the consumer's phone (causing the consumer to retrieve the voicemail message)."

## Looking Ahead to 2023

Although the Supreme Court's decision in *Facebook* resulted in substantially fewer TCPA cases alleging violations of the ATDS provision in 2022, new state laws (like Florida's) tightened restrictions on telemarketing calls and text messages and spurred a new wave of litigation challenging calls under the new laws. In 2023, we expect that the number of TCPA suits will continue to decline overall, and lawsuits around state mini-TCPA statutes will continue to rise in number. We also anticipate that 2023 will see litigation and enforcement actions brought under the TSR and TCPA challenging the validity and effectiveness of consent based on the "nontransferable" consent-to-be-called issue raised by the Pennsylvania attorney general in the *Fluent* case and similar theories that consent is ineffective. In particular, lead generators themselves may be targets for suits asserting such novel theories of liability.

In a similar vein, we also expect to see emerging case law challenging session replay software, which is the technology that businesses often rely upon to prove that they obtained a consumer's consent to call for purposes of defending against TCPA suits. Session replay software allows businesses with consumer-facing websites to understand how consumers interact with their site by tracking, for example, the consumer's mouse movements and keyboard strokes, or the location of a cursor on the business's website. In TCPA litigation, the software has been used to demonstrate that consumers were provided with necessary disclosures regarding their consent to be called, and that they opted in to be called by, for example, clicking a button. While plaintiffs' attorneys have begun filing lawsuits alleging that session replay software violates certain state wiretap acts, we expect to see other, creative claims purporting to invalidate businesses' use of the technology.

## What to Watch

- Continued expansion of state mini-TCPA statutes and surrounding litigation
- Development of the "non-transferable consent" theory of TSR liability as a pathway to TCPA liability for lead generators
- Emerging case law challenging session replay software

## V. Credit, Debit, and Prepaid Cards

During 2022, Goodwin tracked five enforcement actions related to credit, debit, and prepaid cards. This was a decrease from the six enforcement actions Goodwin tracked in 2021, and a reverse in the recent trend of increased enforcement in this area since 2019. However, in 2022, total recoveries by enforcement agencies amounted to $503 million, more than a twentyfold increase from 2021 ($24 million) — characteristic of the increase in civil penalty amounts in this area over the past few years.

Though the number of individual enforcement actions remained low this year, there remains an ever-increasing focus on fees associated with debit and credit card use. Both President Biden and CFPB Director Chopra have indicated a focus on eliminating “junk fees.” Director Chopra previewed this focus in December 2021 and followed through with the launch of the CFPB’s Junk Fee Initiative in January 2022.

### Key Trends

#### Federal and State Crackdown on Debit and Credit Card Fees

As Goodwin predicted last year, 2022 saw an increased federal and state focus on debit and credit card fees. In June, the CFPB began a review of credit card companies’ penalty policies, focusing on what it called “excessive late fees” and requesting data regarding these fees to help assess their reasonability and proportionality. The CFPB stated that these penalty policies cost consumers $12 billion each year, with 18 of the top 20 credit card issuers setting late fees at or near the maximum amount permitted by the Federal Reserve. Historically, credit card companies have avoided enforcement scrutiny under the Federal Reserve Board of Governors’ 2010 immunity provision for excessive late fees. While the Federal Reserve has prohibited companies from generating more late-fee revenue than necessary to cover the cost of a late payment, the immunity provision permits companies to avoid scrutiny if fees are set at a particular level, even if those fees are not necessary to deter a late payment and result in excess profits. Director Chopra stated that the CFPB’s review effort is “particularly timely since current rules might give companies the incentive to impose big hikes based on inflation” because the Federal Reserve allows late fees to rise with inflation. The CFPB noted in particular that late-fee revenue comes “disproportionately from people living in low-income neighborhoods.”

In October, the CFPB issued guidance to help banks avoid charging illegal “junk fees” on deposit accounts, focusing primarily on surprise overdraft fees and other unanticipated fees. Similar guidance was issued by the New York Department of Financial Services (DFS) in July.

#### Prepaid Benefit Cards Continue to Attract Regulatory Scrutiny

Prepaid benefit cards continue to attract regulatory scrutiny, a continuation of a key trend Goodwin highlighted last year. In November, U.S. Bank’s parent company told investors that it was cooperating with a CFPB investigation tied to its administration of prepaid benefit cards during the COVID-19 pandemic. Relatedly, private litigation piggybacking off of federal prepaid card enforcement remains pending.

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In 2021, the CFPB entered into a consent order with JPay LLC over its handling of prepaid cards provided to formerly incarcerated individuals at the time of their release from a correctional facility. Under the order, JPay was required to pay $4 million in consumer redress as well as a $2 million civil money penalty.

## 2022 Highlights

### CFPB Issues Guidance on Illegal "Junk Fees" for Deposit Accounts

In October, the CFPB issued guidance on two "junk fee practices," calling them "likely unfair and unlawful under existing law." The CFPB explained that the first type of fee, "surprise" overdraft fees, can occur when a bank displays a customer account as having sufficient available funds to complete a purchase at the time of the transaction, but the customer is later charged an overdraft fee because the "financial institution relies on complex back-office practices to justify charging the fee. For instance, after the bank allows one debit card transaction when there is sufficient money in the account, it nonetheless charges a fee on that transaction later because of intervening transactions." The CFPB stated that such surprise overdraft fees could constitute charging penalties on purchases made with a positive balance, a possibly unlawful practice. The second "junk fee practice" addressed in the guidance is the alleged practice of "indiscriminately charging depositor fees to every person who deposits a check that bounces." The CFPB called these fees problematic because they penalize "the person who could not anticipate the check would bounce."

### CFPB Requires Bank to Pay More Than $190 Million for Overdraft Fees

In September, the CFPB announced that it had entered into a $190 million consent order with Regions Bank (Regions) to resolve allegations that it had charged consumers surprise overdraft fees. Specifically, the CFPB alleged that Regions had charged consumers surprise overdraft fees, known as authorized-positive fees, on certain ATM withdrawals and debit card purchases after telling consumers they had sufficient funds at the time of the transactions in violation of the CFPA. Under the consent order, the bank agreed to pay a $50 million civil money penalty and to refund at least $141 million to consumers affected by its overdraft fees.

The September action was the CFPB's second enforcement action related to Regions' overdraft practices in recent years. In 2015, CFPB and Regions agreed to a consent order under which the bank agreed to refund $49 million to consumers and pay a $7.5 million penalty for charging overdraft fees to consumers who had not opted into overdraft protection, as well as to consumers who had been told they would not be charged overdraft fees.

### NY DFS Announces New Guidance on Certain Overdraft Fees

In July, the New York Department of Financial Services (DFS) announced new administrative guidance barring certain overdraft and non-sufficient funds (NSF) fees. DFS explained the new guidance aims to "promote financial inclusion" by barring certain fees that disproportionately affect low-income New Yorkers.

Specifically, the guidance mandates that all regulated depository institutions must avoid charging consumers:

- Overdraft fees if the consumer had a sufficient positive account balance to cover the transaction at the time it was authorized
- Fees for "overdraft protection" transfers in an amount insufficient to avoid the overdraft, resulting in both an overdraft fee and an "overdraft protection" fee; and
- More than one NSF fee for the same declined transaction without sufficient disclosures

## Looking Ahead to 2023

President Biden and Director Chopra's public statements regarding their focus on debit and credit card fees make clear that regulatory attention will increase in the year to come. With state and federal agencies issuing guidance in 2022, it seems likely that 2023 will see more investigations and enforcement actions in this space, especially regarding financial institutions alleged to have charged "junk" fees.

Separately, the second half of 2022 saw a slight slowdown in consumers filing new lawsuits related to pandemic benefits. With motion-to-dismiss briefing complete or close to complete in nearly all outstanding federal cases, parties could expect to see decisions in the first half of 2023, followed by potential settlements if the actions are not dismissed outright.

## What to Watch

- Increased enforcement focus on debit and credit card fees
- A decrease in litigation relating to pandemic benefits

## VI. Debt Collection and Settlement

During 2022, Goodwin tracked 16 federal and state enforcement actions related to debt collection and debt settlement services. This number represents a significant decrease from 2021, during which Goodwin tracked 35 actions, and a marked change from the 2016-2018 average of 42 actions per year in this space.

In total, federal and state agencies recovered $42.6 million in this space during 2022 — a 5.6% decrease in total recoveries from 2021 ($45.1 million). This continues an unbroken trend of year-over-year decreases in the total amounts of recovery in this space over the course of the past six years.

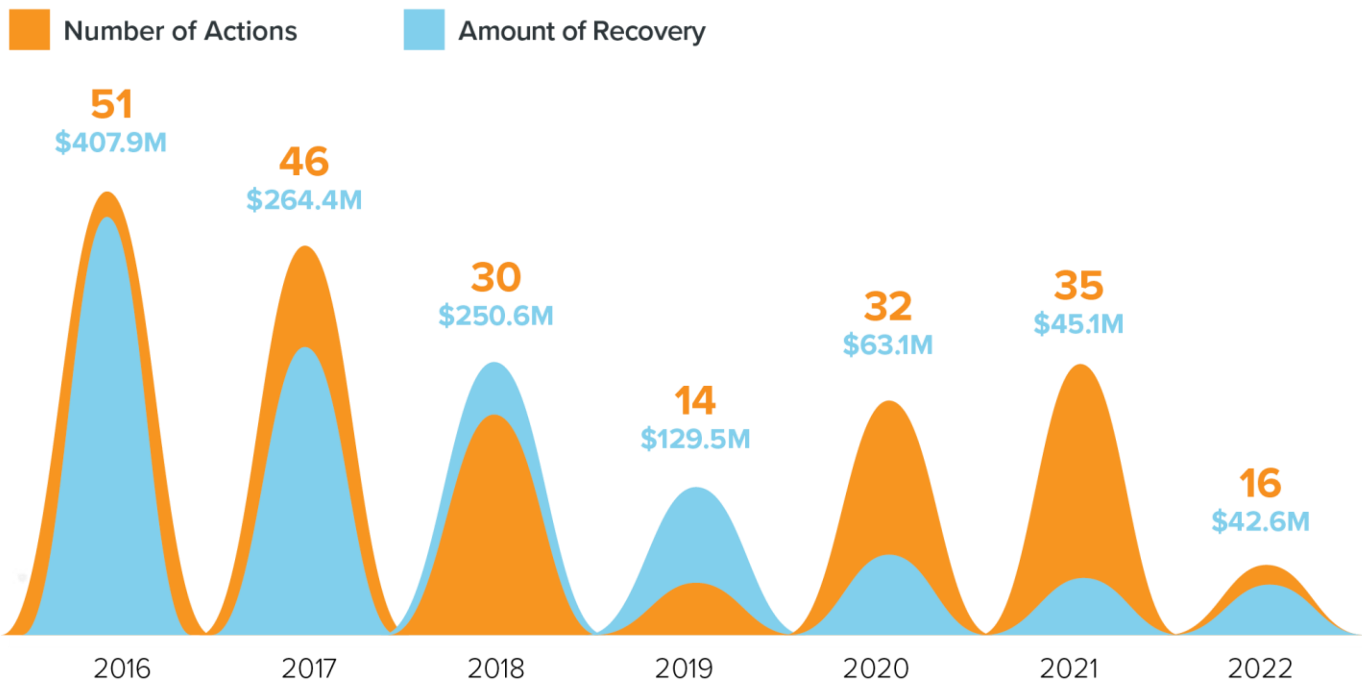
In the regulatory sphere, while there were no significant new federal rules proposed or finalized during 2022 concerning the debt collection or debt settlement industry, the CFPB did promulgate new guidance for the industry, including updated examination procedures that debt collection companies can use to assess their practices, FAQs that clarify debt collectors' communications responsibilities, and an advisory opinion interpreting federal law as prohibiting "pay-to-pay" fees, all of which are discussed in more detail below. Additionally, at the state level, the DFPI implemented changes to the scope of its Debt Collection Licensing Act (DCLA), including clarifications to its definition of a "debt collector" subject to the Act. And in August, the California State Senate voted to approve a bill further modifying the DCLA to make changes limiting the scope of its licensing requirement, specifying the information required in licensees' annual reports, and requiring document retention of all contact or attempted contact to persons with a debtor account.

