The Consumer Financial Protection Bureau (“CFPB” or “Bureau”) continued in 2015 promulgating rulemakings, conducting supervisory examinations, and initiating and settling enforcement litigation to regulate and resolve purported violations of various provisions of the 19 statutes and their implementing regulations under its jurisdiction. In sum, during 2015 the CFPB filed or settled more than four dozen individual actions, obtained over $1.3 billion in consumer redress, and imposed over $186.7 million in civil money penalties on regulated entities.

As there is no reason to believe the CFPB’s pace of enforcement will slow down in 2016, this client alert provides a brief summary of the CFPB’s 2015 activity and seeks to identify trends for 2016.

**Summary Recap of 2015 Activities:**

CFPB actions against regulated entities emanate from two departments within the Bureau—Supervision and Enforcement. These two offices routinely work together with enforcement attorneys supporting supervisory examinations, and the Supervision Office referring matters to Enforcement for further action. The Bureau’s Enforcement Office, however, can also generate investigations independent of supervisory examinations.

While supervisory examiners can require that a CFPB-regulated entity turn over virtually any information requested by an examiner, enforcement attorneys must issue a civil investigative demand (“CID”) to formally mandate that a regulated entity provide information to the Bureau. Notwithstanding the Bureau’s broad authority to issue CIDs, the Bureau will often initiate an informal conversation with a regulated entity.

The CFPB’s Project Catalyst Office, which seeks to engage with those developing innovative financial services and products, did not undertake any public projects this year. However, we are aware of a number of regulated entities that have met with the Bureau through Project Catalyst to discuss regulatory concerns and potential collaboration with the CFPB. We anticipate that 2016 will be a more active year for Project Catalyst and that we will see the issuance of No Action letters this year.

**Overview of CFPB Supervisory Activities:**

During 2015, the CFPB continued to resolve a number of matters though its non-public supervisory authority. The CFPB’s Supervisory Highlights noted that its examinations focused on mortgage origination and servicing, credit reporting, debt collection, student loan servicing, and fair lending practices. The TILA-RESPA Integrated Disclosure Rule (“TRID”) came into effect October 2015 and the Bureau has updated its examination procedures to incorporate TRID. During 2015 examinations, the CFPB noted a number of compliance concerns, including failure to provide adequate disclosures.
though the use of Good Faith Estimate and Closing Cost forms, violation of fee fluctuation tolerances, and the inclusion of general waiver provisions, which may be misleading to consumers and violate Regulation Z. Accordingly, TRID compliance will be an area of focus in the coming year.

Other areas of supervisory focus in 2015 related to the following:

- **Equal Credit Opportunities Act (“ECOA”):** Ensuring fair lending practices in the:
  - indirect auto lending industry, including calling into question the practice of dealer mark-ups that could result in discriminatory treatment of consumers; and
  - home finance industry, specifically that protected classes of borrowers are not discriminated against and that the use of public assistance is not held against borrowers seeking credit.

- **Fair Credit Reporting Act (“FCRA”):** Requiring consumer reporting agencies to:
  - sufficiently monitor and provide feedback to furnishers to ensure the provision of accurate data—even if that data is publically available; and
  - comply with the requirement to conduct a full and timely investigation of information disputed by consumers, and to correct any inaccurate information accordingly.

- **Unfair, Deceptive, and Abusive Acts or Practices (“UDAAP”):** Ensuring that:
  - consumer communications by student loan servicers concerning fees, partial payment application, refinance options, bankruptcy, and tax deductibility are not fraudulent or misleading; and
  - debt collecting attorneys conduct meaningful review of debt filings prior to filing suit, and make personal determinations that their client’s statements are reasonably accurate before introducing them to court.

- **Real Estate Settlement Procedures Act (“RESPA”):** Ensuring compliance by mortgage servicers of RESPA and Regulation X, as it relates to loss mitigation, foreclosure, and accurate periodic statements.

The Bureau also continued to proselytize the importance of regulated entities developing and maintaining a robust compliance management system (“CMS”) scaled to the size of their business. Moreover, the CFPB continues to warn that many violations of consumer financial protection laws result from poorly trained staff, a lack of comprehensive policies or procedures, failure to utilize an outside compliance audit as necessary, or insufficient engagement by those charged with overseeing regulatory compliance. The CFPB also continues to expect that senior management and boards of directors of regulated entities are fully informed on all consumer-related issues.

