



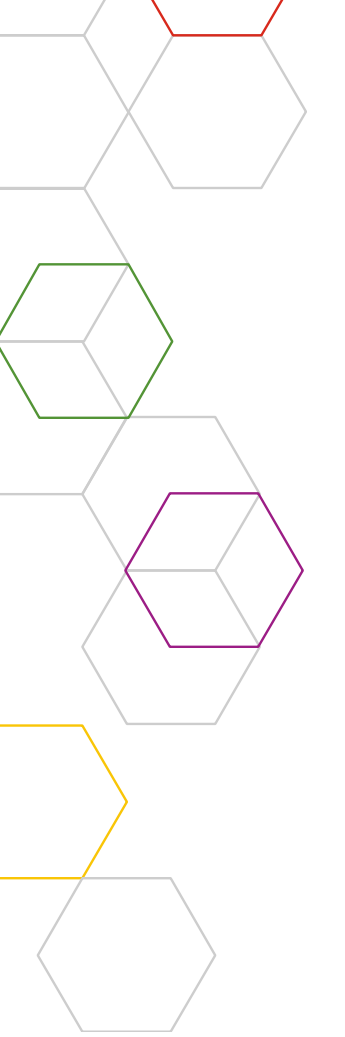
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Recent Trends in Regulatory Enforcement Actions

November 9, 2018

Introductions

Winston & Strawn LLP Navigant



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Agenda

- Enforcement Statistics and Observations
- Enforcement Actions Tracker
- Actions by Regulators
- Regulatory Trends
- Enforcement Trends
- New Worldwide Regulatory Enforcement Priorities
- Recent Prudential Regulator Enforcement Concerns
- Key Concern: AML Exam Criticisms
- BCFP Exam Concerns
- Other Enforcement Developments
- Other BCFP Developments
- Public Enforcement Matters
- Best Practices in Conducting Lookbacks

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Enforcement Statistics and Observations



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Enforcement Statistics

- Trump Administration Impact? Enforcement actions initiated by federal bank regulatory agencies have dropped since the new Administration took office.
 - June 2015 to Inauguration on January 20, 2017:
 - 605 enforcement actions initiated
 - January 20, 2017 to Present:
 - 492 enforcement actions initiated
 - Enforcement Actions Initiated under new Administration:
 - 113 fewer actions; an 18.7% reduction

Enforcement Trend Statistics

	Pre-Trump (06/20/2015-01/20/2017)	Post-Trump (01/20/2017-10/23/2018)	Direct Link
Federal Reserve Board	60	70	Federal Reserve Board Link
OCC	215	198	OCC Link
FDIC	260	185	FDIC Link
CFPB	70	39	CFPB Link
TOTAL	605	492	

Current Environment: 3 Strategic Observations and Action Plans

- 1) **REVIEW:** Identify areas like BSA/AML that continue to be high priority areas for regulators. Key review target: Non Resident Alien accounts.
- 2) **REVISE AND STREAMLINE:** After almost a decade of episodic building of processes to meet new requirements, use this pause to identify overlaps and gaps; streamline processes and implement technology alternatives.
- 3) **EXIT:** Now is the time to review and identify outstanding regulatory exam actions (MRA's, MRIA's, NOD's etc.) that can be exited. Clean them up and request early review for closure by regulators.



Enforcement Actions Tracker

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Trends in Formal Enforcement Actions

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Trends from 2016 to 2018

- Federal vs. State
- CFPB actions
- Types of issues
- Litigation vs. Settlement

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Navigant Enforcement Tracker

Q2 2018

- **Actions by Regulators**

- CFPB was active again in Q2 2018, with three actions and a total of \$1.34 billion fines enforced. One of these actions was involved with Unfair, Deceptive, or Abusive Acts or Practices, which resulted in an amount of \$1 billion civil money penalty
- Thirty-nine actions were levied against financial institutions by federal, state, local, and other regulators in the second quarter, which is a 15% decrease compared to Q2 2017, and a 19% decrease since last quarter. Two hundred thirty-two total actions have been issued over the past five quarters, the most in a single quarter being the 54 actions issued in Q3 2017
- The decrease in number of total actions was primarily caused by a lower number of FDIC and FED enforcement actions, both of which had their least active enforcement periods in the last five quarters. In Q2 2018, there were 22 actions levied by the five main federal regulators (CFPB, OCC, FDIC, FED, and DOJ), which is a 27% decrease compared to Q2 2017, and a 31% decrease since last quarter
- The Office of the Comptroller of Currency (OCC) had six actions in the quarter. This is the most actions from the OCC in a single period observed over the past five quarters and up 50% from the previous quarter. Two of its Q2 actions were involved with the Unfair, Deceptive, or Abusive Acts or Practices violations, and a total amount of \$515,000,000 civil monetary penalty was enforced in these two actions
- The main driver of actions was again state and local regulators, which were involved with 11 actions, or 28% of all actions

- **Actions by Action Types**

- Regulators most frequently used Civil Money Penalty to enforce regulatory requirements, with a total of 16 actions composing 41% of the 39 total Q2 2018 actions. The next most frequently used method of enforcement was Settlement, with 11 instances accounting for 28% of the quarter's 39 actions

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Navigant Enforcement Tracker

Q2 2018

- **Actions by Cited Regulations**

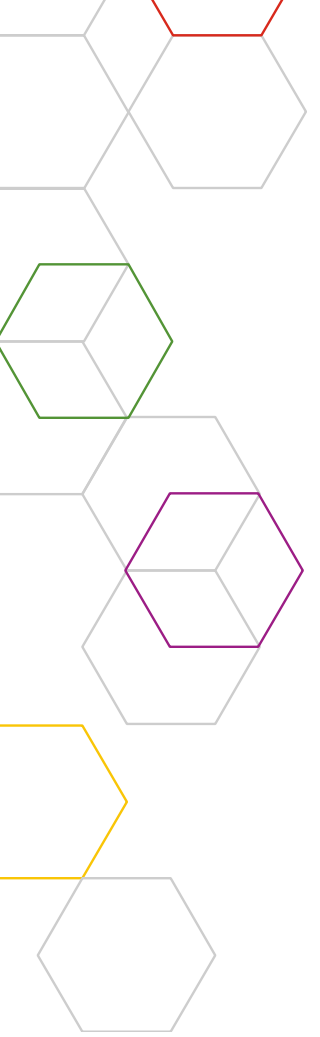
- Unfair, Deceptive, or Abusive Acts or Practices related violations were the area of law that was cited the most during the quarter, with a total of 10 actions, or 23% of total Q2 actions. It is also the law that was cited the most during the past five quarters, with a total of 51 actions accounting for 22% of the total 232 observed actions
- State Foreclosure Law was cited by two actions in Q2 2018. This is the first time this area of law is cited over the past five observed quarters

- **Actions by Practice Areas**

- Seven actions in the quarter were related to servicing or origination of closed-end mortgage loans, six actions were related to unsecured lending, and four actions were related to auto loans

- **Monetary Penalty by Violation Types**

- In the past five consecutive quarters, improper mortgage loan practice has been the source of the highest amount of associated monetary penalty, with over \$11.1 billion in fines or penalties in the. The second most frequent source was unfair or deceptive acts or practices, with over \$2.7 billion in fines or penalties in the past five quarters
- Unfair, deceptive, or abuse acts or practices accounted for the highest number of fines in Q2 2018, with \$1.93 billion, or 58% of the \$3.34 billion total fines. This was followed by violations related to improper mortgage loan practices, improper auto lending practices, and improper foreign transactions