### Key Trends

Consistent with data from the past few years, the CFPB remains the most active federal or state agency in initiating and settling actions related to debt collection and debt settlement services. Despite being responsible for the most actions, the CFPB only brought six such actions in 2022, including one joint action with the New York attorney general. While this year's total represents a slight decrease from the seven actions brought in 2021 and the 12 actions tracked in 2020, it is consistent with the number of actions tracked in 2018 and 2019. The decline in federal actions observed this year was not limited to the CFPB — the FTC has historically been the second most dominant actor in this space, but it brought only two actions this year, down from the seven actions it brought in 2021.

As in the past, the FTC actions involved alleged violations of the FTC Act, whereas the CFPB-initiated actions primarily involved alleged violations of the CFPA and the Fair Debt Collection Practices Act (FDCPA). Additionally, two FTC and two CFPB actions alleged violations of the TSR. Prior to 2019, the TSR was not a commonly used enforcement mechanism, but since then Goodwin has seen an increase such actions.

## Debt Collection + Settlement Actions by Year (with Recoveries)




In 2021, Goodwin observed a rise in the number of state enforcement actions, but that trend may have been an anomaly. This past year, only eight state actions were tracked, including one joint action with the CFPB. By contrast, in 2021, states were the most active enforcers in this space, initiating nearly twice the number of actions as federal agencies. This year, state attorneys general brought actions in Arizona, Massachusetts, New York, Minnesota, and North Carolina. Notably absent from the list is California, which brought eight actions in 2021. California's absence is surprising given the DFPI's expansive authority to enforce debt collection.

## 2022 Highlights

### CFPB Updates Its Examination Procedures

In March, the CFPB updated its debt collection examination procedures to incorporate Regulation F, the implementing regulation of the FDCPA. These updated examination procedures explain in detail how collection operations are examined. They also provide a framework for debt collection companies to identify practices that may lead to violations of consumer financial laws, assess the quality of the entity's current compliance management systems, and determine whether the entity engages in practices that violate these laws. In addition, they highlight certain practices that constitute FDCPA violations, such as publishing a list of consumers who allegedly refuse to pay debts and disclosing the existence of a debt to third parties.

### CFPB Publishes Debt Collection Rule FAQs

In July, the CFPB published Debt Collection Rule Frequently Asked Questions to clarify debt collectors' responsibilities under Regulation F. The FAQs address a debt collector's responsibilities pertaining to third-party communications, electronic communications, and unusual or inconvenient time and place provisions. For instance, the FAQs clarify that a debt collector is not required to communicate electronically with a consumer. Further, the FAQs note that a reasonable method for consumers to opt out of electronic communications is for the debt collector to include a hyperlink or allow the consumer to reply with the word "stop."

### CFPB Releases Advisory Opinion on "Pay-to-Pay" Fees

In June, the CFPB issued an advisory opinion stating that federal law prohibits "pay-to-pay" fees — fees that are charged to consumers seeking to make a payment in a specific way, such as online or over the phone. The opinion interprets Section 808 of the FDCPA, as prohibiting debt collectors from collecting a fee unless it is expressly authorized by the agreement creating the debt or "permitted by law." The advisory opinion noted that "permit" is defined in dictionaries as either "to expressly assent" or "to acquiesce, by failure to prevent." The latter interpretation led some debt collectors to believe that they may collect convenience fees not authorized by the underlying agreement as long as those fees are not expressly prohibited by law. The advisory opinion rejects that interpretation and finds that "permitted by law" restricts any convenience fees to those expressly authorized either by law or by the language of the underlying agreement. District courts around the United States have previously been divided on this issue but will now need to follow the position set forth by the advisory opinion. The opinion further states that debt collectors violate the FDCPA by profiting from payment processors who charge unauthorized fees.

### CFPB Files Lawsuit Against New York-Based Debt Collection Companies

In January, the CFPB filed a complaint against New York-based debt collection companies and their owners in the United States District Court for the Western District of New York, alleging that they had violated the FDCPA and CFPA by selling debts to third parties that in turn used unlawful collection methods, such as threatening consumers with arrest, jail, or a lawsuit. Though the debt collection companies allegedly forwarded the consumer complaints they had received to the third parties, the CFPB alleged that the collection companies failed to take any action to prevent the unlawful practices. Thus, the CFPB alleged that the companies knowingly or recklessly placed debts with third parties engaging in unlawful practices. The companies' motion to dismiss, filed in March, remains pending.

### CFPB and NY Attorney General Reach $4 Million Settlement with Debt Collectors

In May, the CFPB and the New York attorney general announced they had reached a settlement with six New York-based debt collection companies resolving allegations that the companies had used deceptive and harassing methods of debt collection in violation of the FDCPA, the CFPA, and New York state law. Specifically, CFPB alleged that the companies threatened consumers with arrest, imprisonment, and other legal action for failure to pay, and used social media to contact consumers' family members and friends about the debts. The alleged social media practice drew specific attention from Director Chopra, who emphasized that "[i]t is illegal for debt collectors to orchestrate smear campaigns using social media to extort consumers into paying up."

As a result of the settlement and stipulated final judgment, the companies agreed to pay a civil money penalty of $4 million and cease participation in the debt collection industry.

### North Carolina Attorney General Enters Into $23 Million Settlement With Debt Collector

In October, the North Carolina attorney general announced that his office had entered into a consent order with Texas-based debt collection companies stemming from a lawsuit filed in 2019. That complaint alleged that the companies were operating in the state illegally, because they had failed to obtain a required license. The attorney general further alleged that the companies sent customers false court notices claiming they had committed criminal violations by failing to return rented property. Those consumers who contacted the debt collection companies to complain were subsequently subjected to further harassment, allegedly including the threat of arrest.

Under the consent order, the companies agreed to a permanent ban from collecting debt in North Carolina and agreed to make payment of $223,018.98 in consumer refunds, $22,934,075.17 in consumer debt forgiveness, $1,475 in unpaid business registration fees, $20,000 in attorney fees and investigation costs, and $6,000 in civil penalties.

## Looking Ahead to 2023

There was a dearth of enforcement actions in 2022 concerning debt settlement companies, which may be attributable to the fact that Director Chopra's vision has seemed focused on targeting new technologies and big financial institutions, rather than small-time debt collectors. But, as the macroeconomic winds shift, we anticipate that more consumers will seek assistance from such companies, drawing additional scrutiny from enforcement agencies. Since 2017, reported settlement activity has increased in conjunction with increased delinquency by debt collection companies. These increases in reported settlements and delinquency are consistent with past trends during recessions and align with CFPB predictions in this space.

## What to Watch

- Potential CFPB rule-making on first-party debt collection practices
- Stringent enforcement of the FDCPA pursuant to Regulation F
- Continued preponderance of CFPB-led enforcement actions

## VII. Payday and Small-Dollar Lending

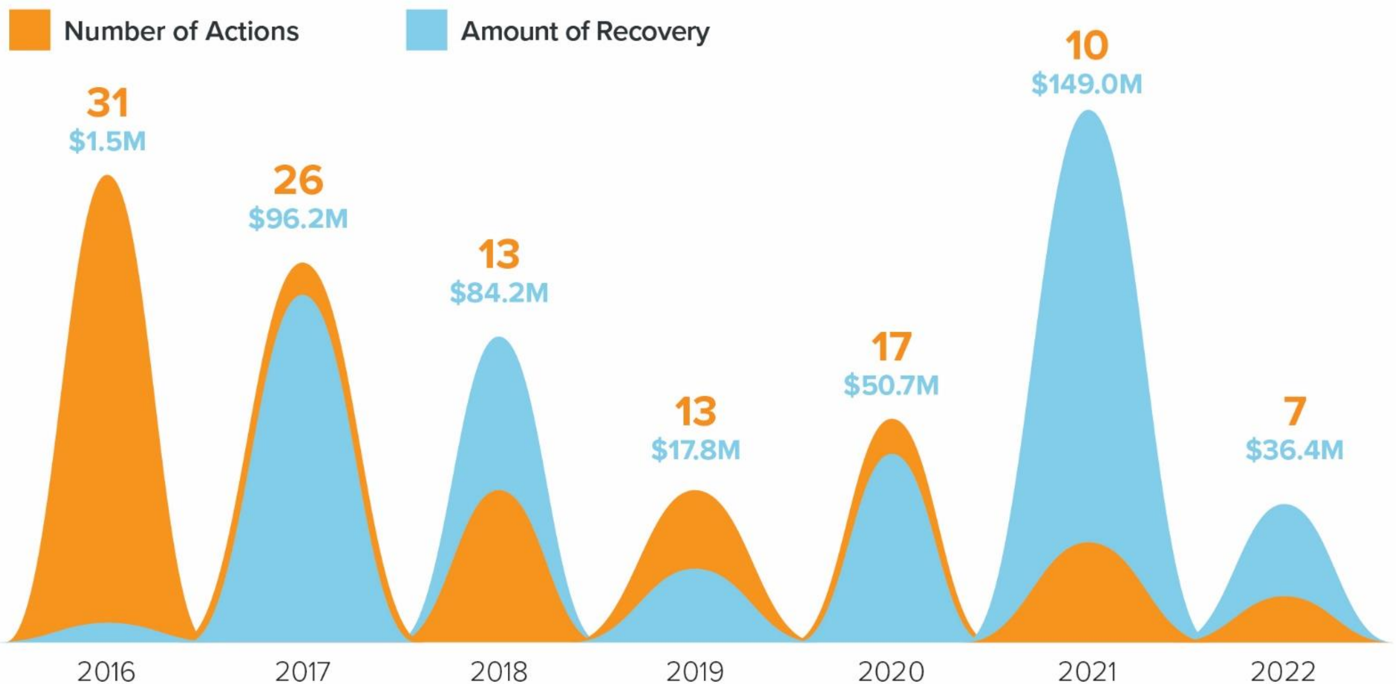
Goodwin monitored only two new federal enforcement actions brought by the CFPB and five state enforcement actions (including a joint enforcement action with the FTC) concerning payday lending or small-dollar lending in 2022. 2022 levels were significantly down from prior years, as Goodwin identified 10 such actions in 2021, 17 actions in 2020, 13 actions in both 2018 and 2019, and 26 actions in 2017. Despite the lack of new enforcement activity, states continued to enact legislation in this area, including a new 36% APR cap on covered loans in New Mexico, which became effective on January 1, 2023.