**Overview of CFPB Enforcement Actions:**

The Bureau filed more than 59 public actions (lawsuits and settlements) in 2015. While mortgage origination, servicing, and other mortgage related issues are a perennial focus of the CFPB, a number of other consumer financial products and services garnered enforcement attention this past year, including matters related to:
The CFPB almost always cited companies for UDAPP violations and sought some type of civil money penalty—whether multimillions of dollars or a single dollar.

What is Ahead for 2016?

Now that most of the mandatory regulatory projects under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") have been implemented, the CFPB’s discretionary rulemaking will likely increase. The large range of products and services regulated by the CFPB (pursuant to 19 statutes and their implementing regulations plus UDAAP authority) dictate enhanced supervisory and enforcement actions will continue against the significant number of companies and individuals engaged in activities under CFPB’s rulemaking authority. Moreover, the CFPB will likely continue to focus its interests on specially protected populations (e.g., service members, students and senior citizens) and large markets that may affect substantial parts of the American consumer population.

Rulemakings:

The CFPB is likely to issue a number of proposed and final regulations in 2016 ranging from revisions to address issues under its recently issued mortgage related rules, application of UDAAP to govern small dollar lending, and rules addressing the propriety of arbitration in relation to consumer financial products and services.

Prepaid Cards: Having released a massive proposed prepaid card rule last year, we expect the CFPB will finalize the rule this year, providing comprehensive regulation over general purpose reloadable cards. The prepaid rule will amend both Regulation E, implementing the Electronic Funds Transfer Act, and Regulation Z, implementing the Truth in Lending Act, to require uniform disclosures, error resolution, and terms for offering credit on prepaid cards. It may even regulate mobile wallets and other similar products.

Small Dollar, Installment, and Auto Title Lending: In 2015, the CFPB released an outline of a possible proposed rule to the Small Business Advisory Review Panel, shedding light on the likely components of a rule expected to be proposed in 2016. The guidance issued indicated that the CFPB will likely require certain safeguards or debt trap preventions. For example, small dollar lenders would be required to make an ability-to-repay determination and verify consumer information including income, credit history, and other financial obligations before lending.

Although the CFPB has yet to release a proposed rule, the Bureau is already receiving a great deal of attention over its regulation of the market. Notable is that this rulemaking will be the first time the CFPB has issued rules pursuant to its Dodd-Frank granted UDAAP rule making authority.

Arbitration: Under Section 1028 of the Dodd-Frank Act, the CFPB released an in-depth two part arbitration study in 2015, indicating that a rulemaking is likely to follow in the near future. Notwithstanding the fact that the Federal Arbitration Act and Supreme Court precedent support the
use of arbitration clauses in commercial and consumer contracts, based on the Dodd-Frank study, the CFPB appears ready to limit the use of pre-dispute arbitration contracts related to consumer financial products and services. Specifically, the CFPB appears to be proposing that with regard to consumer financial products and services contracts, there can be no class action waiver, and pre-dispute arbitration cannot be mandatory but only used after class action certification has been denied or dismissed. The CFPB bases much of its rationale for this type of regulation on the fact that class actions are necessary to stop consumer harm that is not addressed by regulators. 25 Ironically, the entire CFPB data pool pre-dates the Dodd-Frank Act and the CFPB’s existence. Surely, this data would reflect different results, taking into consideration the extensive supervisory and enforcement activity of the CFPB (and the state attorneys general availing themselves of their Dodd-Frank authority). 26 We expect a proposed rule to come out in 2016.

**Fair Debt Collection Practices Act ("FDCPA"):** The CFPB issued an advanced notice of proposed rulemaking in 2013, but to date has not issued a proposed rule. 27 We expect that the Bureau will likely engage in a revision of the debt collection rules this year. The Bureau was particularly active in pursuing enforcement actions against debt collectors in 2015 and resolved a significant debt buyer/collection matter toward the end of last year. 28 In addition, the CFPB released a Bulletin on potential violations of UDAAP and FDCPA associated with in-person debt collections, 29 and is currently reviewing the results of a mail survey it conducted across the U.S. to assess consumers’ experiences with debt collectors. 30 It appears as if the Bureau is poised to use this information and its enforcement settlement precedent to set the stage for revised regulation.