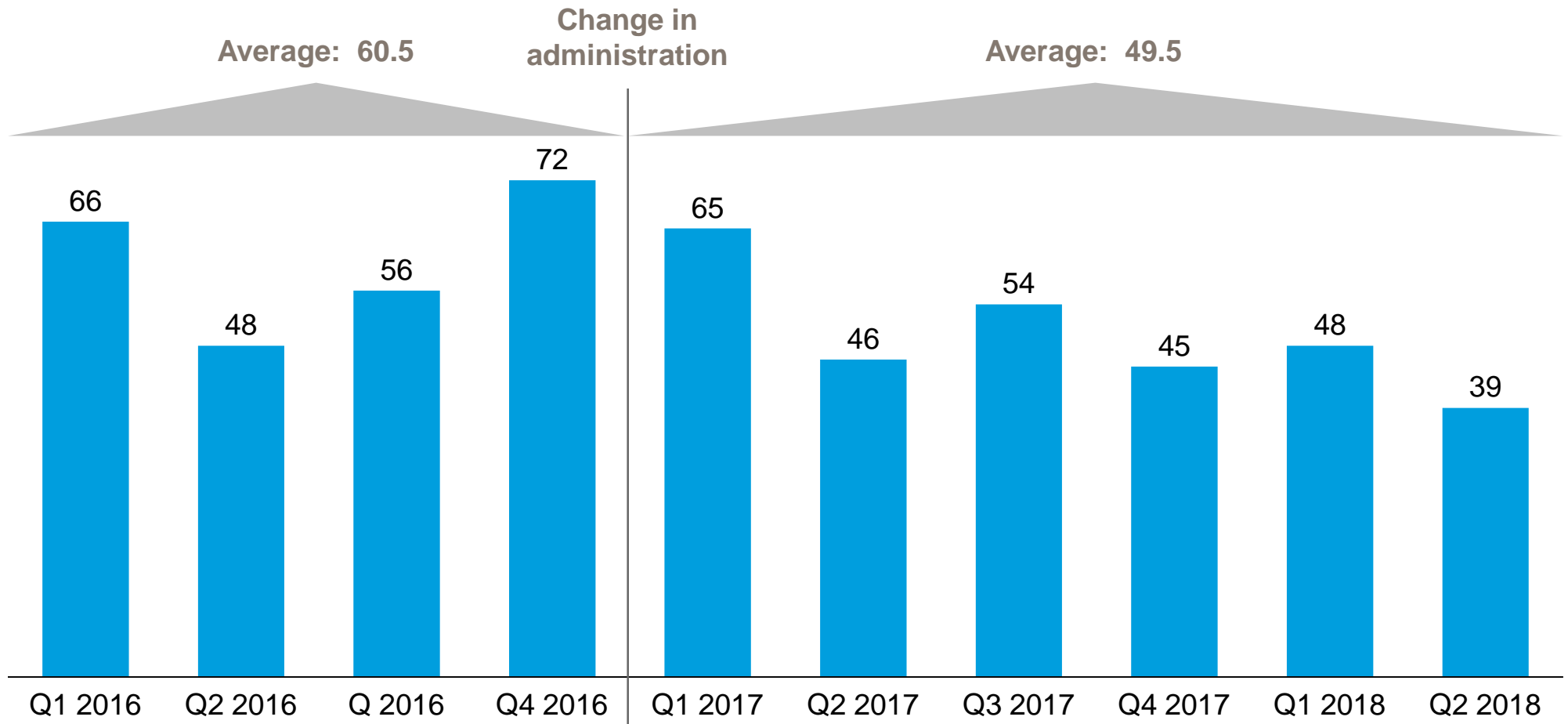
Actions by Regulators

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Trends from 2016 to 2018

Actions by Regulators



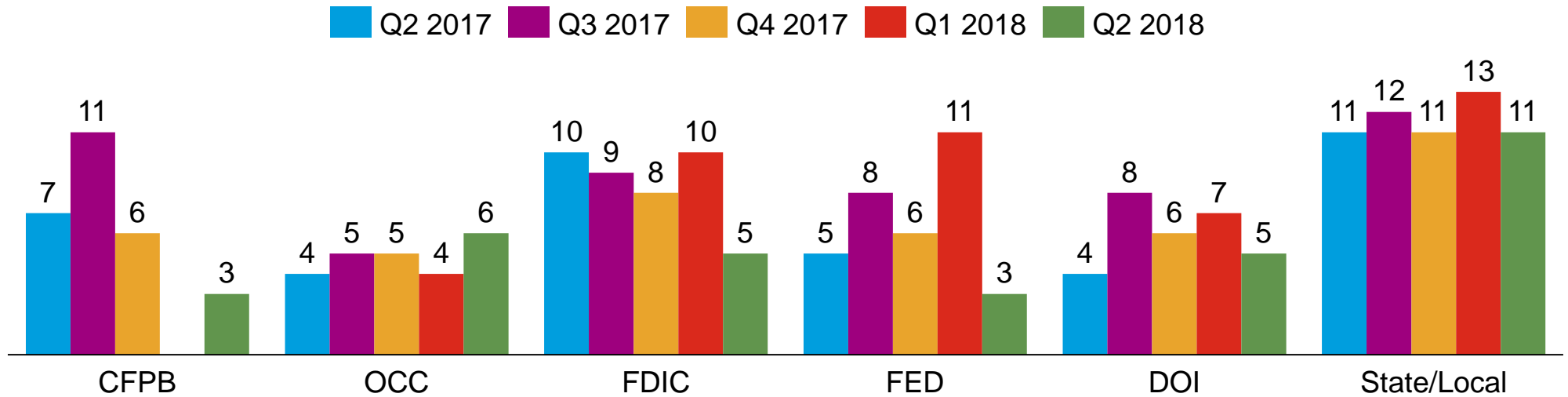
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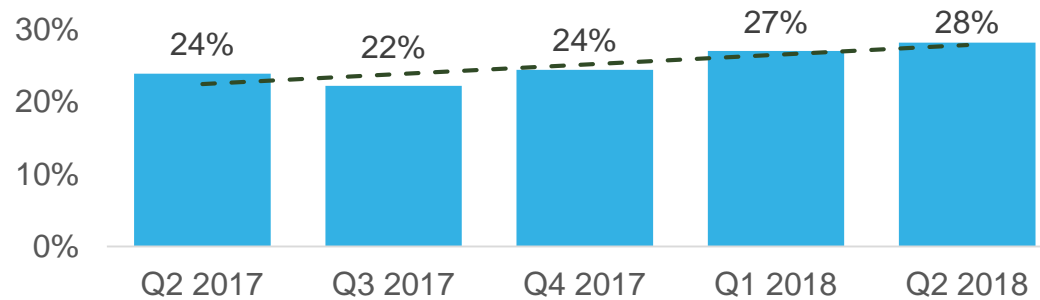
Trends from 2017 to 2018

Actions by Regulators

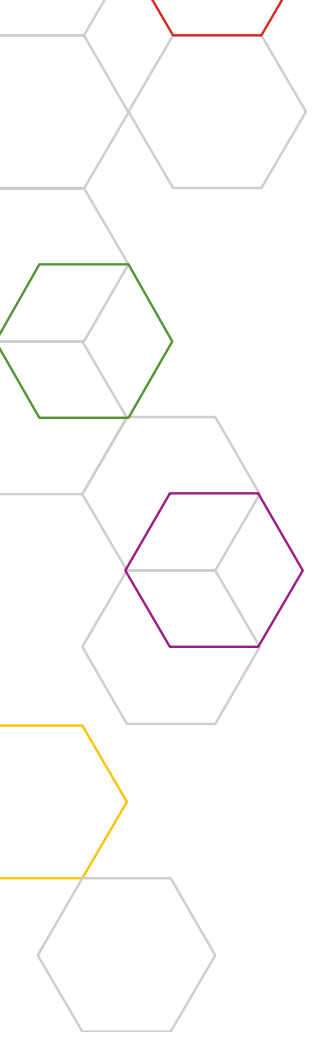
Regulatory Actions Taken by Top Five Federal Regulators and State/Local Regulators