### Key Trends

We predicted an increased focus by the CFPB on payday lending, in part because the payment provisions of the Payday Lending Rule were supposed to take effect in June 2022. But the provisions — which would have, among other things, required covered lenders to get permission to withdraw from a consumer's bank account after two failed attempts to collect — did not take effect. Prior to implementation, the rule was vacated by the Fifth Circuit in *Community Financial Services Association of America Ltd. v. CFPB*, 51 F.4th 616 (5th Cir. 2022). As a result, the expected increase in supervisory examinations and related enforcement in this sphere did not materialize.

Despite the unclear future of the Payday Lending Rule, the CFPB has continued its focus on what it perceives as the abuses of the payday lending industry. In April, the CFPB issued a report titled "Market Snapshot: Consumer use of State payday loan extended payment plans." The report concluded that few payday loan borrowers benefit from no-cost extended payment plans that certain states require. In summarizing the report, CFPB Director Chopra noted that the Bureau's research "suggests that state laws that require payday lenders to offer no-cost extended repayment plans are not working as intended. … Payday lenders have a powerful incentive to protect their revenue by steering borrowers into costly re-borrowing."

The CFPB's fall 2022 Supervisory Highlights detailed other acts and practices of payday lenders that CFPB examiners found constituted violations of consumer protection laws. Specifically, CFPB examiners found that payday lenders "failed to maintain records of call recordings necessary to demonstrate full compliance with conduct provisions in consent orders generally prohibiting certain misrepresentations." The CFPB stated that the "[f]ailure to maintain records of such call recordings violated the consent orders and Federal consumer financial law" and directed "lenders to create and retain records sufficient to capture relevant telephonic communications."




## 2022 Highlights

### CFPB's Payday Lending Rule Struck Down by Fifth Circuit

In October, the US Court of Appeals for the Fifth Circuit issued an opinion in *CFSA* that vacated the Payday Lending Rule on the grounds that the CFPB's funding mechanism is unconstitutional. The Payday Lending Rule, among other things, restricts lenders from withdrawing loan repayments from consumers after two withdrawal attempts have been rejected due to insufficient funds, and it requires lenders to provide an unusual payment withdrawal notice before initiating a withdrawal at an irregular interval. The CFPB filed a certiorari petition with the US Supreme Court seeking review of the Fifth Circuit's opinion on an expedited basis, which would allow the Supreme Court to decide the case this term. Community Financial Services Association of America (CFSA) opposed the Bureau's petition and filed a cross-petition for certiorari, arguing that the Court should deny the writ. Although it urged the Court not to hear the case, CFSA further argued that should the Court grant the petition, it should also consider additional challenges to the Rule, including that it was promulgated by a Director while an unconstitutional removal provision was in effect, and that the CFPB exceeded its authority because the conduct prohibited by the Rule is outside the statutory scope of unfair or abusive conduct.

### CFPB Files Enforcement Action Against Payday Lender for UDAAP Violations

In July, the CFPB filed an enforcement action in the US District Court for the Eastern District of Texas, alleging that ACE Cash Express engaged in unfair, deceptive, and abusive acts or practices by concealing the option of a free repayment plan to consumers by first offering consumers fee-based

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refinances and making unauthorized debit card withdrawals. *CFPB v. Populus Financial Group Inc. d/b/a ACE Cash Express*, No. 3:22-cv-01494-G (E.D. Tex. July 12, 2022). The case has been stayed pending resolution of the CFPB's petition for certiorari in *CFSA.*

**Arizona Attorney General Reaches Settlement With Short-Term Small-Dollar Lender Over Allegedly Usurious Loans**

In March, the Arizona attorney general entered into a settlement and consent judgment, resolving its lawsuit against CashCall, Inc., its subsidiary, and its owner. The Arizona attorney general alleged that CashCall had violated the Arizona Consumer Fraud Act by engaging in a scheme to use a South Dakota company with a purported Native American tribal affiliation to evade state usury limitations. Under the terms of the settlement, CashCall agreed to pay $4.83 million in restitution and to forgive and cease all collection activity on outstanding loans issued to Arizona consumers.

**DC Attorney General Reaches Settlement With Online Lender Over Allegedly Misleading Loan Terms**

In February, the DC attorney general announced that a Delaware-based online lender, Elevate Credit, had agreed to pay $3.3 million to more than 2,500 consumers who allegedly received misleadingly high-cost, short-term loans and lines of credit that carried interest rates up to 42 times the legal limit. This agreement resolved a lawsuit filed by the DC attorney general in the Superior Court of the District of Columbia, which alleged that the lender deceptively marketed various high-cost loan products, was the true lender for these loan products, and engaged in other deceptive and unfair business practices in violation of the District of Columbia Consumer Protection Procedures Act.

**Court Issues Final Approval of Settlement in Class Action Against Tribal Payday Lenders**

In August, the US District Court for the Eastern District of Virginia approved a class action settlement related to high-interest loans allegedly designed to evade usury and lending laws. The plaintiffs alleged that the defendant-lender sought to evade state usury laws by originating high interest loans in the names of entities formed by Native American tribes in violation of state lending laws and RICO. The court approved a payment of $44.53 million to the settlement class of 1,031,852 individual consumers and the cancellation of approximately $450 million in debt.

## Looking Ahead to 2023

Despite the Fifth Circuit's *CFSA* decision, the CFPB may try to press forward with business as usual in the payday lending space. The CFPB has taken the position that *CFSA* is binding precedent only within the Fifth Circuit and that courts in other Circuits should not follow that decision. We also expect the CFPB to continue to pursue previously filed enforcement actions against payday lenders that did not raise timely constitutional challenges to the Payday Lending Rule.

Based on the CFPB's fall 2022 Supervisory Highlights, we expect the Bureau to use the exam process to look closely at past consent orders involving payday lenders to determine compliance, including by reviewing call recordings to determine compliance with consent orders' conduct provisions. This focus — consistent with Director Chopra's repeated statements to guard against recidivism— may allow the CFPB to continue to police the payday lending space even while the implementation of the Payday Lending Rule remains uncertain.

We also expect that the CFPB will continue to actively monitor and review products created by fintech companies that create alternatives to traditional, short-term small-dollar loans. The CFPB reviews such products to ensure they offer adequate consumer disclosures, comply with applicable regulations, and are not unfair, deceptive, or abusive.

**What to Watch**

- Increased regulatory or enforcement activity by states due to uncertain legal status of Payday Lending rule
- The possibility of new enforcement actions against payday and small-dollar lenders based on UDAAP
- Increased attention to compliance with consent orders during CFPB examinations of payday lenders

## VIII. Credit Reporting

In 2022, Goodwin tracked six public enforcement actions related to credit reporting or credit repair services. This is a significant increase from the single enforcement action that Goodwin tracked in 2021, but it aligns more closely with the average four actions per year that we observed in this area between 2017 and 2020.

Enforcement actions in 2022 focused primarily on violations of the FTC Act and allegedly predatory credit repair schemes. Each enforcement action brought in 2022 sought injunctive relief as well as a combination of required disclosures, monetary relief for consumers, and/or civil penalties and fines. Together, the actions resulted in recovery of $20.7 million (which includes $13.2 million in consumer redress and $7.5 million in civil penalties).

Beyond enforcement actions, federal agencies remained active in the space, as demonstrated through recent CFPB guidance, advisory opinions, and supervisory investigations. Moreover, Director Chopra indicated in January 2023 that the CFPB is contemplating issuing new regulations for the major credit bureaus in the near term. Thus, we anticipate that federal agencies, particularly the CFPB, will continue to step up their focus on credit reporting in the coming years.

### Key Trends

In our 2021 Year in Review, we predicted a higher level of activity in the credit reporting space that would focus particularly on credit reporting agencies (CRAs), and 2022 delivered on that prediction. Notably, the majority of last year's actions (four of the seven reported) were FTC actions, an unexpected shift from the past few years, in which the CFPB has been the dominant actor.

Nevertheless, the CFPB remained highly active in this space and has indicated its intent to continue to carefully regulate both this space and the major credit bureaus going forward. Early this year, the CFPB filed a lawsuit against TransUnion, a major CRA, for allegedly deceptively marketing credit scores and credit-related products. Additionally, in January 2022, the CFPB published its updated annual list of consumer reporting companies and encouraged consumers to file disputes and Fair Credit Reporting Act (FCRA) lawsuits concerning potential violations. The January 2022 publication was accompanied by a press release highlighting examples of potential violations, including CRAs failing to adequately respond to consumer complaints about errors, and advising consumers to "fact-check" their consumer reports. Shortly thereafter, the CFPB's spring 2022 Supervisory Highlights stressed that CFPB exams had led the CFPB to believe that several credit card furnishers were violating FCRA's accuracy and dispute investigation obligations by failing to conduct reasonable investigations of disputes. The CFPB further indicated its intent to address credit reporting accuracy by publishing a November 2022 circular on "shoddy" consumer reporting investigations, an October 2022 advisory opinion regarding "junk" data, and a fall 2022 issue of Supervisory Highlights emphasizing furnishers' duties to conduct reasonable investigations of disputes and correct inaccurate information.

We anticipate credit reporting will continue to be a focus of the CFPB in 2023, as reflected by the press release and statements from Director Chopra that accompanied the CFPB's January 2023 report on the major credit bureaus. In issuing the report, Director Chopra noted that despite some improvements in response to consumer complaints, the major credit bureaus continued to top the list of complaints submitted to the CFPB. Director Chopra further indicated that the CFPB is exploring new credit reporting rules and regulations, which could be issued in the relatively near term, and urged the bureaus to pay close attention to how their automation technology could negatively impact consumers.

## 2022 Highlights

### CFPB Files Lawsuit Against TransUnion for Deceptive Marketing

In April, the CFPB announced that it had filed a lawsuit against TransUnion and one of the company's former executives. The complaint, filed in the US District Court for the Northern District of Illinois, alleges that TransUnion violated a 2017 consent order in which it agreed to stop deceptive marketing practices related to credit scores and credit-related products. In the lawsuit, the CFPB claims that since the issuance of the consent order, TransUnion has used "digital dark patterns" to mislead customers into unknowingly enrolling in subscription-based credit monitoring products, and that it has adopted measures making it more difficult for customers to cancel such subscriptions. According to Director Chopra, the CFPB repeatedly informed TransUnion of the alleged violations but did not receive what it deemed to be an appropriate response. The CFPB filed this action to "rein in" TransUnion, which Director Chopra called a "repeat offender" with significant "size and clout." TransUnion's motion to dismiss was denied in November 2022, and the case remains pending in Illinois.

### CFPB Settles With Auto Lender for $19 Million to Resolve Alleged FCRA Violations

In July, the CFPB announced that it had settled with Hyundai Capital America, a California based-auto lender, for alleged violations of FCRA and the CFPA. The CFPB claimed that the auto lender was using outdated systems and procedures for credit reporting information, which led to extensive inaccuracies that had a negative impact on more than 2.2 million consumers' credit reports. Under the consent order, the company agreed to take steps to fix its allegedly inaccurate procedures, correct all inaccurate information, pay $13.2 million dollars in compensation to harmed customers, and pay a $6 million civil penalty.

