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**STATE ENFORCEMENT IN MORTGAGE LENDING**

*The CFPB recently issued a press release and interpretive rule encouraging more enforcement of federal consumer financial protection laws. In this article the authors review the record in four states on the East Coast and find that while they are likely to remain active in enforcing consumer financial protection laws, it can be expected for their focus to shift from mortgage lending.*

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The Consumer Financial Protection Bureau (“CFPB”) recently issued a press release and interpretive rule encouraging more enforcement of federal consumer financial protection laws by state regulators, noting states may have even broader authority than the CFPB to pursue companies and individuals that violate federal consumer financial protection laws.<sup>1</sup> The CFPB has

since doubled down by continuing to encourage and offer support to state attorneys general to bring enforcement actions of federal consumer protection laws.<sup>2</sup> This article examines whether states needed that

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<sup>1</sup> Consumer Financial Protection Bureau, Section 1042 Interpretive Rule 5.19.2022, *Authority of States to Enforce the Consumer Financial Protection Act of 2010* (May 19, 2022), [https://files.consumerfinance.gov/f/documents/cfpb\\_section-1042\\_interpretive-rule\\_2022-05.pdf](https://files.consumerfinance.gov/f/documents/cfpb_section-1042_interpretive-rule_2022-05.pdf). Though certain members of the legislature have issued a letter alleging that the CFPB is “colluding” with states contrary to the Consumer Financial Protection Act. Letter from U.S. Congressmen Patrick

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Mc Henry, Tom Emmer, and Blaine Luetkemeyer, CFPB Letter to Chopra re State AG, [https://republicans-financialservices.house.gov/uploadedfiles/2022-07-28\\_cfpb\\_letter\\_to\\_chopra\\_re\\_state\\_ag.pdf#:~:text=While%20Congress%20intended%20for%20the%20CFPB%20to%20enforce,attorney%20general%20in%20bringing%20a%20federal%20enforcement%20action.](https://republicans-financialservices.house.gov/uploadedfiles/2022-07-28_cfpb_letter_to_chopra_re_state_ag.pdf#:~:text=While%20Congress%20intended%20for%20the%20CFPB%20to%20enforce,attorney%20general%20in%20bringing%20a%20federal%20enforcement%20action.)

<sup>2</sup> Consumer Financial Protection Bureau, Director Chopra’s Prepared Remarks at the 2022 National Association of Attorneys General Presidential Summit (August 10, 2022),

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reminder: Are they using this authority currently? What are the indicators for future enforcement by state regulators?

We look to enforcement actions in a handful of states, over the past year, to see how focused state regulators have been on mortgage lending — a hot topic for enforcement pre-pandemic and closely monitored by regulators during the pandemic — and where we can expect their focus to be going forward. Our analysis looks specifically at New York, Massachusetts, Maryland, and Pennsylvania, all of which have, historically, been focused on consumer protection. Some might recall these were some of the states that sought to “fill the void” in 2017 when the CFPB was seen as weakened, hiring former CFPB personnel and founding “mini-CFPBs.”

Our analysis suggests that states on the East Coast are likely to remain active in enforcing consumer financial protection laws, but not necessarily in mortgage lending. Instead, we expect to see a renewed focus on companies operating in the fintech and virtual currency industries, and a strong focus on cybersecurity and discrimination and fair lending issues.

## NEW YORK

The New York Department of Financial Services (“NYDFS”) and New York Attorney General (“NY AG”) each enforce consumer protection laws in the state. In 2022, NYDFS welcomed a new Superintendent of Financial Services, Adrienne Harris. Superintendent Harris continued many of the priorities of her predecessor, Linda Lacewell, including a focus on cybersecurity, data privacy, climate change, and COVID-19 relief. NYDFS’s current stated priorities include: debt collection, prescription drug pricing oversight, fair lending, and a continued focus on the

virtual currency space. But NYDFS has not — publicly — been as active in the mortgage space as in the past.

As to recent investigations, in 2022, only two settlements were reported in the banking space, both involving Bank Secrecy Act/AML compliance, one against a trading platform for cryptocurrencies following an examination, in the first ever settlement with a cryptocurrency licensee in New York.<sup>3</sup> However, the settlements and exam data show that NYDFS, like other regulators, is concerned with fair lending. In 2021, NYDFS settled with a nonbank lender after HMDA data revealed a lack of lending to minorities, weakness in the compliance system, and a lack of attention to fair lending issues.<sup>4</sup> NYDFS found fair lending concerns in exams too — i.e. inadequate training, excessive discretion when deciding whether to grant mortgage applications, and inadequate marketing policies to avoid discrimination.<sup>5</sup> NYDFS released guidance to mortgage lending institutions to help licensees comply with New York’s fair lending law.<sup>6</sup> NYDFS also investigated