Percentage of State Regulatory Actions



Regulatory Trends

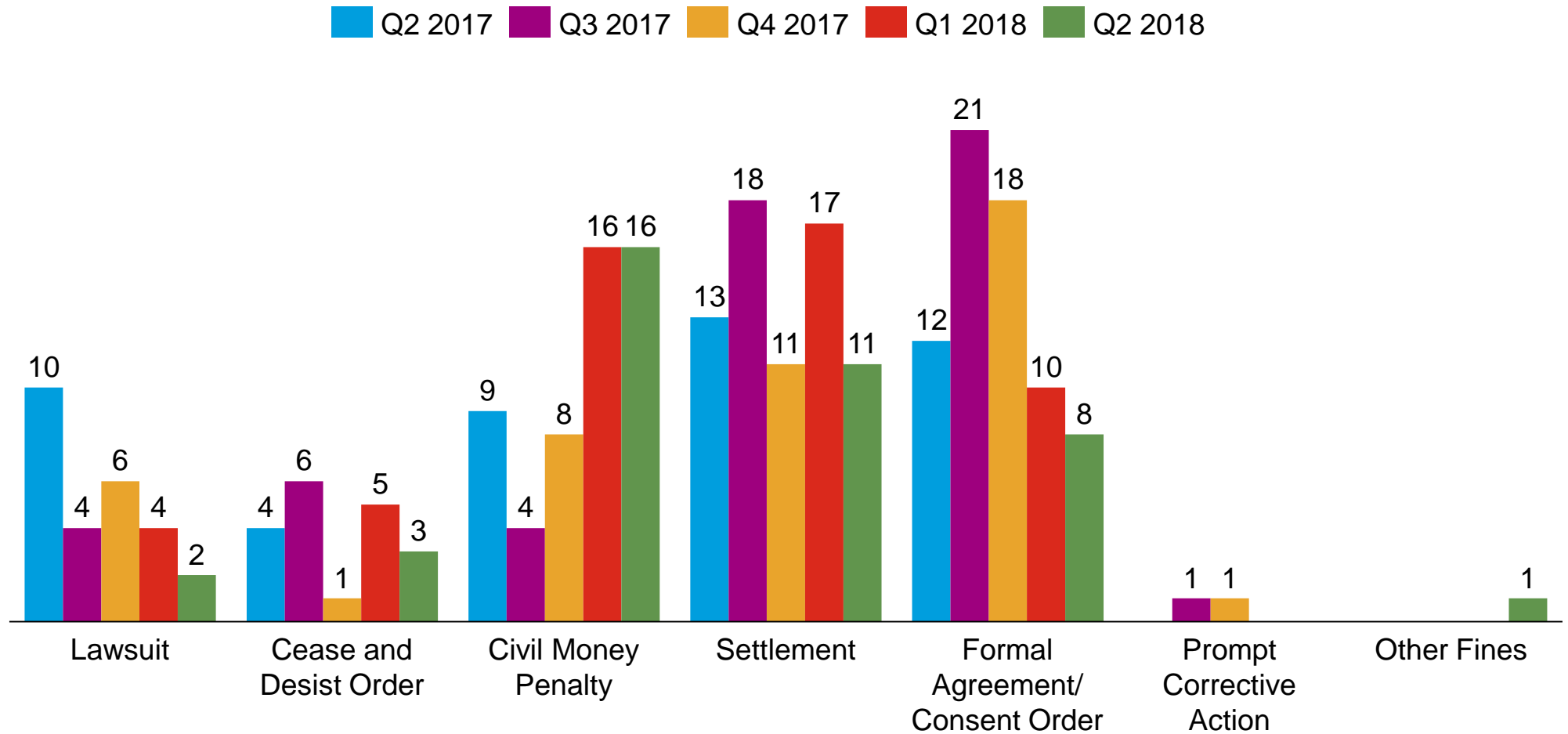


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Regulatory Trends

Trends of Major Regulatory Actions



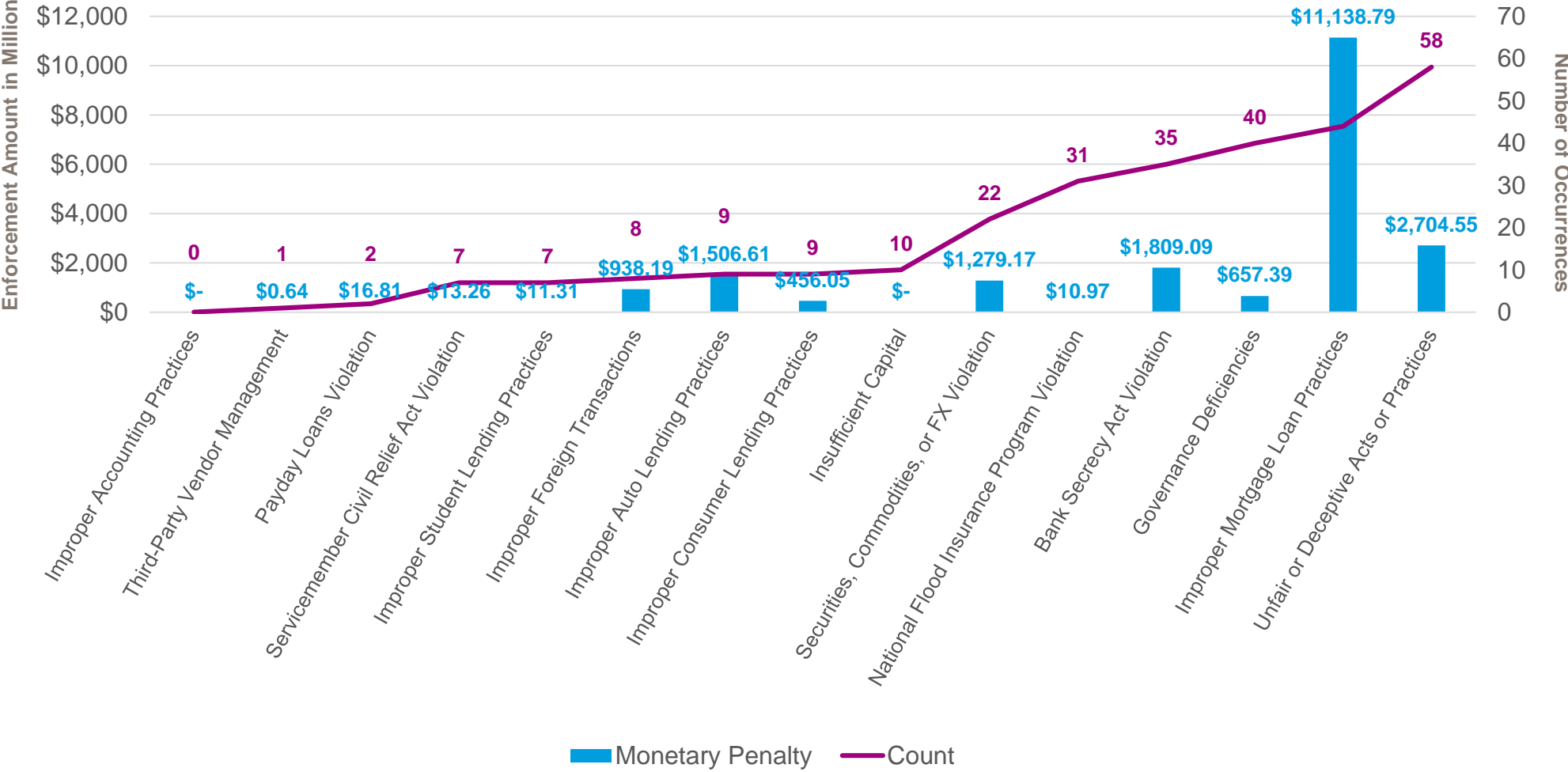
Regulatory Trends

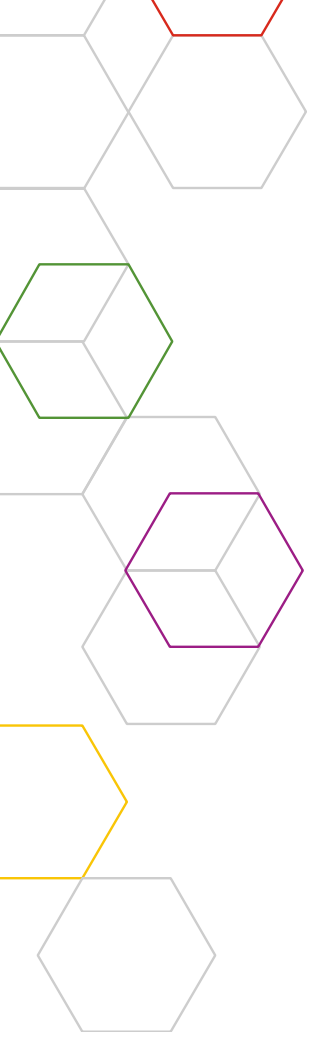
Q2 2017 to Q2 2018 Regulation / Regulation Agency Types of Violations