### FTC Cracks Down on Credit Repair Schemes

Over the course of 2022, the FTC initiated three enforcement actions concerning three separate credit repair schemes in various states. Each action sought injunctive relief to halt operations. According to the FTC, each of the operations targeted vulnerable consumers with low credit scores, charged hundreds or thousands of dollars in illegal advance fees, and falsely claimed to be able to improve those consumers' scores. In reality, the FTC alleged, the operations misled their customers regarding whether the product was effective, legal, or refundable, and took actions such as filing false identity theft reports and attempting to induce customers into joining pyramid schemes. The courts awarded temporary restraining orders or permanent injunctions in all four matters. The companies that received permanent injunctions were permanently banned from operating in the credit repair sphere and had their assets liquidated to refund consumers

**CFPB Issues Guidance to Credit Reporting Companies About Screening for "Junk Data" and Ensuring Accuracy in Credit Investigations**

The CFPB took various actions this year to ensure that credit reporting companies improve their investigation practices and ensure accurate consumer credit information. After the sixth year of complaints concerning "incorrect information on credit reports" accounting for the greatest share of complaints filed with the CFPB, the agency issued guidance to consumer reporting companies about their obligation to screen and eliminate "facially false data" from consumer credit reports. In issuing the guidance, Director Chopra decried "nonsensical junk data," explaining that "consumer reporting companies have a clear obligation to use better procedures to screen for and eliminate conflicting information, or information that cannot be true," such as information stating that a consumer "default[ed] on a loan before they were born." CFPB guidance highlights that a consumer reporting agency's policies, at minimum, should be able to detect and remove information about consumers that is impossible or plainly inconsistent with other information in the report.

In November, the CFPB issued a circular addressing "shoddy" investigation practices by CRAs and furnishers. On the question of whether CRAs and furnishers are permitted to "impose obstacles to deter submission of disputes," the CFPB unambiguously said *no*, stating that the agencies and furnishers "are liable under the FCRA for failing to investigate any dispute that meets the statutory and regulatory requirements." The circular also includes several pages of analysis detailing how companies have allegedly sought to evade their statutory obligations and the potential consequences should they fail to meet those obligations. The circular further addresses whether CRAs need to forward consumer-provided documents attached to a dispute to the furnishers, stating that a violation may be found if the CRA fails to promptly provide "all relevant information" regarding the dispute.

## Looking Ahead to 2023

We predict that this year's marked increase in FTC actions will continue into 2023. Indeed, the FTC's 2022-2026 Strategic Plan highlights the agency's intent to focus its enforcement efforts on unfair and deceptive practices regarding credit reporting in the marketplace. In particular, we anticipate an increased focus on credit repair companies, especially in light of rapid inflation during 2022 and increasing fears of a possible recession that might drive more consumers to credit repair products. Additionally, we anticipate that credit reporting will continue to be an increased focus of the CFPB as it contemplates new regulations concerning the major credit bureaus, as well as other supervisory and enforcement initiatives concerning the accuracy of information reported by CRAs and their responses to consumer complaints.

## What to Watch

- Increased enforcement and regulatory activity from both the FTC and the CFPB in the credit reporting space, especially against CRAs and credit repair operations
- Continued agency focus on improving fair credit reporting investigation practices and ensuring accuracy of reporting information

## IX. Student Lending

In 2022, Goodwin tracked five enforcement actions related to student lending, indicating a slight decrease from the nine actions Goodwin tracked in 2021. These actions resulted in total recoveries of approximately $1.9 billion, a significant increase from the $55 million in recoveries seen in 2021 and $800 million seen in 2020. Nearly all of this increase can be attributed to a single action brought by various state attorneys general against Navient that resulted in a nearly $1.85 billion recovery. Looking ahead to 2023 and beyond, we anticipate a further increase in both state and federal scrutiny if or when the moratorium on federal student loan payments is lifted, and in light of the ongoing debate surrounding federal student loan relief.

### Key Trends

The COVID-19 pandemic has caused a dramatic shift in the student loan servicing market. Federal loan payment suspension, which remains in effect, and the expansion of public service loan forgiveness afforded borrowers meaningful relief. Additionally, 2021 saw several of the largest federal student loan servicers leave the market, based, in part, on their anticipation of increased CFPB scrutiny, resulting in the transfer of at least 16 million federal student loan accounts to other servicers.

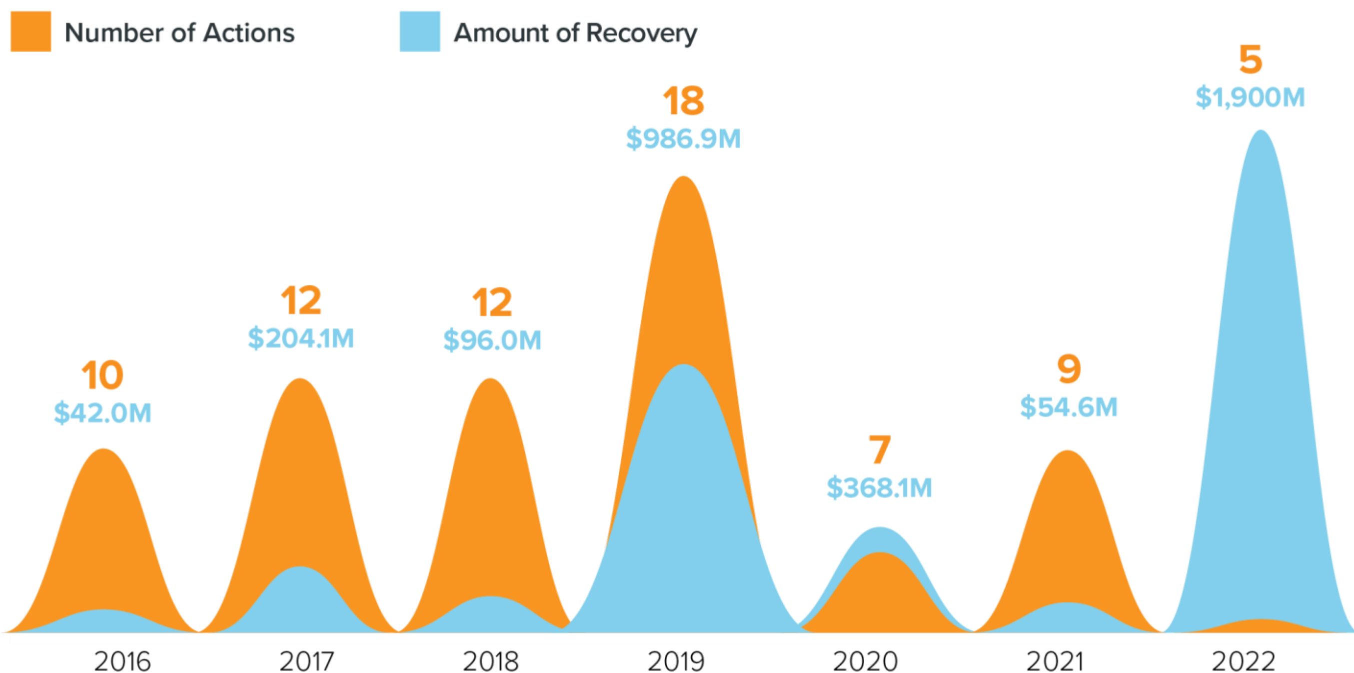
In anticipation of the pending return to payment, in 2021 we predicted that the CFPB would exercise and failing to reverse the negative consequences of automatic natural-disaster forbearances. Despite the Biden administration's extension of student loan forbearances into 2023, student lending was on the CFPB's radar this year and likely will be subject to further scrutiny if and when federal student loan payments resume. significant oversight over student lenders, leading to increased scrutiny regarding misrepresentations about public service loan forgiveness, interest rates, and failing to reverse the negative consequences of automatic natural-disaster forbearances. Despite the Biden administration's extension of student loan forbearances into 2023, student lending was on the CFPB's radar this year and likely will be subject to further scrutiny if and when federal student loan payments resume.

For example, in the fall 2022 issue of Supervisory Highlights, the CFPB reaffirmed its commitment to supervising student loan servicers and lenders and cautioned all market participants to implement robust compliance programs in order to avoid future violations and risks. Additionally, the CFPB noted that its supervisory exams found that student loan servicers regularly provided inaccurate information to borrowers and committed significant violations of the CFPA. In light of the CFPB's warnings, servicers in the federal student lending market and those planning to enter it should focus on:
(1) strengthening internal monitoring and audit practices; (2) self-identifying violations and compliance risks; (3) proactively providing remediation to affected consumers; and (4) reporting said actions to the CFPB.

### 2022 Highlights

**39 State Attorneys General Announce $1.85 Billion Settlement with Navient**

In January, 39 state attorneys general announced a $1.85 billion settlement with Navient, one of the since 2009, Navient misled student loan borrowers into costly long-term forbearance instead of counseling them to pursue more affordable income-driven repayment plans.




**Navient also allegedly originated subprime private loans to** borrowers, knowing that a high percentage of borrowers would be unable to repay the loans. Pursuant to the terms of the settlement, Navient will: (1) cancel the remaining balance on $1.7 billion in subprime private loan balances owed by more than 66,000 borrowers; (2) pay $95 million in restitution payments; (3) implement policies that require Navient to explain the benefits of income-driven repayment plans; (4) train specialists to advise borrowers concerning alternative repayment options and public service loan forgiveness; and (5) notify borrowers about the Department of Education's public service loan forgiveness limited waiver opportunity.

### CFPB Examines Universities' In-House Student Lending

In January, the CFPB announced that it would begin examining the operations of private colleges that operate in-house lending businesses to address potential concerns, including improper blanket policies of withholding transcripts unless students make payments. The CFPB stated that these concerns arose, in part, based on past abuses reported by consumers with institutional loans from schools like Corinthian and ITT Technical Institute.

Subsequently, in September, the CFPB reported in its fall Supervisory Highlights that its examiners found that certain institutions engaged in abusive acts by taking "unreasonable advantage" of the importance of official transcripts to students in pursuing job opportunities or further education. According to the CFPB, these institutions' actions resulted in consumers feeling coerced into making payments, leaving them with little to no bargaining power against a single academic institution. As a result of these findings, the CFPB determined that such blanket policies are abusive under the CFPA and directed institutional lenders to cease this practice.

**DOJ Reaches $8 Million Settlement With Conduent Education Services to Resolve False Claims Allegations**

On January 14, 2022, the DOJ obtained a settlement with Conduent Education Services LLC, (Conduent), a contractor that services student loans under the Federal Family Education Loan Program (FFELP). According to the DOJ, between 2006 and 2016, Conduent submitted false claims to the Department of Education, failed to make certain required financial adjustments to borrower accounts, and improperly considered borrowers to be eligible for military deferments in violation of the False Claims Act. The company agreed to pay $7.9 million to resolve the allegations, including $4,675,000 in restitution.

**CFPB Orders Edfinancial to Pay $1 Million Penalty and Remedy Miscommunications**

The CFPB investigated Edfinancial for engaging in alleged deceptive acts and practices in violation of the CFPA. In particular, according to the CFPB, the student-loan servicer incorrectly told FFELP borrowers that they were not eligible for public service loan forgiveness (PSLF), could not consolidate their loans, and were making payments toward PSLF before consolidation. Additionally, the servicer allegedly misled FFELP borrowers by describing loan forgiveness without mentioning PSLF. When borrowers did not specifically ask about PSLF, the servicer made misleading statements and omissions to borrowers, creating the impression that PSLF was not an option for them. Under the consent order, Edfinancial agreed to inform borrowers of the limited PLSF waiver and pay a $1 million civil money penalty.

