

# The CFPB's Proposals to Create Two Public Registries for Nonbanks: What the Student Loan Industry Needs to Know

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## — Your Presenters



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## — Orders registry proposal overview

- Published in *Federal Register* on January 30, 2023
- Comments due by March 31, 2023
- Certain “covered nonbanks” – any nonbank offering or providing a consumer financial product or service and any affiliate acting as a service provider to it, not just originators of private education loans and larger participants in the student loan servicing market, would be required to register with and submit information to the CFPB when it becomes subject to certain orders from local, state, or federal agencies or courts involving violations of certain consumer protection laws.
- Additional annual attestation requirement would apply to registered “covered nonbanks” subject to CFPB supervision.
- Registration information would be publicly available on the Bureau’s website.

## — Orders registry overview

- Authority relied on by Bureau for proposal includes:
  - CFPB section 1022(b) which authorizes the Bureau to:
    - prescribe rules “as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”
    - prescribe rules to facilitate its supervision of nonbank covered persons subject to its supervisory authority and assessment and detection of risks to consumers
    - prescribe rules regarding nonbanks subject to its supervision to ensure they are legitimate entities and are able to perform their obligations to consumers (requirements can include background checks for principals, officers, directors, or key personnel and bonding or other appropriate financial requirements).

## — Orders registry overview

- require nonbanks subject to its supervision to generate, provide, or retain records for the purposes of facilitating the CFPB's nonbank supervision and assessing and detecting risks to consumers.
- CFPB section 1022(c) which authorizes the Bureau to collect information from covered persons for purposes of monitoring for risks to consumers in the offering or provision of consumer financial products or services, “prescribe rules regarding registration requirements applicable to a covered person, other than an insured depository institution, insured credit union, or related person,” and “publicly disclose registration information to facilitate the ability of consumers to identify covered persons that are registered with the Bureau.”

## Who is covered?

- A “covered nonbank” is any covered person under the Consumer Financial Protection Act (CFPA) that is not:
  - an insured depository institution (or related person);
  - an insured credit union (or related person);
  - a State as defined in the CFPA;
  - a natural person;
  - a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles except to the extent the dealer engages in certain functions not exempt from CFPB’s rulemaking; or
  - a person that is excluded from the Bureau’s rulemaking authority but engages in activities to which the exclusion does not apply.

## — Which orders are covered?

- A “covered order” means a final, public order, issued by an agency or court, whether or not issued upon consent, that:
  - Identifies a covered nonbank by name as a party subject to the order;
  - Was issued at least in part in any action brought by a federal, state, or local agency;
  - Contains public provisions that impose obligations on the covered nonbank to take or refrain from taking certain actions;
  - Imposes such obligations on the covered nonbank based on an alleged violation of a “covered law”; and
  - Has an effective date on or after January 1, 2017.

## — Which orders are covered?

- A “covered order” must involve an alleged violation of a “covered law” which would mean any of the following to the extent the alleged violation of law arises out of conduct in connection with the offering or provision of a consumer financial product or service:
  - a Federal consumer financial law or any other law as to which the CFPB has enforcement authority;
  - Section 5 of the FTC Act (the FTC Act’s UDAP prohibition);
  - any state law prohibiting unfair, deceptive, or abusive acts or practices (the list in Appendix A to the proposal includes state laws that prohibit student loan servicers from engaging in such practices) and a state law amending or succeeding a law identified in Appendix A that is materially similar to its predecessor; or
  - any rule or order issued by a state agency for the purpose of implementing a UDAAP prohibition contained in such a state law (picking up state regulations governing student loan servicers).



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## What are the registration and annual reporting requirements?

- A “covered nonbank” identified by name as a party subject to a “covered order” would be required to register with the CFPB and submit required identifying and administrative information and information about each covered order by the later of 90 days after the registration system implementation date or 90 days after the effective date of a “covered order.”
- The registration requirement would apply to a covered order with an effective date on or after the effective date of a final rule or that has a effective date not before January 1, 2017 and remains in effect as of the effective date of final rule.
- A covered order ceases to be a covered order for purpose of the rule as of the later of 10 years after its effective date or the expressly provided termination date.
- The information to be submitted includes a copy of the covered order, the government entity that issued it, the effective date of the order and any expiration date, and all covered laws found to have been violated or, for consent orders, alleged to have been violated.

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What are the registration and annual reporting requirements?

- An additional annual attestation requirement would apply to a “supervised registered entity,” meaning a covered nonbank that is subject to the CFPB’s supervisory authority, with certain exceptions, and that is subject to a “covered order” with an effective date on after the registration system implementation date.