Regulatory Violation Type	Q2 2017	Q3 2017	Q4 2017	Q1 2018	Q2 2018	Grand Total	% of Total
Allowance for Loan and Lease Losses	1	5	4	0	0	10	3.6%
Bank Secrecy Act/Anti-Money Laundering Act	4	8	6	13	5	36	12.9%
Basel - Capital Requirements	1	6	2	1	0	10	3.6%
Commodities or Securities Exchange Act	0	1	2	3	6	13	4.7%
Fair Housing Act	2	0	0	1	1	4	1.4%
Financial Industry Regulatory Authority	0	1	1	1	0	4	1.4%
National Flood Insurance Program	6	4	9	6	4	29	10.4%
Office of Foreign Assets Control	2	0	1	1	2	6	2.2%
Regulation AB: Asset-backed Securities & RMBS Violations	2	2	2	2	1	9	3.2%
Regulation B: Equal Credit Opportunity Act	0	1	0	0	1	2	0.7%
Regulation C: Home Mortgage Disclosure Act	0	0	0	0	0	0	0.0%
Regulation E: Electronic Fund Transfer Act	0	0	0	3	0	3	1.1%
Regulation H: Membership of State Banking Institutions in The Federal Reserve System	0	1	0	0	1	2	0.7%
Regulation V: Fair Credit Reporting Act	0	1	2	0	1	4	1.4%
Regulation X: Real Estate Settlement Procedures Act	5	4	0	2	0	11	3.9%
Regulation Y: Bank Holding Companies and Change in Bank Control	1	0	0	0	0	1	0.4%
Regulation Z: Truth in Lending Act	2	0	1	2	1	6	2.2%
Service Member Civil Relief Act	0	3	2	2	0	7	2.5%
State Foreclosure Laws	0	0	0	0	2	2	0.7%
State Payday Lending Statutes	0	1	0	0	0	1	0.4%
Unfair, Deceptive, and Abusive Acts and Practices	12	12	12	5	10	51	18.3%
Other	14	16	8	13	15	68	24.4%
Total	52	66	52	55	50	279	100%

Regulatory Trends

Q2 2017 to Q2 2018 Number of Enforcement Occurrences and Total Amount in Fines and Penalties





Enforcement Trends

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Securities Regulatory Enforcement Trends

- 2017 saw a reduction of 13% in the number of SEC enforcement actions from 2016.
 - SEC disgorgement and penalties: down 7%
- In 2017, FINRA disciplinary actions dropped from 1,434 to 1,369.
 - Fines dropped from \$173.8 million to \$64.9 million
- On November 4, 2018, *The New York Times* reported:
 - A 62% drop in SEC penalties and illicit profits ordered returned
 - From \$5 billion in the Obama Administration's last 20 months to \$1.9 billion under the Trump Administration's first 20 months
 - The SEC ordered banks to pay \$1.7 billion during the last 20 months of the Obama Administration, nearly four times more than ordered to be paid in the first 20 months of the Trump Administration

Securities Regulatory Enforcement Trends

- SEC is increasing reliance on:
 - Individual sources
 - Whistleblowers incented by bounties
 - Resulted in \$1.5 billion in sanctions since 2012
 - Since 2012, SEC has paid 53 whistleblowers \$262 million
 - On June 28, 2018, the SEC proposed amending its whistleblower rules to create greater incentives for individuals to report certain violations and to do so quicker (i.e., within 180 days of learning of the possible violation)
 - Hiring of in-house experts
 - Data analytics
 - SEC is becoming increasingly sophisticated in collecting and analyzing data.
- FINRA also is starting to use data analytics.

Worldwide Enforcement Trends

- Duff & Phelps: Worldwide Trends are Different: Fines are increasing.
 - \$26.5 billion in 2017, up from \$20.5 billion in 2015
 - U.S. accounts for 95% of those fines
 - Investment banks globally account for \$20.6 billion of fines
 - The largest dollar amount (65.4%) of fines arises out of conduct of business obligations, not regulatory obligations
 - Conduct of business obligations: 37.8% of penalties; Regulatory obligations: 22.5% of penalties
 - Financial crime is the second-largest category
 - Sanctions breaches
 - Bribery
 - Tax evasion
 - Fraud
 - AML
 - A few large institutions comprise the largest fines: Two firms each had \$600 MM for Inadequate AML programs
- Increasing focus: Restitution to disincentivize bad conduct.
 - In 2017, SEC and FINRA institutions paid out more in restitution than in fines
 - Regulators may be questioning the efficacy of large fines
 - Large fines only hurt shareholders, not individual managers causing violations

BCFP Enforcement Trends

- BCFP Enforcement Stance under Acting Director Mick Mulvaney
 - 26 BCFP lawsuits were pending when he took office in November 2017
 - He did not dismiss any of them
 - 24 investigations were pending when he took office
 - He initially froze all enforcement actions, but now many are moving forward
 - During his first seven months in office, the only new BCFP enforcement action taken was against Wells Fargo
 - Largest bank fine ever
 - Failures in auto and mortgage lending

BCFP Enforcement Trends

- BCFP Enforcement Stance under Acting Director Mick Mulvaney
 - Then, one enforcement action per week over next five weeks
 - Agreed with TCF Financial to a \$30 million settlement related to overdraft charges
 - Barred a payday lender from working in the industry
 - Fined an Alabama small-dollar lender over excess interest charges
 - Agreed with Citibank for the bank to refund \$335 million to consumers for improper credit card rates
 - Fined a South Carolina installment lender \$5 million for illegal debt collection practices
 - Reducing the number of enforcement actions may make it harder for the industry to benchmark

BCFP Enforcement Trends

- Growing Role of State Attorneys-General
 - Fears that, under the current Administration, the BCFP may lessen its enforcement efforts have energized some State Attorneys-General who have threatened to fill any gaps
 - In December 2017, 17 State Attorneys-General wrote to the President vowing to enforce state and federal laws and to redouble their efforts at the state level if the President impedes the BCFP from carrying out its mission
 - In February 2018, Acting BCFP Director Mulvaney addressed the National Association of Attorneys General
 - The BCFP will be “looking to the state regulators and state attorneys general for a lot more leadership when it comes to enforcement” because states “know better” how to protect consumers in their states
 - State UDAP and other consumer protection laws
 - Section 1042 of Dodd-Frank gives authority to State A-Gs to enforce the Consumer Financial Protection Act
 - That includes UDAAP prohibition
 - Q: The 18 federal consumer financial protection laws transferred to the BCFP?

BCFP Enforcement Trends

- Growing Role of State Attorneys-General
 - Some federal consumer financial protection statutes confer enforcement authority on states:
 - TILA
 - RESPA
 - FCRA
 - Multi-state cases
 - 1998 tobacco settlement precedent
 - Household Finance (2002), Ameritrust (2005), Countrywide Financial (2008), Ocwen (2013), and HSBC (2016) cases
 - E.g. 47 states and D.C. sued Target for its data breach and agreed to an \$18.5 million settlement in May 2017
 - Coordination can be complicated:
 - Sharing information
 - Sharing expertise
 - Differing political priorities

BCFP Enforcement Trends

- Growing Role of State Attorneys-General
 - States, of course, lack:
 - National rulemaking power possessed by the BCFP and
 - Supervisory authority possessed by the BCFP
 - State “BCFPs”
 - Maryland
 - Proposed in New Jersey



New Worldwide Regulatory Enforcement Priorities

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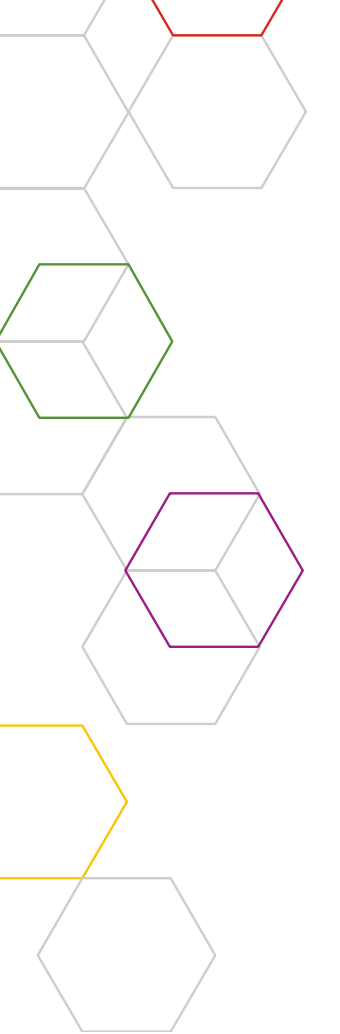
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New Worldwide Enforcement Priorities: Cybersecurity

- Of the highest concern for many financial institutions
- Federal Reserve Board Vice Chairman Randall Quarles February 26, 2018 Speech to the Financial Services Roundtable
 - Cybersecurity “continues to be a high priority for the Federal Reserve.”
 - “The Federal Reserve is committed to strategies that will result in measurable enhancements to the cyber resiliency of the financial sector.”
 - Q: Might those strategies include stepped-up enforcement?
 - “... we know that successful cyber attacks are often connected to poor basic information technology hygiene, and firms must continue to devote resources to these basics....”
 - “... some of the solutions in place to improve the resiliency of... critical services may actually contribute to a cyber event. One example would be the replication of bad data across data centers. As the Federal Reserve thinks about its financial stability mandate, this concern will be a particular focus.”