## Looking Ahead to 2023

In 2023, we expect that student lending will continue to be at or near the forefront of the CFPB's supervision and enforcement priorities.
We anticipate increased scrutiny from regulators, particularly if or when forbearances are lifted or the Supreme Court issues a ruling blocking some of the Biden administration's actions. Otherwise, we expect regulators will continue to monitor the private market for any abuses or failures to assist borrowers in forbearance. In that regard, institutions, lenders, and originators will likely endeavor to bolster compliance and internal auditing policies in light of increased scrutiny from the CFPB.

## What to Watch

- Increased scrutiny and supervision of student loan servicers should federal student loan forbearances be lifted in 2023

## X. Auto Loan Origination and Servicing

In 2022, Goodwin tracked 13 publicly announced auto lending enforcement actions. Unlike in 2020 and 2021, state regulators were more active than federal regulators. State regulators brought eight of the 13 public actions, including one joint action with the FTC. The total amount recovered by enforcement agencies this year was $48.3 million — an increase from the amount recovered in 2021 ($35.2 million) and a decrease from the amount recovered in 2020 ($562 million).

### Key Trends

Auto lending remained a focal point for federal and state regulators and enforcement agencies in 2022, with an emphasis on "junk fees," discriminatory lending practices, and efforts to ensure equal access to financial services for consumers across the country.

On the federal side, similar to 2021, the DOJ brought two auto finance enforcement actions under the Servicemembers Civil Relief Act (SCRA) arising from two auto lenders' alleged refusal to timely or appropriately ensure interest rate benefits for service members. 2022 also saw the FTC reenter the space and initiate two enforcement actions. In both instances, the FTC alleged claims concerning "junk fees," misleading advertisements, and discriminatory lending practices. Additionally, in July, the FTC issued a proposed rule to ban "junk fees" and "bait-and-switch" advertisements relating to the sale, financing, and leasing of cars by dealers. 16 C.F.R. § 463. Among other things, the proposed rule would prohibit car dealers from making misrepresentations concerning "the costs or terms of purchasing, financing, or leasing a vehicle." The proposed rule would also require dealers to provide consumers with information about optional add-on charges and prohibit dealers from charging consumers for add-ons without their express, informed consent. If implemented, the rule would effectively ban specific sales practices currently employed at car dealerships.

The CFPB announced two actions related to auto finance in 2022. One of these actions, discussed in more detail below, arose from the alleged mismanagement of auto loans and unlawfully repossessed vehicles.[3] Earlier in 2022, the CFPB issued policy guidance concerning the mitigation of harm from the repossession of automobiles and stated its intention to continue to closely review entities' automobile repossession practices for potential violations.

### 2022 Highlights

#### FTC Proposes Rule to Ban "Junk Fees" and Certain Deceptive Advertising Tactics Related to the Sale, Leasing, or Financing of Motor Vehicles

In June, the FTC proposed a rule that would address certain unfair and deceptive practices in car sales. In its Notice of Proposed Rulemaking, the FTC reports that in the past three years, the FTC has received more than 100,000 complaints each year related to the sales, financing, service, and warranties of car

[3] The other CFPB enforcement action, brought against a national bank, also resolved allegations that the bank engaged in violations related to mortgage loan servicing and its handling of consumer deposit accounts. For purposes of this review, the entire recovery amount from that action is attributed to mortgage servicing and not included in the auto loan origination and servicing recovery amount.

dealerships. The notice highlights that the process of buying or leasing a car is challenging and lengthy, and often involves unfair or deceptive practices. The Proposed Rule would address several issues identified by the FTC. First, the FTC seeks to address deceptive advertising by prohibiting various misrepresentations concerning (1) the costs or terms of purchasing, financing, or leasing a vehicle; (2) the costs or limitations of any add-on products or services; and 3) the availability of vehicles at an advertised price.

Second, the FTC seeks to require car dealers to provide key disclosures to consumers, noting that it is "deceptive" for car dealerships to advertise a certain price "without disclosing material limitations or additional charges required by the dealer that are fixed and thus can be readily included in the price at the outset." The disclosures would include requirements related to pricing and financing information, such as "requir[ing] a motor vehicle dealer to disclose the true 'Offering Price' of a vehicle in advertisements that reference specific vehicles or price or financing terms."

Third, the FTC seeks to prohibit dealers from charging for add-on products without "Express, Informed Consent" of the consumer and from stating that an optional add-on is required for purchase. The FTC also seeks to prohibit dealers from charging consumers for add-on products or services that ultimately provide no benefit to the consumer. For example, a dealer would violate this provision "if the dealer sold Guaranteed Asset Protection (GAP) insurance to buyers whose financing balance was so low that ordinary insurance would be adequate to cover any loss."

Lastly, the FTC proposes to impose various record-keeping requirements to ensure compliance with the disclosure requirements. For instance, the FTC seeks to require car dealers to keep "all materially different advertisements, sales scripts, training materials, and marketing materials regarding vehicle price, financing, or leasing terms" for two years.

**FTC and Illinois Settle With Automobile Dealerships for Unauthorized Add-Ons and Discriminatory Lending Practices**

In April, the FTC and the state of Illinois entered into a $10 million settlement with a group of automobile dealerships concerning allegedly unlawful add-on charges and discriminatory lending practices. The settlement resolves allegations that the dealerships charged consumers hidden fees for add-on products without obtaining informed consent. According to the regulators, in certain instances, the dealerships would inform the consumers that the add-on products were mandatory even though the price was not included in the advertised price. The FTC and Illinois further alleged that the dealerships charged Black customers higher financing fees and interest rates than similarly situated non-Latino white consumers in violation of the ECOA.

To resolve these allegations, the auto group agreed to an order prohibiting them from: (1) misrepresenting whether products or services are optional or required; (2) charging a consumer without having obtained the consumer's express, informed consent; (3) advertising or offering "closed-end credit" terms without clearly and conspicuously providing required disclosures; and (4) discriminating against any credit applicant on the basis of race, color, religion, national origin, sex or marital status, or age. Under the order, the auto group also agreed to establish and implement a fair lending program to prevent members from engaging in discriminatory

conduct against credit applicants. Last, the auto group agreed to pay $9.95 million to the FTC to be used for consumer relief and $50,000 to the Illinois Attorney General Court Ordered and Voluntary Compliance Payment Projects Fund.

**DOJ Settles With Credit Union and Auto Finance Company Over Alleged SCRA Violations**

In March, the DOJ announced a settlement with BayPort Credit Union (BayPort) for alleged violations of the SCRA. Specifically, the DOJ alleged that BayPort unlawfully charged excessive interest on loans for service members who qualified for SCRA interest-rate benefits and unlawfully repossessed service members' cars without court orders. The settlement provides that BayPort will pay a $40,000 civil penalty to the United States and $69,443.10 to the affected service members.

Similarly, in September, the DOJ announced a settlement with auto lender Westlake Financial (Westlake) for alleged violations of the SCRA. Specifically, the DOJ alleged that Westlake failed to provide qualified service members with interest-rate benefits for the entire period required under the act and that Westlake violated the act by improperly delaying approval of interest-rate benefit requests. The settlement provides that Westlake will pay a $40,000 civil penalty to the United States and $185,460 to 250 service members who did not receive interest-rate benefits dating back to when their military orders were issued or who had to wait more than 60 days to receive their benefits. Last, Westlake also agreed to revise its policies and procedures to ensure that interest-rate benefits for service members are timely and appropriate.

**New York DFS Settles With Banking Institution Over Alleged Discrimination Against Minority Borrowers**

In October, DFS issued a consent order to Rhineback Bank (Rhineback) in which Rhineback agreed to pay a $950,000 civil monetary penalty concerning the bank's indirect auto lending program. The consent order follows DFS' investigation of Rhineback's underwriting and the pricing of retail installment contracts that it purchased from automobile dealers, after which DFS concluded that the indirect automobile loans purchased from the automobile dealers charged Black, Hispanic, and Asian borrowers higher discretionary dealer markups than non-Hispanic white borrowers. Rhineback also agreed to provide restitution to affected consumers.

**Attorneys General in Massachusetts and Colorado Announce Settlements Over Guaranteed Asset Protection Fees**

In March, auto lender GM Financial entered into an agreement with the Massachusetts attorney general to pay more than $1.8 million in customer relief for alleged state consumer protection violations. Specifically, the Massachusetts attorney general alleged that GM Financial failed to pay interest after delays in providing consumers with refunds of GAP enrollment fees. The attorney general also alleged that the company did not provide certain consumers with sufficient information after their vehicles were repossessed.

Also in March, Colorado announced a $6.5 million settlement with three credit unions for alleged failure to return unearned GAP fees to consumers, which is required by Colorado law. The settlement funds were used to refund the credit unions' consumers.

## Looking Ahead to 2023

We expect auto lending to be a key focus of regulators and enforcement agencies during 2023. At the federal level, key players have signaled a focus on the auto lending industry. First, we expect that the FTC will continue to move forward with its proposed rule to ban “junk fees” and “bait-and-switch” advertising practices in the auto industry. Second, the CFPB’s December announcement concerning its settlement with a national bank suggests it will further focus on auto lending in 2023, and on repossessions in particular. We also expect that agencies at both the federal and state levels will continue efforts concerning “junk fees” and discriminatory lending practices.

## What to Watch

- Continued federal and state enforcement activity designed to protect servicemembers and minority borrowers
- Continuation of the FTC’s rule-making process regarding proposed rule related to junk fees and misleading dealer advertisements

## XI. Data Privacy

Regulators increased their scrutiny of the data security and privacy practices of companies in the financial services industry in 2022. Motivated by the uptick in destructive cyberattacks and a developing awareness of the harmful effects of commercial surveillance, regulators have increased enforcement of privacy and cybersecurity laws, proposed amendments and expansions of key rules that govern financial institutions, and signaled an appetite for continued rule-making.

### Key Trends

Cybersecurity emerged as a dominant consumer financial protection issue in 2022. Regulators have articulated enhanced expectations surrounding the technical, administrative, and procedural measures that companies in the financial services industry must implement to safeguard consumer information and mitigate the threat of cyberattacks. New rules and modifications to critical regulations institute reporting and corporate governance requirements, emphasizing that companies must prioritize their commitment to cybersecurity at the board and executive level. Privacy activity also reached its zenith during the summer of 2022, with the first enforcement settlement under the California Consumer Privacy Act (CCPA), an anticipated FTC privacy rule-making initiative, and increased momentum surrounding federal privacy legislation. While significant, these actions had less direct impact on consumer financial protection than did cybersecurity developments, which manifested in enforcement actions and updates to regulations pertaining specifically to financial institutions.

### 2022 Highlights

#### New York DFS Signals Continued Rigor in Its Enforcement Actions

In 2022, the New York DFS announced the execution of three new consent orders for alleged violations of Cybersecurity Regulation, Part 500 of Title 23 of the New York Codes, Rules, and Regulations (Part 500). The department entered into consent orders with Carnival Corporation, Robinhood Crypto, and EyeMed Vision Care, which resulted in penalties of $5 million, $30 million, and $4.5 million respectively. These latest consent orders reinforce the Department's particular focus on several key enforcement priorities, including the importance of implementing multi-factor authentication (MFA) and measures that limit user access privileges, carrying out cybersecurity training and risk assessments, timely notifying the DFS of any cyber events, and securely disposing of nonpublic financial information (NPI) that is no longer necessary. While the Carnival and EyeMed enforcement actions responded to security incidents that allowed unauthorized access to consumer data, the Robinhood action developed as a result of a supervisory examination for violations of the Department's Virtual Currency, Money Transmitter and Transaction Monitoring Regulations, in addition to Part 500.