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## What are the registration and annual reporting requirements?

- “Supervised registered entities” to whom the additional annual reporting requirement would apply consist of:
  - mortgage companies and mortgage servicers;
  - payday lenders;
  - private education lenders;
  - entities considered a “larger participant” under the CFPB’s larger participant rules for consumer reporting, consumer debt collection, student loan servicing, auto financing, and international money transfers; and
  - entities as to whom the CFPB has invoked risk-based supervision.

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## What are the registration and annual reporting requirements?

- Entities exempted from “supervised registered entity” include:
  - a service provider that is subject to CFPB supervision solely in its capacity as a service provider;
  - a motor vehicle dealer predominantly engaged in the sale and servicing of motor vehicles except to the extent the dealer engages in certain functions not exempt from CFPB’s rulemaking; and
  - an entity with less than \$1 million in annual receipts from offering or providing all consumer financial products or services.

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## What are the registration and annual reporting requirements?

- A supervised registered entity subject to the additional annual attestation requirement would have to:
  - Annually designate an “attesting executive” for each covered order to which it is subject and for all related submissions and other purposes related to the covered order.
  - Attesting executive must be the entity’s highest-ranking senior executive officer (or, if the entity has no duly appointed officers, the highest-ranking individual charged with managerial or oversight responsibility for the entity) whose duties include ensuring the entity’s compliance with Federal consumer financial laws and who has knowledge of the entity’s systems and procedures for complying with the covered order and control over the entity’s compliance efforts.



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## What are the registration and annual reporting requirements?

- By March 31 of each calendar year, submit to the registration system a written statement signed by an attesting executive with respect to each covered order in which the attesting executive must:
  - describe the steps that the executive has personally taken to review and oversee the entity's activities subject to the covered order for the preceding calendar year; and
  - attest whether, to the executive's knowledge, the entity during the preceding calendar year identified any violations or other instances of noncompliance with obligations that were imposed in a public provision of the covered order based on a violation of a covered law.

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## What are the registration and annual reporting requirements

- Maintain documents and other records sufficient to provide reasonable support for the attestation and otherwise demonstrate compliance with the annual reporting requirement with respect to any submission for 5 years after such submission is required.
  - Such documents and records must be made available to the Bureau upon request.
- An entity can submit a notice of non-registration stating that it is not registering (and, if applicable, not designating an attesting officer or submitting a written statement) because it has a good faith basis to believe that it is not a covered nonbank (or supervised registered entity) or that an order in question is not a covered order.
  - Such entity must promptly comply with the registration (and annual reporting) requirement when it becomes aware of facts or circumstances that would not allow it continue representing it has such a good faith belief.

## — State law requirements

- Private student lenders and services are often required to hold state licenses
- In order to obtain these state licenses, they are required to complete an MU1 Form, which includes “Disclosure Questions” and “Disclosure Explanations” sections that require the entity to answer and provide explanations for “Yes” answers to the following questions...

## State law requirements

### Regulatory Action Disclosure

**(C) In the past 10 years, has any State or federal regulatory agency or foreign financial regulatory authority or self-regulatory organization (SRO) ever:**

- (1) Found the entity or a control affiliate to have made a false statement or omission or been dishonest, unfair or unethical?
- (2) Found the entity or a control affiliate to have been involved in a violation of a financial services-related [regulation] or [statute]?
- (3) Found the entity or a control affiliate to have been a cause of a financial services-related business having its authorization to do business denied, suspended, revoked or restricted?
- (4) Entered an order against the entity or a control affiliate in connection with a financial services-related activity?**
- (5) Denied, suspended, or revoked the entity's or a control affiliate's registration or license or otherwise, by otherwise, by order, prevented it from associating with a financial services-related business or restricted its activities?

See [Company MU1 Form](#), dated as of 9/12/2015

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## State law requirements

These questions contain a number of defined terms that a non-bank should consider when deciding if it should provide a “yes” answer. Generally, the most determinative of these terms is:

### **FOUND –**

*Includes:* Adverse final actions; Consent decrees/orders in which the respondent has neither admitted nor denied the findings

*Does not include:* Agreements; Late fees; Deficiency letters; Examination reports; Memoranda of Understanding; Letters of caution; Admonishments; or Similar informal resolutions of matters.

“Settlement” often falls under the “included” category like consent decrees and final actions. However, in jurisdictions that use “settlement” to be synonymous with “agreement” such settlements would fall under the “not included” batch with other agreements. One possibility that may be relevant in determining where a “settlement” fits in your jurisdiction is to the determination of whether it is a public record or not. In this analysis, if it is a public record then it should be included and if it is not a public record, it should not be included.