**Private Student Lending:** While student lending and student loan servicing is already regulated by TILA and subject to UDAAP generally, as well as by the Department of Education, the CFPB has shown a significant amount of interest in this large marketplace. 31 In 2015, the CFPB, Department of Treasury, and Department of Education released a joint report on student loan servicing, 32 and the Bureau has expressed interest in comprehensive federal standards regulating student loan servicing. 33 Considering that the Bureau has a specialized office dedicated to protecting students, we expect it to consider using its UDAAP rulemaking authority to fill any regulatory gaps or concerns.

**Fair Credit Reporting Act:** Although the CFPB has not highlighted this area as a rulemaking priority, we would not be surprised if it proposes some revisions to Regulation V. It has the authority to do so. 34 The FCRA has not been meaningfully updated since 2003 and appears out of step with product innovation and alternative underwriting. 35 As underwriting innovates and improves the CFPB may just adjust the regulation.

**Enforcement:**

We expect that CFPB enforcement activity will continue to be aggressive in 2016, and that its enforcement office will continue to send broad sweeping civil investigative demands with short compliance deadlines.

In the light of new TRID rules, the Bureau’s 2015 guidance concerning RESPA violations and Marketing Services Agreements, 36 and recent press on fair lending issues related to manufactured housing, 37 we believe the CFPB will focus on markets where it has unquestionable jurisdiction—such as mortgage lending, credit cards, student lending, debt collection, and credit reporting. Moreover, we expect the CFPB to bring at least a few auto finance actions stemming from its newly created authority to conduct supervisory examinations of certain larger non-bank auto finance companies. 38 However, the
Bureau’s foray into auto lending will likely be toned down, particularly in light of the recent Congressional action to nullify the CFPB’s 2013 Bulletin on indirect auto lending.

Moreover, as the Bureau released another Card Act study in late 2015, addressing in part student credit cards, we can expect to see the enforcement office follow up with investigations of credit card providers to drive home concerns raised in the study. In addition, consistent with the CFPB’s historic scrutiny of financial innovation and expressed concerns related to digital financial products and services, we also expect increased enforcement related to innovative products such as online lending, mobile payments, digital wallets, and virtual or alternative currencies. While the Bureau has not been willing to provide assurances, those engaged in developing new financial products may benefit from engaging with the Bureau’s Project Catalyst before entering the market to help prevent unexpected and unpredictable CFPB scrutiny.

Specialized Populations: We expect that the CFPB will be actively engaged in enforcement actions related to products that touch specially protected populations, including service members, older Americans, and students. Particular areas of focus include financial products targeted toward low income consumers (subprime loans), college-age students (student loans and credit cards), and retired or soon to be retired Americans (reverse mortgage and pension advance products).

Responsible Conduct: In 2013, a CFPB bulletin described the type of “responsible conduct” CFPB-regulated entities may engage in, and benefits which the Bureau may bestow upon those entities for that behavior. In a series of enforcement actions in 2015, the Bureau highlighted that entities engaged in such “responsible conduct” benefit by reduced money penalties, as well as in some instances, non-public agreements that protect the identity of cooperating entities or individuals. Although the standard is quite subjective and controversial, we expect enforcement actions in 2016 will continue to encourage regulated entities to curry favor with the Bureau by engaging in self-policing, self-reporting, remediation, and/or cooperation with Bureau investigations under the rubric of engaging in “responsible conduct.”

Action Items:
Based on the CFPB’s actions over 2015 and their expected focus for 2016, there are a number of action items financial firms subject to CFPB jurisdiction should consider. These include:

- Determine if your business offers any financial products or services likely to be subject to CFPB’s focus in 2016.
- Review your CMS to ensure it addresses specific CFPB risk management expectations for your products and services, taking special consideration for those offered to specialized populations, including low income consumers.
- If your business offers products or services likely to be subject to a CFPB rulemaking, consider engaging with the CFPB before or during a rulemaking process in order to assist the CFPB in understanding your business model and the implications of any potential rule on your industry.
- Consider whether your business can avail itself of the CFPB Project Catalyst resources or the developing No Action Letter policies.
If your business receives a civil investigative demand, consider the requirements and implications of the CFPB’s “responsible conduct” bulletin and determine early whether you can benefit from responsibly cooperating with the CFPB.

If your business receives a voluntary information request from the CFPB, consult with counsel to determine whether and how best to respond to the CFPB, while keeping in mind that the CFPB’s regulations require an initial “meet and confer” within 10 days of receipt of a civil investigative demand.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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2 All figures are approximations obtained from CFPB press releases, available at http://www.consumerfinance.gov/newsroom.


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