### CFPB Announces Expanded Authority for Information Security Issues

In August 2022, the CFPB announced that financial companies may violate federal consumer financial protection laws when they fail to adequately protect consumer data as required under certain laws such as the Gramm-Leach-Bliley Act (GLBA). According to the Bureau, "inadequate data security can be an unfair practice in the absence of a breach or intrusion." The Bureau reasons that the failure to implement certain practices — such as MFA, password management, and software updates — is likely to cause consumers substantial injury that is not reasonably avoidable and is not likely to be justifiable based on countervailing benefits to consumers or competition. According to the Bureau, financial institutions should adhere to the aforementioned data security measures to avoid liability under the CFPA.

### FTC's Amendments to the Safeguards Rule Take Effect

In January 2022, the FTC's changes to the Standards for Safeguarding Customer Information (Safeguards Rule) officially became effective. This Rule requires financial institutions within the FTC's jurisdiction (i.e., nonbank financial institutions) to implement administrative, technical, and physical safeguards to protect certain customer information. Due to pandemic-related delays, the FTC extended the effective date for certain provisions to June 2023. Covered financial institutions must designate a qualified individual to oversee information security, develop a written risk assessment, limit access to sensitive customer information, encrypt sensitive information, train security personnel, develop an incident response plan, assess service providers' security practices, and implement MFA or an equivalent for anyone accessing customer information.

While the new Rule preserves the ability of financial institutions to tailor their programs to reflect their size, complexity, and operations, the amendments impose significantly more prescriptive requirements. The Rule also expands the definition of "financial institution" to include "finders" — those engaged in activities deemed incidental to financial activities, such as lead generators connecting consumers with financial services.

### New York DFS Proposes Significant Amendments to Cybersecurity Regulation

In November 2022, DFS released proposed amendments to Part 500 that, if finalized, would impose additional requirements on covered entities and even more stringent ones on "Class A companies," a new subset of covered entities. The amendments make significant changes to several critical definitions; cyber-event reporting obligations; the policies, procedures, and technical measures required to safeguard consumer information; and requirements related to cybersecurity governance. For instance, the amendments would require Class A companies to conduct an annual independent audit of their cybersecurity programs, use external experts to conduct a risk assessment regularly, and monitor privileged access activity. DFS has also proposed two additional scenarios that trigger the 72-hour notification requirement for reporting by all covered entities: (1) a cybersecurity event in which an unauthorized user has gained access to a privileged account; and (2) if ransomware is deployed within a material part of the information system. The amendments have also added a new 24-hour notification requirement when a covered entity makes a ransomware payment.

### SEC Proposes Rules to Enhance and Standardize Cybersecurity Incident Disclosures, Risk Management, and Governance

In March 2022, the SEC voted to issue proposed new rules that would significantly increase cybersecurity disclosures related to current and annual reporting of all public companies that are subject to the reporting requirements of the Securities Exchange Act of 1934. The impetus for the new rule stems from increased risk of impact

from cybersecurity incidents, which include the costs of remediation and business interruption, payments to meet ransom demands, increased cybersecurity protection costs, and lost revenues resulting from the theft of intellectual property.

The new rule would require public companies to disclose any cybersecurity incidents in a Form 8-K within four business days of the company's determination that the incident is "material." In addition, the SEC would require regulated companies to file an annual Form 10-K describing their cybersecurity risk management policies and procedures, governance practices, and board-level cybersecurity expertise. The 60-day notice-and-comment period concluded May 9, 2022, and the rule is slated for adoption in April 2023.

## Looking Ahead to 2023

Key regulators have proposed future rule-making and convened discussions surrounding privacy and cybersecurity initiatives. In addition, the modification of laws and regulations in 2022 portend increased enforcement activity in 2023.

### CFPB Proposes Dodd-Frank 1033 Financial Data Rule-Making

In October 2022, the CFPB published an outline of proposals and alternatives under consideration for the CFPB's data rights rule-making, commencing the first step toward implementing Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1033 authorizes the CFPB to issue regulations that allow consumers to access information about themselves from their financial service providers. The CFPB's outline notes that the CFPB is considering a requirement that firms make a consumer's financial information available to consumers or to a third party at that consumer's direction, empowering consumers to easily transfer account history. The CFPB is also considering proposals that would include privacy restrictions for personal financial data authorized for third-party use, including limitations that would prevent third parties from reselling authorized data for other uses. CFPB Director Chopra announced that the Bureau will publish a report in the first quarter of 2023 to inform a proposed rule that will be issued in 2023 and finalized in 2024.

### The FTC Announces Rule-Making on Commercial Surveillance and Lax Data Security Practices

In September 2022, the FTC hosted a virtual public forum on its advance notice of proposed rulemaking to seek comment on whether new rules are needed to address harms related to "commercial surveillance and lax data security." The FTC defines "commercial surveillance" as the "business of collecting, analyzing, and profiting from information about people" and includes practices such as "cross-platform tracking, advertising, targeting and other means of gathering data about consumers." During the public forum, the commissioners discussed using Section 18 rule-making to expand the definition of "unfair" data privacy practices and imposing broader "substantive" requirements, such as limitations on the collection or processing of data in certain contexts. Such changes would enable the FTC to use its Section 5 authority to initiate enforcement actions related to a wider range of conduct that would constitute unfair data privacy practices. The public comment period ended on November 21, 2022. If the FTC decides to move forward, the next step is the publication of a notice of proposed rule-making.

### State Privacy Laws Will Come into Full Effect

Several comprehensive state privacy acts officially took effect in January 2023. Notably, four of the five state laws — those of Utah, Virginia, Colorado, and Connecticut — exempt financial institutions (as defined under the GLBA) from complying with these laws altogether. However, California's law,

the CPRA, which amends the CCPA, contains a data-based exemption for all NPI that is subject to GLBA. This means that if a financial institution is regulated as a business under the CCPA, it must comply with the law, but only with respect to a limited universe of data — data that is not NPI. This subset may include information collected from website users browsing these institutions' websites, information collected from users who have not yet started applications for financial products, and information from users who submit feedback or questions.

### What to Watch

- SEC and New York DFS responses to the comments received during the notice-and-comment periods regarding new and amended rules and regulations
- Continued rigorous enforcement by DFS of Part 500
- Potential CFPB enforcement actions related to information security

## XII. Major US Supreme Court and Appellate Cases Decided in 2022

Decisions of the US Supreme Court and Courts of Appeals significantly affected the consumer finance industry in 2022. The Supreme Court widened the door for potential challenges to agency actions under the "major questions" doctrine and revisited the scope and application of the Federal Arbitration Act (FAA), among other noteworthy developments discussed below. The Courts of Appeals also issued decisions of significance to the consumer finance industry in 2022. Though the most notable such decision — the Fifth Circuit's holding that the CFPB's funding mechanism is unconstitutional — is well known in the industry, the Courts of Appeals decided other important cases, discussed below, that will shape the consumer finance landscape for years to come.

### 2022 Highlights

*US Supreme Court*

**Supreme Court Widens Door for Challenges to Agency Actions Under 'Major Questions' Doctrine**

In June, the Supreme Court decided in *West Virginia v. EPA*, 142 S.Ct. 2587 (2022), that the EPA had exceeded its authority under the Clean Air Act by limiting carbon emissions for existing power plants. To reach its decision, the Court invoked the "major questions" doctrine, which holds that in "extraordinary cases," the "history and the breadth of the authority that [the agency] has asserted" and the "economic and political significance" of that assertion require the agency to point to "clear congressional authorization" for the authority it claims. Though the Court found that the authority the EPA sought to invoke implicated the "major questions" doctrine, it did not provide much guidance as to how extraordinary, broad, or significant the action must be to trigger the doctrine's application. Nonetheless, the decision provides another arrow for consumer finance industry targets to challenge agency action as beyond the scope of congressional authorization. Indeed, in the six months since the Court decided *West Virginia*, multiple agencies, such as the US Department of Education and Department of Health and Human Services, have already faced challenges under the major questions doctrine. See, e.g., *Brown v. U.S. Dep't of Educ.*, 2022 WL 16858525, No. 4:22-cv-0908 (N.D. Tex. Nov. 10, 2022); *Louisiana v. Becerra*, 2022 WL 4370448, No. 3:21-cv-04370 (W.D. La. Sept. 21, 2022).

**Supreme Court Issues Several Decisions on Scope and Application of Federal Arbitration Act**

In 2022, the Supreme Court issued several decisions regarding the scope and application of the FAA that are likely to have an impact on the forum in which disputes between consumer finance companies and consumers are resolved.

In March, the Supreme Court concluded in *Badgerow v. Walters*, 142 S.Ct. 1310 (2022), that federal courts may not look to underlying disputes to determine whether they have jurisdiction to rule on applications to confirm or vacate arbitration awards under Sections 9 and 10 of the FAA. The Court had previously concluded that federal courts faced with Section 4 petitions to compel arbitration may "look through" those petitions to the underlying dispute and rule on them if the underlying dispute fell within

the court's jurisdiction. The Court, however, declined to extend that "look through" approach to applications to confirm or vacate arbitration awards under Sections 9 and 10 of the FAA. The Court reasoned that because Sections 9 and 10 did not include Section 4's language allowing for look-through analysis, federal courts may only look to the application itself to determine if they have jurisdiction. As a result, going forward, federal courts have no authority to rule on arbitration award applications unless there is an "independent jurisdictional basis" for review by federal courts.

In May, the Supreme Court issued a unanimous decision in *Morgan v. Sundance Inc.*, 142 S.Ct. 1708 (2022), clarifying that the FAA's pro-arbitration policy "does not authorize federal courts to invent special, arbitration-preferring procedural rules." Courts of Appeals had been split as to whether a party waives its arbitration rights by litigating when the party's litigation conduct did not prejudice the opposing party, even though the waiver analysis in other contexts generally does not require prejudice. Although most Courts of Appeals had required a showing of prejudice, the Supreme Court rejected this approach, reasoning that the "federal policy is about treating arbitration contracts like all others, not about fostering arbitration."

In June, the Supreme Court ruled in favor of an employer seeking to enforce its pre-dispute arbitration agreement in *Viking River Cruises Inc. v. Moriana*, 142 S.Ct. 1906 (2022). California's Private Attorneys General Act (PAGA) allows employees to bring actions on behalf of all employees against their former employers for labor violations. The California state courts denied the former employer's motion to compel arbitration because, under a rule of California law, pre-dispute arbitration agreements that waived employees' rights to bring representative PAGA claims violated public policy and PAGA claims could not be split into arbitrable individual claims and non-arbitrable "representative" claims. The Supreme Court reversed, holding that the FAA preempted this rule to the extent that it prevented parties from splitting their PAGA actions into individual and representative claims through an arbitration agreement. Although the Court concluded that the FAA did not preempt the employee's representative claims, it concluded that those claims should still be dismissed because PAGA did not provide a mechanism to allow courts to adjudicate representative PAGA claims once the individual claim had been sent to arbitration.