New Global Regulatory Enforcement Priorities: Privacy and Cryptocurrency

- Cybersecurity and data privacy
 - GDPR (Europe's General Data Protection Regulation)
 - Q: Should firms monitor employee use of social media and external electronic communications platforms (WhatsApp; Telegraph) to detect sharing of confidential information?
- Cryptocurrency concerns
 - FINRA, SEC
 - AML – circumvention of conventional controls laboriously built up over 30 years
- Q: Focus on individual accountability?
- Q: Regulator emphasis on accuracy of reporting as regulators have invested heavily in systems and people to use report data to understand market activity and identify risks?



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Key Indicators: Future Enforcement

- Regulatory Notices
- FRB SR Letters
- Speeches by Regulators

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Indicator: Speech by SEC Enforcement Director

- Key speech October 3, 2018 by Steven Peikin
 - Do not measure SEC effectiveness by number of enforcement actions nor total amount of penalties and disgorgement
 - Measure SEC performance based on:
 - Are its efforts protecting retail investors?
 - To what extent is the SEC holding individuals accountable?
 - Is the SEC keeping pace with technological change?
 - Do the non-financial remedies that the SEC recommends further its enforcement goals?
 - Undertakings
 - Injunctions
 - Bars
 - Suspensions
 - Is the Division of Enforcement efficiently allocating its resources?

Recent Prudential Regulator Enforcement Concerns



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Recent Prudential Regulator Enforcement Concerns

- **BSA/AML**

- E.g., October 23, 2018 \$100,000,000 civil money penalty upon consent of Capital One, N.A. imposed by the OCC
- E.g., July 2, 2018 written agreement with United Bank Limited, Karachi, Pakistan imposed by FRB

- **Flood Insurance**

- E.g., August 28, 2018 \$16,000 civil money penalty upon consent of Bank of New York Mellon imposed by FRB

- **Self-dealing**

- E.g., August 16, 2018 prohibition order entered by default against Jacob H. Goldstein, a bank officer who misled his bank as to loans for his benefit, imposed by FRB

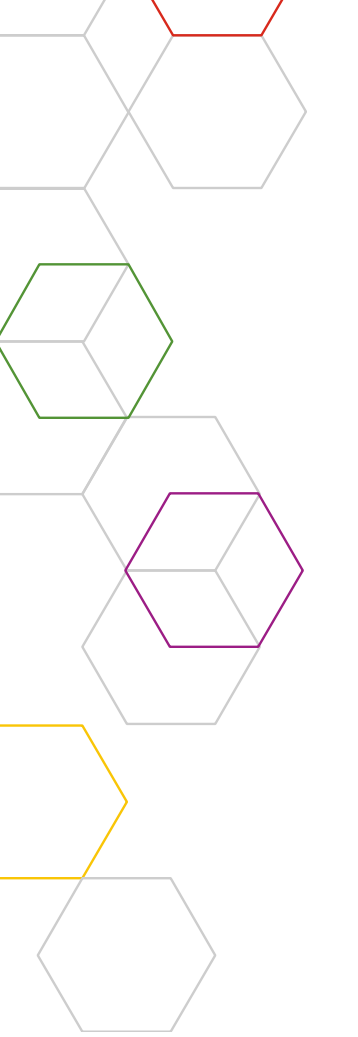
- **Improper execution of foreclosure affidavits**

- E.g., August 10, 2018 \$8.6 million civil money penalty upon consent of Citigroup Inc. imposed by FRB

Recent Prudential Regulator Enforcement Concerns

- Deceptive Marketing of Add-on Products Concern Continues
 - E.g., July 25, 2018 cease and desist order against Community Trust Bank issued by FRB (\$4.75 million in restitution, correct all violations of FTC Act, and refrain from deception; board of director and senior management oversight; consumer compliance risk management plan) imposed by FRB
- Improper Overdraft Fees
 - E.g., July 19, 2018 consent order for a civil money penalty against TCF National Bank, imposed by OCC

Key Concern: AML Exam Criticisms



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Anti-Money Laundering Exam Criticisms of Governance

- Insufficient knowledge of AML risks
- Inadequate discussion of AML in board meetings
- Insufficient levels of responsibility at board and committees and unclear lines of escalation
- Insufficient involvement of senior management in important AML decisions
- Duplication of responsibilities between committees
- Failure to act on regulator alerts
- Failure of tone at the top to promote AML compliance
- Management information systems without trend analysis
- Money laundering risk management lacking independence or appropriate reporting lines

Anti-Money Laundering Exam Criticisms of Operations

- Lack of process for enhanced due diligence and politically-exposed persons
- Inadequate risk assessment
- Inadequate screening of relationships
- Lack of awareness of AML risk and controls
- Underinvestment in AML technology and expertise
- Failure to consider AML risk in designing new products
- Transaction lead group relying on head office to perform due diligence
- Inadequate oversight of third-party providers

Anti-Money Laundering Exam Criticisms of Lines of Defense

- First line business unit not accountable for AML risks and controls
- Second and third lines not treating AML as being of sufficient importance
- AML duties not segregated
- Ineffective reporting lines in second and third lines
- Insufficient skills, resources, and training of AML staff
- Testing is not frequent or broad enough
- Monitoring plan not signed off on by appropriate stakeholders
- Monitoring plan not sufficiently risk-based



BCFP Exam Concerns

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BCFP Examination Context

- BCFP examinations feed its enforcement effort.
 - Supervision and Enforcement are part of the same division at the BCFP
 - BCFP examination process should be treated differently than prudential regulator examination process.
 - Consider attorney-client privilege issues

Key Indicator: BCFP Examination Concerns

- BCFP's Quarterly Publication "Supervisory Highlights"
 - "[S]haring with the public key findings from [the BCFP's] supervisory work to help industry limit risks to consumers and comply with federal consumer financial law."
- Summer 2018 Issue
 - Automobile Loan Servicing
 - Credit Cards
 - Debt Collection
 - Mortgage Servicing
 - Payday Lending
 - Small Business Lending

BCFP Exam Concerns: Automobile Loan Servicing

- Misleading billing statements
 - Promissory note: Insurance proceeds from total vehicle loss shall be applied as one-time payment with any remaining balance to be collected according to regular billing schedule
 - Actual practice of some: Billing statements show loan was paid ahead after one-time payment and next payment was due months or years later
 - But servicers treated failure to pay the next month as delinquency, imposed late fees, and reported same to CRAs
 - BCFP: Sending the billing statements was deceptive if monthly payments were required
 - MRA: Send billing statements that accurately reflect account status after applying insurance proceeds from a total vehicle loss

BCFP Exam Concerns: Automobile Loan Servicing

- Repossession after extension or making of payment
 - Extension or payment is to cancel a repossession order, but some servicers:
 - Incorrectly coded accounts as remaining delinquent or
 - Failed to cancel repossession orders
 - BCFP: Unfair
 - MRA:
 - Stop the practice
 - Review accounts of consumers affected by wrongful repossession
 - Remove or remediate all repossession-related fees

BCFP Exam Concerns: Credit Cards

- Periodic re-evaluation of rate increases
 - Regulation Z as revised to implement the CARD Act: Issuer shall periodically re-evaluate card accounts subjected to increases in APRs to assess whether rate reduction may be appropriate
 - Every six months
 - Apply
 - Original factors or
 - Current factors
 - Exam findings:
 - Some failed to re-evaluate all eligible accounts
 - Some were inadvertently excluded
 - Some failed to consider appropriate factors when re-evaluating
 - Re-evaluation factors were inappropriately conflated
 - Some failed to reduce rates appropriately
 - Additional criteria were imposed
 - MRA: Undertake remedial and corrective actions

BCFP Exam Concerns: Debt Collection

- FDCPA: Upon receipt of a written debt validation request from consumer, cease collection until verification of debt is obtained and mailed by the debt collector to the consumer.
- BCFP:
 - Some debt collectors forward requests to originating creditors who responded to consumers directly
 - Some debt collectors accepted creditor determinations that the debt was owed without receiving information verifying the debt and without mailing that verification to consumers
- MRA: Revise debt validation policies, procedures, and practices to ensure appropriate validation of debt is obtained and mailed to consumers before engaging in further collection activity.