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<sup>3</sup> See Press Release, NYDFS, Superintendent Adrienne A. Harris Announces \$35 Million Penalty on National Bank of Pakistan For Repeated Compliance Failures (February 24, 2022), [https://www.dfs.ny.gov/reports\\_and\\_publications/press\\_releases/pr202202241](https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202202241) and Press Release, NYDFS, Superintendent Adrienne A. Harris Announces \$30 Million Penalty on Robinhood Crypto for Significant Anti-Money Laundering, Cybersecurity & Consumer Protection Violations (August 2, 2022), [https://www.dfs.ny.gov/system/files/documents/2022/08/ea20220801\\_robinhood.pdf](https://www.dfs.ny.gov/system/files/documents/2022/08/ea20220801_robinhood.pdf).

<sup>4</sup> Press Release, NYDFS, Governor Cuomo Announces Findings of New York Investigation of Redlining in Buffalo (February 4, 2021), [https://dfs.ny.gov/reports\\_and\\_publications/press\\_releases/pr202102043](https://dfs.ny.gov/reports_and_publications/press_releases/pr202102043).

<sup>5</sup> NYDFS, *2021 Consumer Protection and Financial Enforcement Annual Report* (March 15, 2022), [https://www.dfs.ny.gov/system/files/documents/2022/03/2021\\_cpfed\\_annual\\_report\\_20220303.pdf](https://www.dfs.ny.gov/system/files/documents/2022/03/2021_cpfed_annual_report_20220303.pdf).

<sup>6</sup> NYDFS, NYDFS Issues Guidance to Mortgage Lending Institutions to Comply with New York’s Fair Lending Law (August 31, 2021), [https://www.dfs.ny.gov/reports\\_and\\_publications/press\\_releases/pr202108311](https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202108311).

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<https://www.consumerfinance.gov/about-us/newsroom/director-chopras-prepared-remarks-at-the-2022-national-association-of-attorneys-general-presidential-summit/>.

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allegations of discrimination in access to credit based on sex by a credit card company.<sup>7</sup>

There were also multiple investigations regarding data breaches. By way of example, NYDFS entered a consent order with a mortgage servicer for violations of cyber security regulations, finding the company's internal investigation was inadequate and the company waited too long, 18 months, to report the event to NYDFS.<sup>8</sup> More recently, in June 2022, NYDFS settled with Carnival Cruise Company for violations of the cyber security regulations, finding that the company waited too long to notify NYDFS, and that its cybersecurity program was insufficient.<sup>9</sup>

Like the CFPB, and other regulators who latch on when a bank is an outlier in charging certain fees to customers when others do not, NYDFS has found certain banking account fees objectionable, like dormancy fees on savings accounts.

Turning to the NY AG, it too has not been as active in the mortgage space in 2022 — but it has been coordinating with other AGs, and the CFPB, particularly if there are indicia of discrimination or a vulnerable group is impacted.

There were three actions by the NY AG this year notable to those in the financial services space.

First, on March 22, 2022, the NY AG sent letters to the largest credit card companies and major debt collectors warning them of new state regulations that prevent them from suing consumers for old debts.<sup>10</sup>

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<sup>7</sup> While NYDFS issued a report, no fair lending violations were found. Press Release, NYDFS, DFS Issues Findings on the Apple Card and Its Underwriter Goldman Sachs (March 23, 2021), [https://dfs.ny.gov/reports\\_and\\_publications/press\\_releases/pr202103231](https://dfs.ny.gov/reports_and_publications/press_releases/pr202103231).

<sup>8</sup> Enforcement Action - March 3, 2021: Consent Order to Residential Mortgage ([ny.gov](https://www.ny.gov)).

<sup>9</sup> Press Release, NYDFS, DFS Superintendent Harris Announces \$5 Million Penalty on Cruise Company Carnival Corporation and its Subsidiaries for Significant Cybersecurity Violations (June 24, 2022) [https://www.dfs.ny.gov/reports\\_and\\_publications/press\\_releases/pr202206241](https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202206241).

<sup>10</sup> The new state law — the Consumer Credit Fairness Act, which was signed into law on November 8, 2021 — gives New Yorkers additional rights when sued in regard to consumer debt, limits communications with consumers, and reduces the statute of limitations for consumer debt collection from six years to

Second, in April 2022, the NY AG led a multistate coalition of attorneys general to call on the CEOs of four large banks to eliminate all overdraft fees on consumer bank accounts.<sup>11</sup> The rationale was that studies — including by CFPB — have shown that overdraft fees disproportionately affect vulnerable families and communities of color by saddling them with debts that they cannot afford. The AG noted that two peer banks had already eliminated the fees.<sup>12</sup>

Lastly, the NY AG and CFPB teamed up to sue Moneygram at the end of April 2022, alleging violations of consumer protection laws, including the Consumer Financial Protection Act of 2010 (“CFPA”), Electronic Funds Transfer Act, and Regulation E.<sup>13</sup> While not a complete surprise, as money transfers have received high levels of complaints for years, which is always a good indicator of where regulators will focus their attention, the collaboration to enforce the CFPA is interesting, particularly as the CFPB encouraged more action to enforce the CFPA by states in the recent May 2022 announcement.