### Supreme Court Hears Case That Will Decide When Administrative Actions Can Be Challenged by Enforcement Targets

In November, the Supreme Court heard oral argument in *Axon Enterprise, Inc. v. FTC*, No. 21-86, a case that will determine whether federal district courts have jurisdiction to hear a challenge to FTC administrative adjudication proceedings prior to resolution of the administrative adjudication process. If the Court affirms the Ninth Circuit's decision, litigants challenging the constitutionality of the procedures of the FTC's administrative adjudications will have to first exhaust those arguments in administrative proceedings before raising in federal court. The Court's decision on when and how FTC administrative actions may be challenged may impact challenges to other agencies' administrative adjudications, including the CFPB's, if such proceedings are utilized going forward.

## *Courts of Appeals*

### Fifth Circuit Holds That CFPB Funding Mechanism Is Unconstitutional

In October, the Fifth Circuit held in *Community Financial Services Association of America Ltd. v. CFPB*, 51 F.4th 616 (5th Cir. 2022) (*CFSA*), that the CFPB's funding mechanism violates the Appropriations Clause of the Constitution because the CFPB does not receive its funding directly from congressional appropriations and instead receives funding from the Federal Reserve. The Fifth Circuit

further held that, as a result of the unconstitutional funding mechanism, the Bureau had no authority to promulgate the Payday Lending Rule, reasoning that there was a direct connection between the agency's unconstitutional funding mechanism and the Payday Lending Rule's promulgation, thus voiding the rule. The CFPB filed a petition for certiorari with the Supreme Court, which may decide to hear the case this term. CFSA filed an opposition to the Bureau's petition, urging the Court not to hear the case, as well as a cross-petition arguing that should the Court hear the case, it should also consider additional challenges to the Payday Lending Rule rejected by the Fifth Circuit. Since the Fifth Circuit issued its decision, several defendants in CFPB enforcement actions have used that decision to seek dismissal of the enforcement actions, though to date no court has expressly agreed with the Fifth Circuit's decision (and many have disagreed). Nonetheless, courts have begun to stay litigation matters involving the CFPB pending the Supreme Court's decision on whether to grant certiorari and take up review of the decision in *CFSA*.

### Tenth Circuit Grapples With Fallout From Supreme Court's 2020 Holding That Restriction on President's Power to Remove CFPB's Director Violated Separation of Powers

In September, the Tenth Circuit issued a decision in *Integrity Advance, LLC v. CFPB*, 48 F.4th 1161 (10th Cir. 2022), affirming the CFPB Director's order that imposed civil penalties and required Integrity Advance and its CEO (the petitioners) to make restitution payments. After the CFPB filed its notice of charges to initiate an enforcement action against the petitioners, the Supreme Court decided in *Seila Law LLC v. CFPB*, 140 S.Ct. 2183 (2020), that the CFPB's structure violated the separation of powers because the president can only remove the CFPB Director for cause. Following the Court's severance of the for-cause removal provision from the CPA, the director issued the challenged order and ratified the CFPB's decision to file the notice of charges, noting that this ratification cured any defects from the notice of charges issued during the time period when the CFPB was unconstitutionally structured. The Tenth Circuit rejected the petitioners' argument that the CFPB's order should be set aside, given that the agency had been unconstitutionally structured when it initiated the enforcement action. The court instead noted that ratification was not necessary and that petitioners had failed to show any "compensable harm" stemming from the CFPB's unconstitutional structure. The Third Circuit is also poised to hear a similar challenge in *CFPB v. National Collegiate Master Student Loan Trust*, No. 22-1864.

### Fifth Circuit Holds SEC Administrative Actions Unconstitutional, Potentially Threatening CFPB Adjudication Process

In May, a panel of the Fifth Circuit held in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), that the SEC's administrative adjudication of fraud claims violated three constitutional principles: the Seventh Amendment's guarantee of a right to trial by jury, the Non-Delegation Doctrine, and the Take Care Clause. This decision, if widely adopted, will have significant implications for the CFPB's administrative adjudication process, which is largely based on SEC procedures. The Fifth Circuit held that the right to trial by jury was violated because a fraud claim was the type of claim that, at common law, implicated the right to trial by jury, rather than a public right that can be adjudicated through an administrative process. Bureau administrative action would suffer from the same infirmity, to the extent that the action is premised on or analogous to a right that would exist at common law. As to the Non-Delegation Doctrine, the court held that even the decision of whether to bring an action in federal court or through an administrative adjudication violated the Constitution because Congress had not provided the SEC any "intelligible principle" by which to make that determination — it was left entirely to the SEC's discretion. The same is true regarding the Bureau's decision of what forum to bring an action in — it is left entirely to the Bureau's discretion and, therefore, is not power that has been validly delegated by Congress.

### Fifth Circuit Applies Supreme Court's 2021 *TransUnion* Standing Decision

In 2022, the Fifth Circuit issued several decisions regarding the impact of the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021). In *TransUnion*, the court held that "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." In September, the Fifth Circuit concluded that plaintiffs lacked standing to sue the secretary of the state of Texas for denying their request for voter registrants' information in *Campaign Legal Center v. Scott*, 49 F.4th 931 (5th Cir. 2022). The court explained that "even in public disclosure-based cases, plaintiffs must and can assert 'downstream consequences,' which is another way of identifying concrete harm from governmental failures to disclose." The court rendered similar decisions in *Earl v. Boeing Co.*, 2022 WL 17088680 (5th Cir. Nov. 21, 2022), and *Perez v. McCreary, Veselka, Bragg & Allen, P.C.*, 45 F.4th 816 (5th Cir. 2022).

### Courts Consider FCRA Accuracy and Disclosure Requirements

In August, the Third Circuit issued a decision in *Bibbs v. TransUnion LLC*, 43 F.4th 331 (3d Cir. 2022), in which it adopted the "reasonable reader" standard under which courts determining the accuracy of credit reports under FCRA should consider "how a reasonable reader would have comprehended a report." The plaintiffs in these consolidated cases had failed to make timely payments on their student loans, and, although their lenders closed and transferred their accounts, the plaintiffs' credit reports stated that their accounts were both 120 days past due and closed. In affirming the district courts' dismissal of the cases, the Third Circuit concluded that, read in their entirety under the reasonable reader standard, the consumer reports were accurate under the FCRA.

Previously, in March, the Ninth Circuit considered FCRA disclosure requirements in *Tailford v. Experian Information Solutions Inc.*, 26 F.4th 1092 (9th Cir. 2022). There, the plaintiffs sought information from Experian, including "behavioral data" and soft credit inquiries, and argued that Experian's failure to disclose this information violated the FCRA. FCRA requires credit reporting agencies, such as Experian, to disclose certain information when consumers request it. The Ninth Circuit held, however, that the information the plaintiffs sought did not fall under the FCRA's disclosure requirements in § 1681g and that Experian thus did not violate the FCRA.

### Eleventh Circuit Holds That Monthly Mortgage Statements May Constitute FDCPA Debt Collection Communications

In May, the Eleventh Circuit issued a decision in *Daniels v. Select Portfolio Servicing, Inc.*, 34 F.4th 1260 (11th Cir. 2022), in which a mortgage loan borrower sued her loan's servicer for sending her monthly statements she claims included misstatements. The plaintiff alleged this conduct violated the FDCPA's prohibitions on harassment or abuse, false or misleading representations, and unfair practices. In reversing the district court's dismissal of the complaint, the Eleventh Circuit held that monthly mortgage statements that contain debt collection language not required by the Truth in Lending Act or its regulations may constitute an FDCPA (and its Florida analogue) debt collection communication if "context suggests that they are attempts to collect or induce payment on a debt."

### Seventh Circuit Criticizes Wording of Credit Union's Deposit Account Agreement

In October, the Seventh Circuit issued a decision in *Page v. Alliant Credit Union*, 52 F.4th 340 (7th Cir. 2022), in which a credit union customer brought suit on behalf of herself and others similarly situated, alleging that the credit union charged NSF fees in violation of their deposit account agreement.

The parties' account agreement stated that the credit union would only permit withdrawals if the customer's account had "sufficient available funds" but also used the phrase "insufficient account balance" when discussing overdrafts. The customer argued that her account balance should be calculated through the ledger-balance method, which calculates balances based on posted debits and deposits. The credit union argued that the balance should be calculated through the available-balance method, which considers holds on deposits and transactions that are pending but not yet posted. Although the Seventh Circuit ultimately ruled in favor of the credit union, it noted that the credit union "could have drafted the Agreement more clearly than it did" but decided that the "fact that some institutions disclosed that they used the available-balance method differently or more clearly d[id] not prove that the Agreement promised to use the ledger-balance method or that the Agreement [was] ambiguous."

### What to Watch

- The Supreme Court's decision on the CFPB's petition for writ of certiorari from the Fifth Circuit's *CFSA* decision
- The Supreme Court's decisions in *Axon Enterprise, Inc. v. FTC*, No. 21-86, and *SEC v. Cochran*, No. 21-1239, as to whether federal district courts have jurisdiction when plaintiffs in ongoing SEC or FTC proceedings challenge the agencies' authority, structure, or procedures
- The Supreme Court resolving in *Coinbase, Inc. v. Bielski*, No. 22-105, whether district courts must stay proceedings when a party files a nonfrivolous appeal from a denial of a motion to compel arbitration
- The Supreme Court's ruling in *Biden v. Nebraska*, No. 22-506, and *Department of Education v. Brown*, No. 22-535, on whether the Biden administration's student-loan debt relief program was authorized by the Higher Education Relief Opportunities for Students Act and whether the program should be allowed to go forward
- Continued challenges to the CFPB's statutory authority to promulgate regulations and guidance, such as the short-form disclosure requirement and 30-day credit linking restriction at issue in *PayPal, Inc. v. CFPB*, No. 21-5057 (D.C. Cir.)
- Courts continuing to determine the scope of accuracy requirements under the FCRA, including whether the FCRA distinguishes between factual and legal accuracy in consumer reports, which is at issue in *Sessa v. Linear Motors, LLC*, No. 22-87 (2nd Cir.)