BCFP Exam Concerns: Mortgage Servicing

- Delay in Converting Trial Modifications to Permanent Status
 - More than 30 days' delay
 - Causes consumers to accrue unnecessary interest and fees
 - Sometimes caused by insufficient staffing
 - BCFP: Unfair act or practice
 - MRA: Remediate and adopt policies and procedures to timely convert trial modifications to permanent modifications where consumers have met trial modification conditions

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BCFP Exam Concerns: Mortgage Servicing

- Charging Consumers Unauthorized Amounts for Loan Modifications
 - Governed by loan modification agreements
 - Overcharges were caused by data errors affecting starting balances, rate changes, deferred interest, and maturity date when data was entered into servicing system
 - BCFP: Unfair practice
 - MRA: Remediate affected consumers and correct loan modification terms in systems
 - Q: Institute validation procedures for loan modification data?



BCFP Exam Concerns: Mortgage Servicing

- Misrepresentations Regarding Initiation of Foreclosure
 - When servicers approved borrowers for a loss mitigation option, servicers represented that they would not initiate foreclosure if borrower formally accepted loss mitigation offers by a certain date, but then initiated foreclosure even if borrowers accepted by that date
 - BCFP: Deceptive act or practice

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BCFP Exam Concerns: Mortgage Servicing

- Misrepresentations Regarding Foreclosure Sales
 - When some borrowers submitted loss mitigation applications before a scheduled foreclosure, some servicers sent them notices that the applications were complete and that the servicers would notify the borrowers of their decisions in 30 days, but then conducted foreclosure sales
 - BCFP: This may be a deceptive practice

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BCFP Exam Concerns: Payday Lending

- Misleading Collection Letters
 - False threat to repossess vehicles if consumer failed to pay or contact lender
 - Lender had no relationship with repossession firm
 - Lender did not repossess vehicles
 - BCFP: Deceptive act or practice
 - MRA: Ensure that collection letters do not contain deceptive content

BCFP Exam Concerns: Payday Lending

- Debiting Customer Accounts Without Valid Authorization
 - Using account information previously provided for other purposes
 - Debit card numbers or ACH credentials provided for one-time payments or in credit applications
 - BCFP: Unfair act or practice and violations of Regulation E (where regularly recurring)
 - Debits were made that consumers could not anticipate, leading to potential fees
 - Regulation E requires that preauthorized electronic fund transfers from a consumer's account be authorized only by a writing signed or authenticated by the consumer
 - MRA: Cease violation, remediate impacted borrowers, and revise loan agreement templates and ACH authorization forms

Other Enforcement Developments



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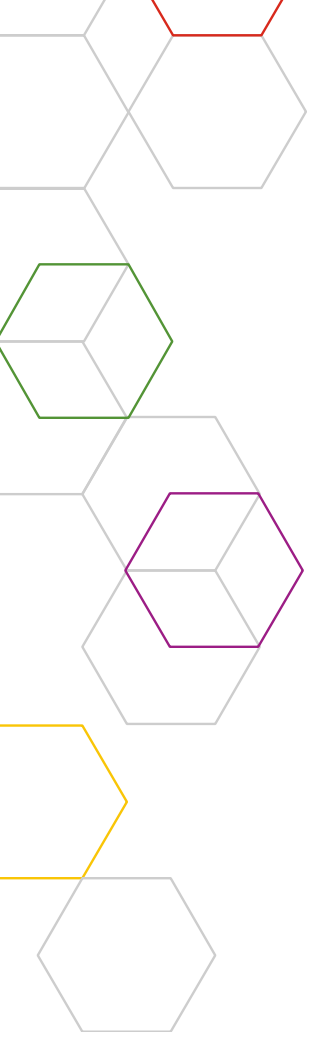
Other Enforcement Developments

- September 11, 2018 Interagency Statement Clarifying the Role of Supervisory Guidance
 - Context:
 - December 2017 GAO declaration that BCFP “guidance” constituted a binding rule subject to Congressional review
 - Separate GAO declaration that prudential banking agency guidance on leveraged lending constituted a binding rule
 - Arguably such “guidance” and other guidance was invalid as not having been submitted to Congress for review under the 1996 Congressional Review Act
 - Forms of guidance:
 - Advisories
 - Bulletins
 - Policy statements
 - Questions and answers
 - Frequently asked questions

Other Enforcement Developments

- Agencies' Dilemma
 - Submit all previous guidance to Congress for review, risking some disapproval or
 - Risk particular guidance being someday being held to be invalid binding rule or
 - Declare that the guidance is not binding
- The agencies chose to declare that guidance is not binding and will not serve as the basis for enforcement action.

Other BCFP Developments



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Other BCFP Developments

- *All American Check Cashing case*
 - Pending in Fifth Circuit U.S. Court of Appeals (Texas)
 - Constitutionality of BCFP structure is at issue
 - Lower court: Structure is constitutional
 - Argument: Dodd-Frank only permits the President to remove the Director of the BCFP for cause which limits the President's executive power conferred by the Constitution.
 - All American Check Cashing is represented by same counsel that represented PHH Mortgage in the D.C. Circuit Court of Appeals

Other BCFP Developments

- *RD Legal Funding* case
 - Pending in Second Circuit U.S. Court of Appeals (New York)
 - Constitutionality of BCFP structure is at issue
 - Lower court: Structure is unconstitutional, citing Judge Kavanaugh's opinion in *PHH Mortgage* case in D.C. Circuit Court of Appeals
- Other BCFP defendants are raising the constitutional issue
 - T3Leads in the Ninth Circuit U.S. Court of Appeals
 - Lower court: Structure is constitutional
 - Settlement has been proposed
 - Think Finance

Other Regulatory Developments: Fintech – BCFP, OCC, FDIC

- Fintech

- BCFP has established an Office of Innovation headed by former Arizona Assistant Attorney-General who established Arizona regulatory “sandbox”
 - That “sandbox” allowed limited access to a market in exchange for relaxation of some regulations
- Acting Director Mulvaney: BCFP will coordinate with the Office of the Comptroller of the Currency (the “OCC”) to ensure global leadership in fintech
- BCFP announced it is working with 11 foreign financial regulators and related organizations to create a Global Financial Innovation Network to help fintech firms navigate between countries and to serve as a framework of cooperation between regulators on innovation
- OCC has announced it will issue special purpose national bank charters to fintech firms
- FDIC has announced it is opening an Office of Innovation

Other BCFP Developments

- Consumer Complaint Database
 - The database publishes unverified complaints
 - Many banks do not respond publicly out of concern over customer privacy
 - Thus, the BCFP publishes potentially false, erroneous, or incomplete information about the conduct of financial institutions without rebuttal
 - Acting BCFP Director Mulvaney: “A Yelp for financial services sponsored by the federal government”
 - Dodd-Frank requires that the BCFP collect this information, but does not require the BCFP to make it public
 - Last April, Acting Director Mulvaney, at a banking industry conference, questioned making the complaints public

Other BCFP Developments

- Civil Investigative Demands (CIDs)

- Fifth Circuit U.S. Court of Appeals (Texas) struck down a CID that the BCFP served on a firm that runs a website offering access to public records
 - The BCFP was conducting an industry-wide “compliance sweep”
 - The court: The BCFP does not have “unfettered authority to cast about for potential wrongdoing”
 - Dodd-Frank requires the BCFP to include a Notification of Purpose with each CID, indicating:
 - Nature of the conduct constituting the alleged violation under investigation and
 - Provisions of law applicable
 - The CID had not adequately advised the company of the specific conduct under investigation
 - Without such information, a court cannot evaluate the relevance of the information sought by the CID
 - The court: “[t]here are consequences to the absurdity of giving a notification that notifies of no purpose whatsoever”
- The U.S. Court of Appeals for the D.C. Circuit struck down a BCFP CID last year for similar reasons

Other BCFP Developments

- Disparate Impact

- On May 21, after Congress disapproved the BCFP's 2013 indirect auto lending Guidance, the BCFP announced that it would reexamine the Equal Credit Opportunity Act (ECOA) in light of the Supreme Court decision in the *Inclusive Communities* case distinguishing statutes that refer to consequences of actions and statutes that refer only to intent of the actor
 - The disapproved Guidance had suggested that lenders that purchased automobile loans from automobile dealers compensated based on interest rate may be in violation of ECOA
 - *Inclusive Communities*: 5-4 decision with the opinion written by now-retired Justice Kennedy
 - Disparate-impact claims are cognizable under the Fair Housing Act
 - Cases under Title VII of the Civil Rights Act and the Age Discrimination in Employment Act: encompass disparate-impact claims when text of statute refers to consequences of actions and not just to mindset of actors
 - FHA makes it unlawful to “otherwise make unavailable” a dwelling because of race
- That is results-oriented
 - Compare the language of ECOA
 - “It shall be unlawful for any creditor to discriminate....”