And reinforcing its commitment to investigate unlawful discrimination and violations of fair housing laws, at the end of August 2022, the NY AG announced investigations, and settlements, with three real estate

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three years. Press Release, NYAG, Attorney General James Warns Debt Collectors of New State Regulations Banning Lawsuits on Old Debts (March 29, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-warns-debt-collectors-new-state-regulations-banning>.

<sup>11</sup> Press Release, NYAG, Attorney General James Leads Multistate Coalition Calling on Consumer Banks to Eliminate Overdraft Fees (April 6, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-leads-multistate-coalition-calling-consumer-banks>.

<sup>12</sup> Press Release, NYAG, Attorney General James Leads Multistate Coalition Calling on Consumer Banks to Eliminate Overdraft Fees (April 6, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-leads-multistate-coalition-calling-consumer-banks>.

<sup>13</sup> Press Release, NYAG, Attorney General James and Consumer Financial Protection Bureau Sue Major International Money Transfer Provider for Violating Consumer Protection Laws (April 21, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-and-consumer-financial-protection-bureau-sue-major>.

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brokerages in New York.<sup>14</sup> The investigations concluded that the brokerages steered prospective homebuyers of color from white neighborhoods, engaged in biased behavior, among other unlawful conduct.

In sum, New York regulators have not been as active as in the past in the mortgage space. Based on recent activity, we expect that NYDFS will be active in cybersecurity, virtual currency, and fair lending. From the NY AG, we expect additional coordination with other states and the CFPB related to financial services.

## MASSACHUSETTS

Massachusetts has been surprisingly less active, except on discrimination issues, publicly, than in the past but, like New York, Massachusetts has been collaborating with other states.

The Massachusetts Division of Banks had 13 reported settlements in 2022 against debt collectors, mortgage lenders/brokers, or originators.<sup>15</sup> The only significant settlement, based on size and value, was the multi-state settlement with more than 400 mortgage loan originators, led by California Department of Financial Protection and Innovation (“CA DFPI”), involving claims under the SAFE Act.<sup>16</sup>

The Massachusetts Attorney General (“MA AG”) has been active in the debt collection and automobile loan

industries over the past 12 months. This comes as no surprise because auto issues were the top complaint to the AG’s office in 2021.<sup>17</sup> Other areas in which the MA AG appears interested: Buy Now, Pay Later; COVID-19 mortgage forbearance; auto dealership rights; and landlord-tenant protections.

There was only one large settlement in 2022. At the end of August 2022, the MA AG entered into an Assurance of Discontinuance with a mortgage servicer to settle allegations that the servicer failed to take required steps to help homeowners avoid foreclosure, harassed customers with debt collection calls and failed to inform borrowers of their right to request verification of the amount due. According to the settlement, the servicer will pay \$2.7 million in the form of principal forgiveness for eligible loans and \$500,000 to the state.<sup>18</sup> The MA AG also brought a handful of individual cases, including four settlements that companies violated state fair housing and consumer protection laws by denying the opportunity to rent apartments because of receipt of Section 8 assistance.<sup>19</sup> Two of those cases were referred by the Massachusetts Commission Against Discrimination (“MCAD”), which is the state agency that enforces Massachusetts anti-discrimination laws by investigating discrimination complaints. MCAD has been actively investigating mortgage loan lending and servicing discrimination claims, and with a nearly doubled budget approved for 2023, more investigations can be expected.<sup>20</sup>

Based on current public cases, we expect to see additional mortgage lending and servicing settlements, and enforcement actions in Massachusetts, particularly relating to discriminatory practices.

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<sup>14</sup> Press Release, NYAG, Attorney General James and Governor Hochul Tackle Discriminatory Practices at Long Island Real Estate Brokerages, (August 30, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-and-governor-hochul-tackle-discriminatory-practices-long>.

<sup>15</sup> Massachusetts Division of Banks, Enforcement actions issued by the Division of Banks, <https://www.mass.gov/info-details/enforcement-actions-issued-by-the-division-of-banks#2022->.

<sup>16</sup> A summary is here: Multi-state National Settlement with Mortgage Loan Originators (January 18, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-and-consumer-financial-protection-bureau-sue-major>; and here: download (mass.gov) Multi-state National Settlement with Mortgage Loan Originators | Mass.gov.