See [NMLS Policy Guidebook](#), dated as of Sept. 30, 2022



## State law requirements

- An explanation must be provided for each disclosure question that has a “yes” response. A separate explanation should be provided for each event resulting in a “yes” response to a disclosure question. A single explanation can be associated to multiple “yes” responses and each explanation allows a single PDF to be uploaded in support of the explanation. Multiple explanations may be provided if multiple events are related to a single question.
- Submitting an explanation to a “yes” response alerts a non-bank’s other state regulators to the regulatory action triggering the “yes” response; however, it does not necessarily trigger a public disclosure to consumers that a regulatory action has been taken against the non-bank. It remains within the state regulator’s sole discretion as to whether it may include it in either (1) a state-specific registry or (2) the NMLS Consumer Access.
- Examples of (1) and (2) include...

# State law requirements

## Illinois Department of Financial and Professional Regulation's Monthly Consolidated Reports on Enforcement Actions



# IDFPR

Illinois Department of  
Financial and Professional Regulation

[www.idfpr.com](http://www.idfpr.com)

**JB PRITZKER**  
Governor

**MARIO TRETO, JR.**  
Acting Secretary

**SPRINGFIELD, IL** - The Illinois Department of Financial and Professional Regulation (IDFPR) announced that Acting Director of Banking, Chasse Rehwinkel, Director of Financial Institutions, Francisco Menchaca, Acting Director of Professional Regulation, Cecilia Abundis, and Acting Director of Real Estate, Laurie Murphy signed the following enforcement actions taken during the month of **January 2022**.

### **DIVISION OF BANKING**

#### **MORTGAGE LOAN ORIGINATOR**

**Nabih Kanaan, Bloomington, 031.0035869** – MLO entered a consent order with the Department in which his MLO License was revoked for failing to update his responses to two critical disclosure questions on his MLO license application in violation of the Act and Rules.

### **DIVISION OF FINANCIAL INSTITUTIONS**

#### **CREDIT UNION SECTION**

**Ethicon Suture Credit Union, Chicago** – Department issued a civil money penalty order for violations of the Illinois Credit Union Act.

#### **CONSUMER CREDIT SECTION**

**Approved Financial, Miami, FL** – Issued Order of Fine for failure to correctly surrender license.

# State law requirements

NMLS Consumer Access,  
A Public Record for Consumers to  
Look Up The Regulated Entities  
with which They Do Business



← Back to Search Results

↻ Start New Search

Regulatory Actions <sup>?</sup> While some state and federal agencies may add actions taken in previous years against a licensee, the majority are adding only new actions from 2012 or later. To view complete information regarding regulatory actions posted by the agency, click any regulator link.

Regulator <sup>?</sup>	Action Type <sup>?</sup>	Date of Action	Multi-state Action ID <sup>?</sup>	Docket Number	Associated Document(s)
<a href="#">Louisiana</a>	Order - Consent Agreement and Order	██████████	██████	██████	Settlement
<a href="#">Massachusetts</a>	Settlement Agreement	██████████	██	██████	Settlement Agreement
<a href="#">North Carolina</a>	Settlement Agreement	██████████	██████	██████████	Settlement
<a href="#">Pennsylvania</a>	Order - Consent Agreement and Order	██████	██████	██████	Consent Agreement and Order, Settlement

## Contracts registry proposal overview

- Published in the *Federal Register* on February 1, 2023.
- Comments must be filed by April 3, 2023.
- Proposal would establish a system for the registration of “supervised nonbanks” – a term that includes private education lenders and larger participants in the student loan servicing market but not entities only subject to CFPB regulations and/or enforcement orders – that use “certain terms or conditions that seek to waive consumer rights or other legal protections or limit the ability of consumers to enforce their rights.”
- Mandatory arbitration provisions are among the terms that would trigger registration.

## Contracts registry proposal overview – Congressional Review Act

- Proposed rule would require reporting of arbitration awards and court orders enforcing or not enforcing the arbitration provision. And the Bureau has requested comments on whether it should also require supervised registrants to submit information concerning other terms of the arbitration provision, including the identity of the arbitration administrator.
- Is proposal an attempt by the CFPB to accomplish indirectly what Congress prevented it from doing directly when it disapproved the Bureau's final arbitration rule under the Congressional Review Act, i.e., prohibit the enforcement of class action waivers in consumer arbitration agreements?



## — Contracts registry proposal overview

- Authority relied on by the Bureau is the same as the authority relied on for the orders proposal (CFPA sections 1022(b) and (c) and 1024(b)).