Other BCFP Developments

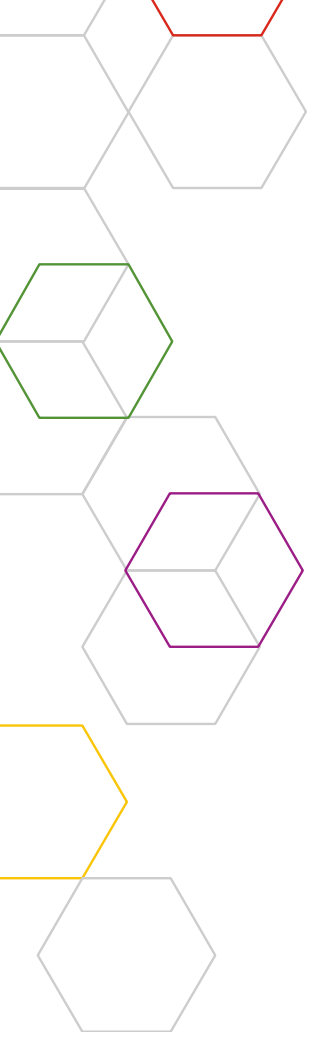
- Short-term and Long-term Balloon Payment Lending Rule (Payday Lending Rule)
 - Compliance date: August 19, 2019
 - Lender must:
 - Consider (and document) ability to repay
 - Limit number of such loans a borrower can have outstanding at one time
 - Litigation pending in Fifth U.S. Circuit Court of Appeals
 - BCFP is reconsidering rule
 - Court declined to stay the rule pending the litigation, but suspended the litigation pending BCFP reconsideration of the rule

Other BCFP Developments

- Legislative Development

- September 17, 2018, Senator Hatch (R-UT) introduced the “Give Useful Information to Define Effective Compliance Act” (the “GUIDE Compliance Act”)
 - Requires the Director of the BCFP to issue:
 - A rule defining
 - Each type of guidance that the BCFP will provide
 - Criteria for selecting each type of guidance
 - Process and timelines for persons to request guidance
 - Time periods for the BCFP to respond to such requests
 - Process for amending or revoking guidance
 - No person is to be held liable for relying on such guidance even if such guidance is later revoked or amended, even by a court
 - Requires the BCFP also to propose a rule establishing guidelines for determining the size of civil money penalties based on:
 - Severity of conduct and
 - Level of culpability

Public Enforcement Matters



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Noteworthy Recent Public Enforcement Matters

Citibank

Triton Management Group

Mosely Companies (Hydra Group)

Santander

Navient

Conduent (National Information System
Supervision Program)

Citibank, N.A.

- June 29, 2018
- Truth in Lending Act
 - Failing to periodically re-evaluate and reduce APRs on credit cards that had been increased
 - Failing to have in place reasonable policies and procedures to do so
- Self-disclosed (so no civil money penalty)
- Remedies: Correction and \$335 million in restitution

Triton Management Group

- July 19, 2018
- Consent order with payday lender
- Truth in Lending Act
 - Failure to properly disclose finance charges associated with auto title loans
 - Ads failed to disclose APR and other information
- Remedies
 - No misrepresentation of costs of loans
 - Remediate \$1,522,298
 - Inability to remediate total
 - Remediate \$500,000

Mosely companies (Hydra Group)

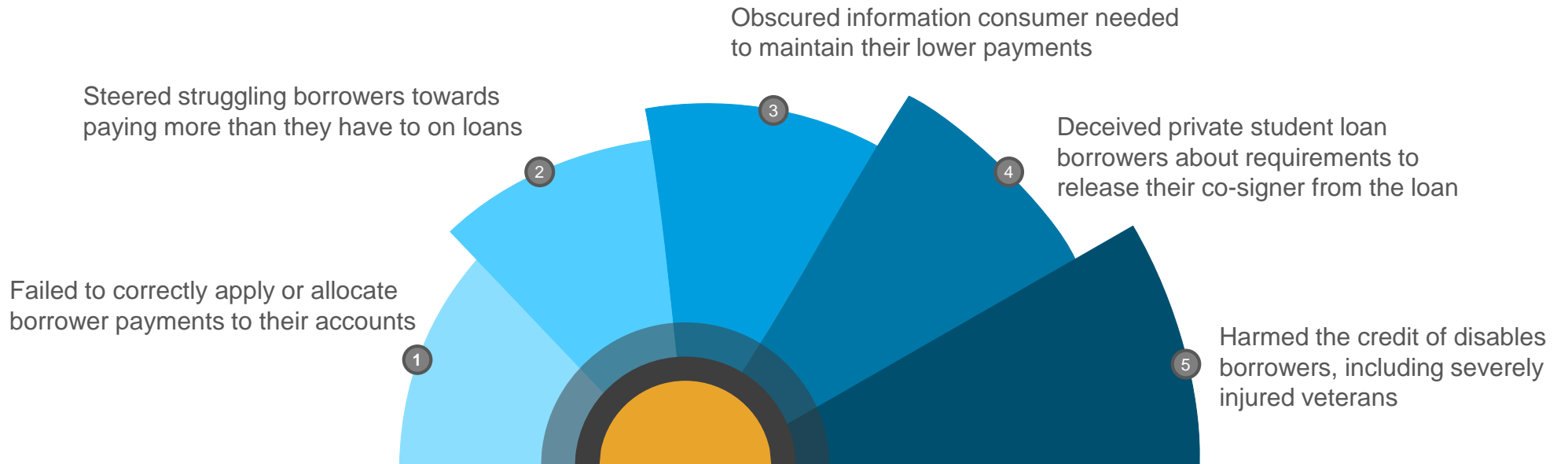
- Consent order for unlawful origination and servicing of short-term small-dollar online loans
 - Failure to disclose automatic renewal feature of the loans
 - Unauthorized access to consumer bank accounts using confidential information from third-party data brokers
 - Deposited loan proceeds in consumer bank accounts and then debited biweekly “finance charges” indefinitely
 - No loan agreements in many cases
 - Those with loan agreements had inaccurate disclosures
 - Ban from industry, forfeiture of \$14 million in assets, \$1 civil money penalty (penalty is low because of defendant’s inability to pay)
- Criminal conviction of principal is now being appealed

Santander Consumer USA Holdings

- Settlement of charges that Santander misled drivers about loan costs and insurance coverage
 - Allegations of non-disclosure: making permitted interest-only monthly payments would extend the life, and increase the total cost, of the loan
 - Allegations of non-disclosure: “guaranteed auto protection” would not always cover replacement cost of a car destroyed in an accident due to a cap on coverage

Navient

On January 18th, 2017 (two days prior to Trump's inauguration date) the Consumer Financial Protection Bureau (CFPB) sued the nation's largest servicer of both federal and private student loans for systematically and illegally failing borrowers at every stage of repayment. "For years, Navient failed consumers who counted on the company to help give them a fair chance to pay back their student loans," said CFPB Director Richard Cordray. "At every stage of repayment, Navient chose to shortcut and deceive consumers to save on operating costs. Too many borrowers paid more for their loans because Navient illegally cheated them and today's action seeks to hold them accountable."¹



¹ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/>

Conduent

The Consumer Financial Protection Bureau (CFPB) took action against Xerox Business Services, LLC, now called Conduent Business Services, for software errors that led to incorrect consumer information about more than one million borrowers being sent to credit reporting agencies. The company also failed to notify all of its auto lender clients about known flaws in its software that led to the errors. The consent order requires Xerox to pay a \$1.1 million civil penalty, explain its mistakes to its lender clients, and fix its faulty software.¹



Operated and maintained loan-servicing software that contributed to the furnishing of inaccurate consumer information to consumer reporting agencies