In January 2022, 44 state financial agencies — led by CA DFPI — reached settlements with more than 400 mortgage loan originators nationwide who deceptively claimed to have completed annual continuing education for the Secure and Fair Enforcement for Mortgage Licensing Act (“SAFE” Act) as required under state and federal law.

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<sup>17</sup> National Consumer Protection Week: AG’s Office Issues Consumer Advocacy Report Highlighting Tips and Trends From 2021 | Mass.gov.

<sup>18</sup> Assurance of Discontinuance, *In Re Fay Servicing, LLC* (August 16, 2022), <https://www.mass.gov/doc/fay-servicing-llc-aod/download>.

<sup>19</sup> Press Release, MA AG, In Recognition of Fair Housing Month, AG Healey Announces Resolutions in Four Housing Discrimination Cases (April 7, 2022), <https://www.mass.gov/news/in-recognition-of-fair-housing-month-ag-healey-announces-resolutions-in-four-housing-discrimination-cases>.

<sup>20</sup> Massachusetts, Legislature, Summary FY23 Budget, <https://budget.digital.mass.gov/summary/fy23/enacted/independents/comm--against-discrimination/09400100>.

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## MARYLAND

Maryland has been more focused on mortgage lending than Massachusetts, particularly from the Office of the Commissioner of Financial Regulation (“OCFR”), Maryland’s consumer financial protection agency and financial services regulator. The Maryland Attorney General, on the other hand, had no significant mortgage related public settlements in 2022; instead, the office’s stated priorities for 2022 include guns, evictions, and the environment.

The greatest number of consumer complaints in FY2021 and 2022 to the OCFR was related to mortgage loans – leading to the agency’s interest in mortgage lending.<sup>21</sup> About 20% of new enforcement investigations in FY21 related to mortgages, showing that the OCFR is actively investigating mortgage issues, and often in tandem with other agencies.<sup>22</sup> The OCFR is active in the Multi-state Mortgage Committee and supportive of multistate coordination as well as collaboration with the CFPB.

We expect to see more joint investigations with the CFPB, exams or enforcement matters in Maryland.

## PENNSYLVANIA

Pennsylvania Attorney General Josh Shapiro made news in 2017 when he created the first “mini CFPB” — appointing Nick Smyth, a former CFPB enforcement attorney, as head. Shapiro recently teamed up with the CFPB, the Department of Justice and the Attorneys General from New Jersey and Delaware, to bring an action against Trident Mortgage Company for redlining in the Philadelphia metropolitan area.<sup>23</sup> The complaint against the company alleged discrimination in the company’s marketing practices towards consumers, failure to make loans or locate offices in minority areas, and issuing racist internal emails. In this first of its kind redlining settlement with a nonbank mortgage lender, the

company agreed to invest at least \$20 million to increase credit opportunities in neighborhoods of color in Philadelphia and to pay a penalty of \$4 million. While there have been few public suits or settlements in the mortgage space in 2022, don’t write off the AG’s office — Shapiro is running for Governor so his focus may have shifted, for the moment. If elected, he could support more enforcement of consumer protection laws.

The Pennsylvania Department of Banking and Securities issued a handful of consent agreements in 2022 over violations of the mortgage licensing act, but with relatively small fines.

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## CONCLUSION

While many expected the states to expand consumer protection actions and step up scrutiny of the mortgage industry following the pandemic, it remains to be seen whether states have both the interest and resources. Other post-pandemic issues may need to be prioritized, or regulators could find the mortgage industry in fact appropriately responded to the impact of the pandemic. The states, at least from the East Coast, are currently not as aggressive as they have been historically in the mortgage space.

The CFPB’s call to arms could reinvigorate regulators, or encourage more collaboration and sharing of information and resources between the states or the states and the CFPB going forward. The lull in regulation is an apt time to keep a close eye on issues raised in consumer complaints relating to pandemic relief, beef up compliance programs relating to fair lending/housing and discrimination, and maintain relationships with state regulators for when they do come knocking. Also, this is an important time to keep apprised of the complaints coming into the CFPB’s complaint database, as more partnerships between the CFPB and states may be coming.

States have not been as active in enforcing federal consumer protection laws as many anticipated; the CFPB’s reminder was timely for many state attorneys general and banking departments to step up enforcement, and coordination with other states or agencies. ■

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<sup>21</sup> Maryland Office of the Commissioner of Financial Regulation, *Annual Report For Fiscal Year Ended June 30, 2021*, <https://www.dllr.state.md.us/finance/finregannrep2021.pdf>; 2022 Regulatory Highlights Webinar (state.md.us).

<sup>22</sup> *Id.*

<sup>23</sup> Press Release, U.S. Department of Justice, Justice Department and Consumer Financial Protection Bureau Secure Agreement with Trident Mortgage Company to Resolve Lending Discrimination Claims, <https://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-secure-agreement-trident-mortgage>.