## Who is covered?

- Unless covered by one of the proposal's limited exclusions, a "supervised nonbank" would be required to register if it "use[s] a covered term or condition," which is defined as "entering into a covered form contract" or "obtaining a court or arbitrator decision ruling on the enforceability of a covered term or condition in a covered form contract."
- Excluded entities include:
  - a company with less than \$1 million in annual receipts;
  - a company that entered into covered form contracts less than 1,000 times during the previous calendar year and did not receive, as a party to a legal action, a court or arbitrator ruling on the enforceability of a covered term or condition during the preceding calendar year; and

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## Who is covered?

- “Supervised nonbanks” include the following entities that are subject to CFPB supervision:
  - Regardless of its size, a provider of private education loans;
  - A larger participant in the student loan servicing market; and
  - A nonbank as to which the CFPB has exercised its risk-based supervisory authority.

## — Who is covered?

- Covered form contract. A “covered form contract” is defined as “a written agreement between a covered person and a consumer that was drafted before the transaction for use in multiple transactions and contains a covered term or condition.”
  - Doesn't have to be a “take-it-or-leave-it” contract

## Who is covered?

- A company would not be covered if its use of covered form contracts in the previous calendar year was limited to entering into contracts for residential mortgages in a form made publicly available on the internet required for insurance or guarantee by a federal agency or purchase by Fannie Mae, Freddie Mac, or Ginnie Mae.
- Exclusion would not apply if the company obtained a court or arbitrator decision in the previous calendar year regarding the enforceability of a covered term or condition in a covered form contract.
- No exclusion for the use of covered form contracts in a form made publically available on the internet by the Department of Education

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## Who is covered?

- A “supervised nonbank enters into a covered form contract” when it:
  - Provides a new consumer financial product or service that is governed by a covered form contract;
  - Provides a new consumer financial product or service that is subject to a pre-existing covered form contract and the provider is a party to the contract;
  - Acquires or purchases a consumer financial product or service subject to a covered form contract even if the seller is not subject to CFPB supervision or a covered person, such as when a larger participant auto finance lender acquires a retail installment sales contract from an automobile dealer excluded from the Bureau’s supervisory authority;

## — Who is covered?

- Adds a covered term or condition to a covered form contract governing an existing consumer financial product or service provided to a consumer; or
- Adds a covered form contract to a consumer financial product or service.

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Which contract terms and provisions are covered?

- A “covered term or condition” is defined as any provision in “a covered form contract” that expressly purports to establish “a covered limitation on consumer legal protections” applicable to the offering of or provision of a consumer financial product or service.
- A “covered limitation on consumer legal protections” is defined as any covered term or condition (irrespective of legal validity or enforceability):
  - Precluding the consumer from bringing a legal action after a certain period of time;
  - Specifying a forum or venue where a consumer must bring a legal action in court;
  - Limiting the ability of the consumer to file a legal action seeking relief for other consumers or to seek to participate in a legal action filed by others;



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## Which contract terms and provisions are covered?

- Limiting liability to the consumer in a legal action including by capping the amount of recovery or type of remedy, which includes
  - Institutional loan contracts that cap the amount of recovery at a percentage of or at all of the tuition paid by the student;
- Waiving a cause of legal action by the consumer, including by stating a person is not responsible to the consumer for a harm or violation of law, which includes;
  - Student loan contracts that purport to limit or waive bankruptcy protections (apparently including contracts where the student certifies that the student has no intent to file or no intent to file within a specified period of time)
  - Institutional loan contracts that fail to include the Holder Rule and contracts that include a waiver of any claim of any kind against the institution;

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## Which contract terms and provisions are covered?

- Limiting the ability of the consumer to make any written, oral, or pictorial review, assessment, complaint, or other similar analysis or statement concerning the offering or provision of consumer financial products or services by the supervised registrant;
- Waiving, whether by extinguishing or causing the consumer to relinquish or agree not to assert, any other identified consumer legal protection, including any specified right, defense, or protection afforded to the consumer under Constitutional law, a statute or regulation, or common law, which includes
  - Any waiver of the right to revoke consent to receive autodialed calls under the TCPA

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## Which contract terms and provisions are covered?

- Requiring that a consumer bring any type of legal action in arbitration (note that the CFPB says that over 85% of private student loan contracts it sampled in 2014 included arbitration clauses as well as class action waivers).
- If an arbitration agreement contains specific express waivers (such as a jury trial waiver), the waiver would trigger separate reporting

— What are the registration requirements?