## XIII. What We're Watching: 2023 Emerging Issues

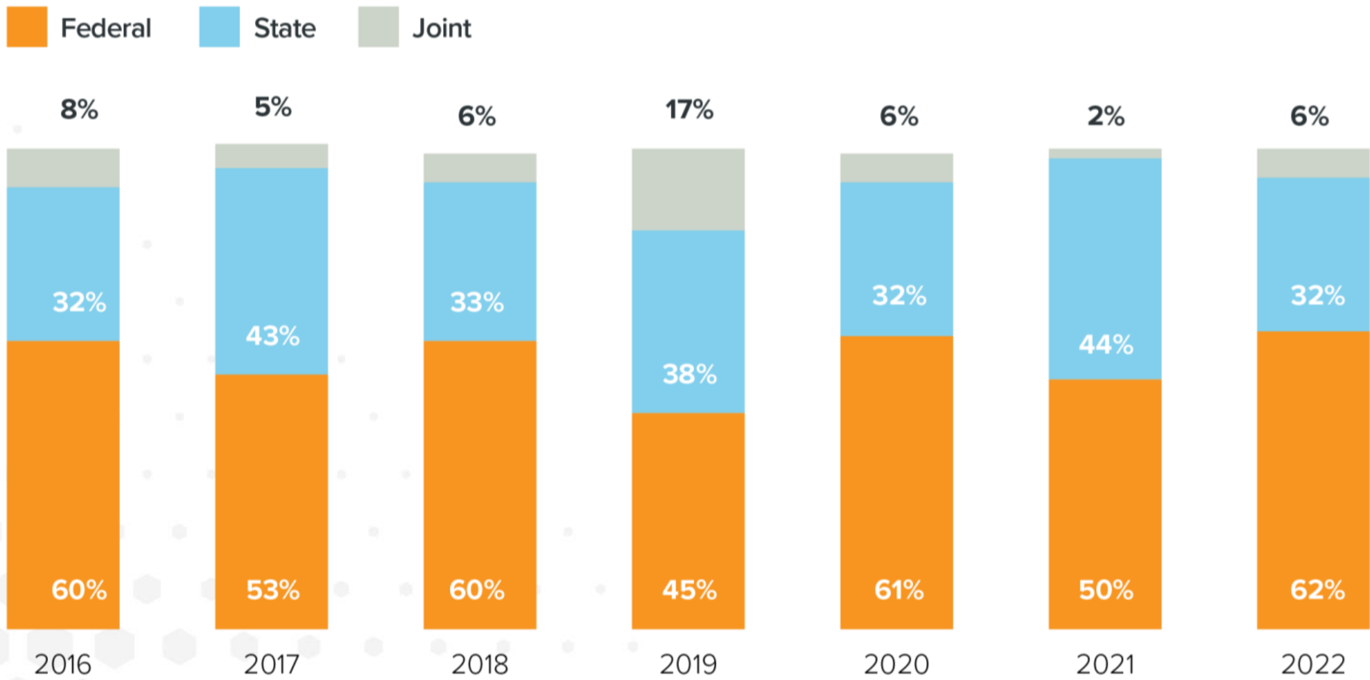
In 2023, all eyes will, again, be on the CFPB. The CFPB's actions last year reflect a clear indication that it will continue to focus on expanding its authority and enforcement power in 2023, including over nonbanks that offer financial products or services to consumers, over issues over which the Bureau has not been granted clear statutory authority, and through enforcement channels rarely used by the Bureau to date. The Bureau will also continue targeting repeat offenders, which it sees as a clear and present threat to consumer financial markets.

Notably, the Bureau announced in 2022 that it was invoking its dormant authority to supervise nonbank financial companies whose activities the CFPB has reasonable cause to determine "pose risks to consumers." The CFPB also proposed a rule that would require certain nonbank entities to register with the CFPB when they become subject to local, state, or federal consumer financial protection agency or court orders, and certify annual compliance with those orders. Presumably, the CFPB will then seek to enforce any noncompliance. It has announced that the orders themselves may indicate a risk to consumer markets, which gives CFPB justification to subject companies to its supervisory authority. The registry will also be publicly available to allow access by other regulators and agencies, and it will publish information about the company executives responsible for compliance with the order. In addition, at the start of 2023, the CFPB proposed a rule that would establish a public registry of supervised nonbanks' terms and conditions that waive or limit consumer rights. The rule would require certain nonbanks to submit information to CFPB regarding their terms and conditions in form contracts to be posted on the registry. Collectively, these developments signal that the CFPB intends to be even more active in the coming year in its supervision and enforcement activity in the fintech space and with other nontraditional financial companies.

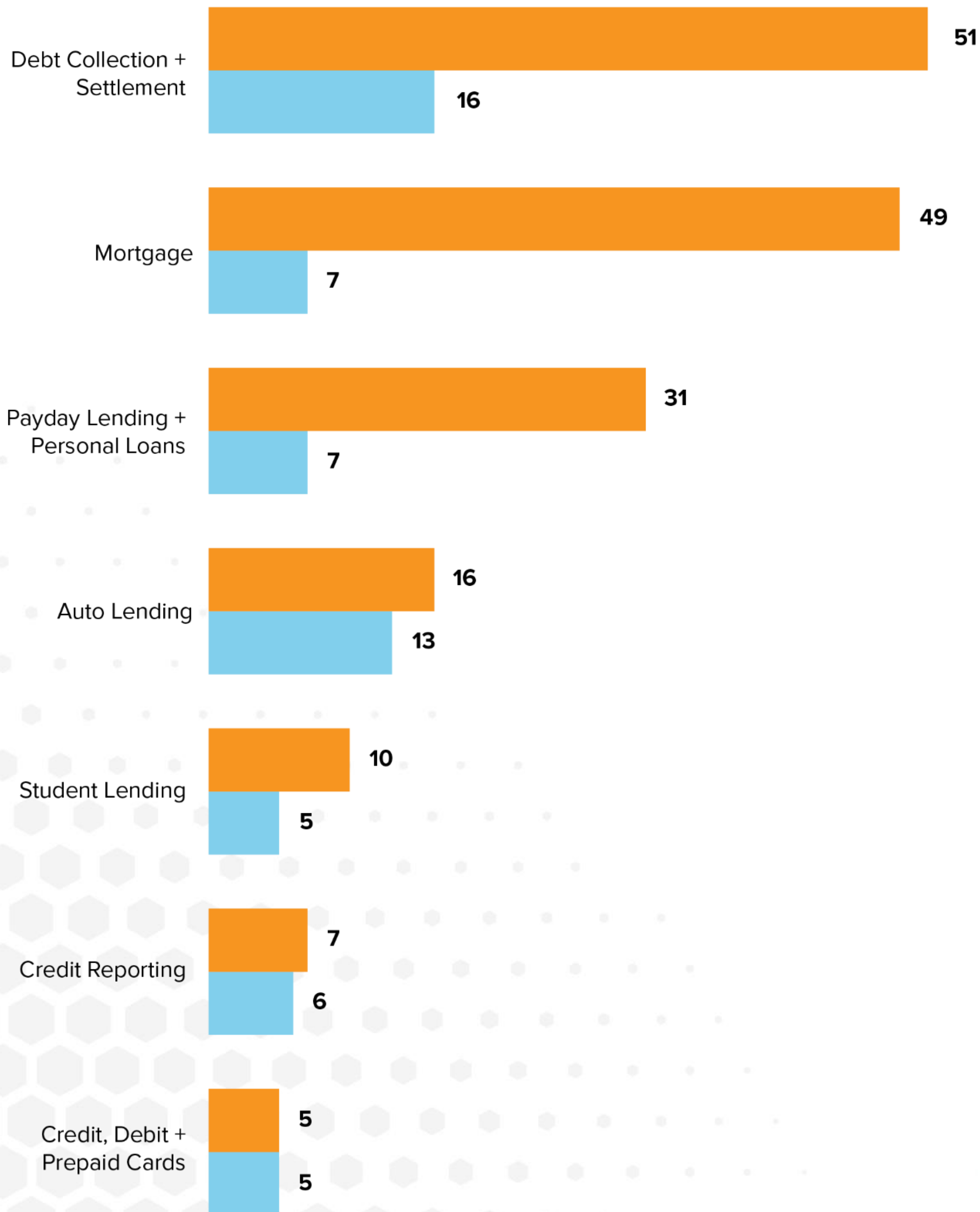
Consistent with the Bureau's goal of using the registry to target recidivism, we anticipate that in 2023 the CFPB will continue to target "repeat offenders" across its many areas of enforcement, given Director Chopra's concern for "the rinse-repeat cycle of consumer abuse." In instances of perceived corporate recidivism, companies that find themselves in the crosshairs of this campaign should expect much more than significant financial penalties — by all indications, the Bureau has focused on securing either structural changes to prevent further recidivism or personal liability of those responsible for the noncompliance. We would not be surprised to see the punishment being sought by the Bureau in this area to expand beyond alleged corporate recidivists to other companies that have transgressed the Bureau's high-priority focus areas, such as anti-discrimination laws.

2022 also saw the Bureau expand the reach of its authority to examine all entities subject to its supervisory authority for potential violations of UDAAP. By updating its UDAAP examination manual to instruct examiners to evaluate potentially discriminatory conduct as an "unfair" practice, even where anti-discrimination statutes — the ECOA and FHA — do not otherwise apply, the Bureau has signaled its willingness to fill a regulatory gap through enforcement. Though the industry has mounted a full-frontal attack on the Bureau's expansion of its authority (and the lawsuit making that attack remains pending), we fully expect the Bureau to wield its UDAAP authority to examine, investigate, and prosecute what it views as discriminatory conduct, regardless of whether ECOA, the FHA, or another anti-discrimination law applies.

Finally, we expect the Bureau to initiate more administrative adjudications in 2023. To date, the CFPB has rarely used its administrative adjudication authority, instead opting to file contested enforcement actions in federal court. In 2022, however, the Bureau revamped its administrative adjudication procedures for the first time since the agency was created, providing the Director more oversight and authority during the adjudication process. Given the more one-sided nature of administrative adjudications and the efficiency of such proceedings compared with those of the federal courts, we expect the Bureau's procedural update to signal a revival of this rarely used process, in 2023 and beyond.



## Total Actions by Product 2016 + 2022

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### Consumer Data Protection

We expect that consumer data protection will remain an area of focus for federal and state regulatory and enforcement agencies in the coming year. In 2023, we anticipate that the CFPB will increase its scrutiny of how consumer finance companies protect and disseminate consumer data, consistent with the circular published by the Bureau in May that explains the Bureau's view that lax data security practices may constitute a UDAAP.

At the same time, 2023 is likely to see the FTC finalize its rule-making on commercial surveillance and lax data security practices. Both agencies are likely to assess and enforce compliance with these authorities immediately.

### Resolution of Key Lawsuits

More than any year in recent memory, 2023 will see the resolution of lawsuits that threaten the existences and functions of federal consumer protection agencies. Most notably, we anticipate that the Supreme Court will weigh in on whether the CFPB's funding mechanism violates the Appropriations Clause and fundamental Separation of Powers principles in its review of the Fifth Circuit's decision in *Community Financial Services Association of America, Ltd. v. CFPB*, 51 F.4th 616, 625 (5th Cir. Oct. 19, 2022), holding that the Bureau was unconstitutionally funded and that, as a result, its actions are void.

The Supreme Court is also poised to decide *Axon Enter., Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2020) and *SEC v. Cochran*, 20 F.4th 194 (5th Cir. 2021), cases it heard oral argument on in the fall. If the Supreme Court agrees with the Ninth Circuit in *Axon*, litigants challenging the structure, procedures, or existence of FTC administrative adjudications on constitutional grounds will have to wait until they exhaust the administrative adjudication process before challenging those matters in federal court. Similarly, in *Cochran*, the Supreme Court has been asked to determine if federal district courts have jurisdiction to consider claims challenging the constitutionality of the SEC's administrative proceedings before those proceedings conclude. The timing and extent to which such administrative actions may be challenged will have a significant impact on the industry's litigation strategy going forward, particularly if the CFPB revives its own administrative adjudication process.

Finally, the industry is also likely to see a decision in *Chamber of Commerce v. CFPB*, No. 22-381 (E.D. Tex.), which argues that the CFPB exceeded its statutory authority under the CFPA and violated the Administrative Procedure Act when it updated its UDAAP exam manual to examine entities for alleged discriminatory conduct not covered by existing anti-discrimination statutes. The ramifications of this lawsuit and the result of any subsequent appeal could extend beyond the CFPB, because the FTC has signaled that it, too, considers discrimination to be an "unfair" practice that violates the FTC Act. Notably, no court has yet decided whether discrimination may constitute an "unfair" practice in violation of the CFPA or FTC Act.

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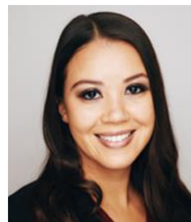

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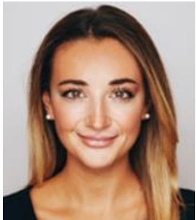

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