Utilized a version of software for the lenders' furnishing systems that was incapable of accurate furnishing



Failed to notify the lenders when it learned of its existence of defects

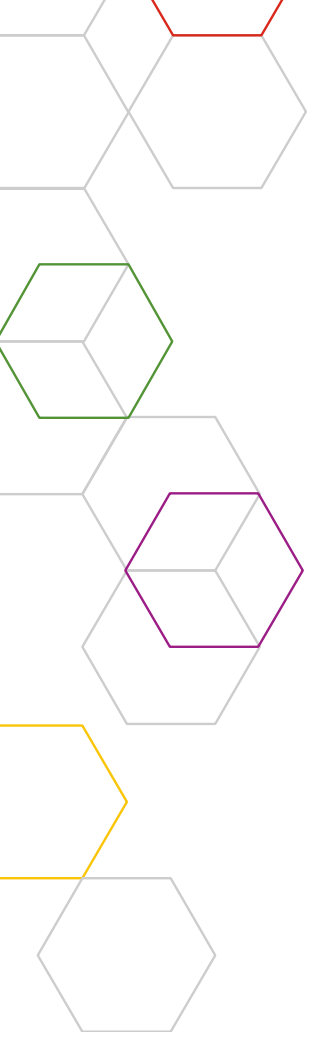


Over 30 Findings & Conclusions as to the Unfair Acts and Practices

One of the first enforcement actions under the CFPB's National Information System Supervision (NISS) Program

¹ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment/>

Best Practices in Conducting Lookbacks

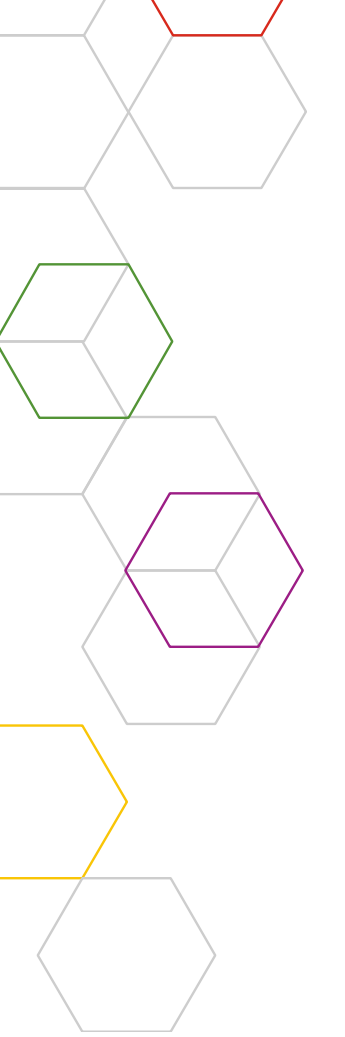


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Typical Steps & Considerations for Conducting a Lookback

Key Tasks	Considerations
1. Agree terms with regulator	<ul style="list-style-type: none"> a. How could scope and findings be interpreted differently? b. What is timeline and is it achievable?
2. Mobilize project team	<ul style="list-style-type: none"> a. Who needs to provide information/data? b. Any third-party service providers involved? c. Are the right level of resources delegated?
3. Determine impacted populations	<ul style="list-style-type: none"> a. What can be used to validate population is correct? b. Are their multiple systems or vendors that need to be accessed?
4. Perform analysis	<ul style="list-style-type: none"> a. How are calculations performed? b. What is the escalation process if results aren't definitive?
5. Validate results	<ul style="list-style-type: none"> a. Who performs validation? b. How are exceptions cleared? c. What sample methodology is used?
6. Remediate customers	<ul style="list-style-type: none"> a. How are customers remediated? b. How are they located? c. What are the steps to locate if they don't cash checks or take action? d. What is the process to locate individuals who are no longer customers?
7. Report	<ul style="list-style-type: none"> a. What reporting is in place to track remediation results? b. Who gets the report and who is responsible for taking action?



Leading Practices for Conducting Lookbacks

- 1 Treat like a project – status reporting, project plans, communication protocols, and regular check ins
- 2 Mobilize a team with program management, data, technology line of business and compliance expertise
- 3 Have a clear definition of lookback scope and requirements that has been agreed with all stakeholders (Regulators, Audit, Legal)
- 4 Getting to the correct data population is critical and a major source of errors – tie data population to reports or other independent information.
- 5 Deploy a validation methodology including an independent validation group in addition to internal audit
- 6 Expect on-going conversations with the regulators as you work through the process
- 7 Consider remediation pilot runs
- 8 Document approach, decisions, results and validation findings
- 9 Involve all key stakeholders from risk, compliance, legal, etc. early in decisions to prevent “surprise learnings” that create re-work and issues
- 10 In complex decisions, consider how the decision would look on the front cover of a newspaper. If there is doubt, escalate the decision.
- 11 If multiple remediations are required, consider setting up a remediation center of excellence
- 12 Track the remediation results. If remediation requires customer action, determine follow up approach if customer doesn't take any action

Questions?



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Chris Edwards, a corporate partner in Winston's Chicago office, is chair of the firm's bank regulatory practice. She focuses on the regulation of the financial services industry—including the securities, banking, and insurance industries—as well as corporate governance and public and regulatory policy issues.

Chris provides proactive counsel to clients on corporate governance, public company boards of director issues, banking, insurance and securities industry regulation, risk management, consumer banking and securities transactions, and privacy and identity theft matters. She also has extensive experience supervising complex internal investigations and regulatory defense matters.

Prior to joining the firm in 2003, Chris was executive vice president and chief legal officer at Bank One Corporation, a predecessor to JPMorgan Chase, one of the nation's largest bank holding companies. She was in charge of Bank One's 500-person legal, compliance, government relations, and regulatory management department, with responsibility for the bank's worldwide legal and compliance needs. Previously, Chris served as chief legal officer for large, international financial services firms, including, for over 10 years, Morgan Stanley.

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Julius “Jerry” Loeser is of counsel in Winston’s Chicago office, and his practice focuses on banking regulation. He has extensive experience in counseling financial services clients on, among other things, bank acquisitions, privacy, financial modernization, the USA PATRIOT Act, Basel II and III, lending limits, capital, trust, affiliate transactions, and Federal Reserve, OCC, FDIC, and CFPB regulations.

Prior to working at large corporate law firms, Jerry was chief regulatory and compliance counsel for Comerica Bank, where he also served as senior vice president and deputy general counsel and as general counsel of its retail bank division. Before that, he served as chief regulatory in-house counsel at Wells Fargo & Co. Jerry began his legal career advising the Board of Governors of the Federal Reserve System in Washington, D.C.

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Paul Noring is a Managing Director and Co-Leader of the Banking, Insurance & Capital Markets practice at Navigant. Paul has deep experience in Accounting, Financial Risk Management, Credit Risk Management and Consumer Finance Operations.

Paul is a recognized expert in financial reporting, accounting policy and auditing matters related to banks and other financial institutions and served as both an expert witness and consultant to various law firms in many high profile matters, including the largest bank failure in U.S. history. He has over 28 years of experience with in securities accounting, capital markets operations, mortgage banking, securitization transactions, derivative risk management operations, best practice environments surrounding financial instrument accounting, fair value measurements, and allowance for loan loss methodologies.

Prior to joining Navigant Consulting, he was a Partner at PricewaterhouseCoopers, LLP, where he spent 18 years serving large multinational financial services clients and Senior Vice President of Finance at Fannie Mae, responsible for financial reporting, internal controls, tax and the business unit controller's function.

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Christopher Sicuranza is a Managing Director in the Financial Services Advisory and Compliance segment and co-lead of the Banking, Insurance, and Capital Markets practice. With over 20 years of experience advising consumer finance, government, and banking organizations, Chris specializes in providing solutions that help clients optimize the use of financial and operational information to improve profitability, to minimize risk capital, and to address regulatory requirements. He is a proven engagement leader with the ability to manage large complex projects in risk management, regulatory compliance, and operational effectiveness.

Chris is currently advising clients on implementing global regulatory change management processes, rationalizing the control and risk infrastructure to improve outcomes while reducing costs and acting as an expert in mortgage servicing related matters.

He has published and spoken about banking topics including regulatory compliance, third-party vendor management, and regulatory change management. Prior to joining Navigant Consulting, Chris was with Deloitte and Touche's Enterprise Risk Services practice.

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Thank You.



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