- By the annual registration date in each calendar year (as set by the CFPB), a supervised nonbank would be required to provide or update “identifying” and “administrative” information to the Bureau, together with information about its use of covered terms and conditions in the previous calendar year. Such information would include:
  - The consumer financial products and services for which the registrant uses covered terms and conditions;
  - Each state or jurisdiction in which the products or services are offered or provided;

## — What are the registration requirements?

- For each covered form contract entered into, various items of information that include each type of covered limitation on consumer legal protections and specified information for each type of limitation that varies with the nature of the limitation. For example, for any limitation on liability to the consumer, waiver of a cause of action by the consumer, or limitation on consumer reviews, the registrant must provide the text of the limitation or waiver; and
- Whether, as a party to a legal action, the registrant obtained one or more court or arbitrator decisions regarding enforceability of a covered term or condition in a covered form contract and, if so, certain information relating to such decisions, included the type of covered term or condition involved in the decision and whether the decision enforced or declined to enforce the covered term or condition at issue.

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## What are the registration requirements?

- A company can submit a notice of non-registration stating that it is not registering “because it has a good faith basis to believe that it is not a supervised registrant, or that it is not registering terms or conditions contained in a contract that it uses because it has a good faith basis to believe that the contract is not a covered form contract or that the terms or conditions are not covered terms or conditions.” (A “supervised registrant” is a “supervised nonbank” not excluded from the registration requirement.)
- Such company must promptly comply with the registration requirement when it becomes aware of facts or circumstances that would not allow it continue representing it has such a good faith belief.

## — State law requirements?

- Colorado, Louisiana, Maine, and Illinois adopted laws establishing registration systems for private student lenders that obtain their standard loan terms and conditions.
- Colorado, Louisiana, and Maine also require the registry to post these terms and conditions on a public website.



# Thank you for joining us!

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## Alan S. Kaplinsky

- Senior Counsel and former longtime Practice Leader of the Consumer Financial Services Group at Ballard Spahr (1995 – 2020)
- Devotes his practice to counseling financial institutions with respect to bank regulatory and transactional matters and defending them in individual and class action lawsuits (including CFPB investigations and government enforcement matters)
- First President of the American College of Consumer Financial Services Lawyers and the recipient of the College's 2016 Lifetime Achievement Award
- Former Chair of the American Bar Association Committee on Consumer Financial Services of the Business Law Section
- Founder of and former co-Chair of the Practising Law Institute's Annual Consumer Financial Services Institute, from 1995 - 2020
- Has been named as a tier one banking and consumer financial services lawyer in the 2006 through 2021 editions of *Chambers USA*
- Has been named in *The Best Lawyers in America* under financial services regulation law and banking and finance litigation from 2007 to 2022
- Recipient of the *National Law Review's* Go-To-Thought Leadership Award in Consumer Finance, 2018
- Recipient of the National Law Journal's 2015 Litigation Trailblazers Award for pioneering the use of class action waivers in consumer arbitration provisions
- Founder of Consumer Finance Monitor Blog in July 2011, the first blog at Ballard Spahr
- Founder of Consumer Finance Monitor Weekly Podcast in 2017 and regular host

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## Richard J. Andreano, Jr.

- Richard is the Practice Leader of Ballard Spahr's Mortgage Banking Group
- He is also a member of the firm's Business and Transactions, Consumer Financial Services, and Fair Lending Groups
- He has devoted over 30 years of practice to financial services, mortgage banking, and consumer finance law
- Rich advises banks, lenders, brokers, home builders, title companies, real estate professionals, and other settlement providers on regulatory compliance and transactional matters, Federal Housing Administration (FHA) issues, and administrative examinations, enforcement actions and investigations
- He is the principal contact for the firm in its role as federal consumer regulatory counsel to the Real Estate Services Providers Council, Inc. (RESPRO)
- *Chambers USA*, banking and finance: financial services regulation: consumer finance (compliance), national ranking, 2014-2021

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## John L. Culhane, Jr.

- Partner at Ballard Spahr and a member of the firm's Consumer Financial Services, Mortgage Banking, Bank Regulation and Supervision, Higher Education, and Privacy and Data Security Groups as well as its Marketplace Lending Task Force, Fair Lending Task Force, TCPA Task Force, and Military Lending Act Task Force
- Compliance practice emphasizes counseling clients on the development and implementation of innovative loan, leasing, and payment programs, and includes counseling on fair lending, servicing and collection issues
- Regulatory practice includes preparing clients for banking agency and CFPB targeted fair lending and full spectrum compliance examinations as well as assisting in the defense of consumer class actions, attorney general investigations, and agency enforcement actions
- Named a top consumer financial services lawyer by Chambers USA, 2015-2022
- Recipient of the *National Law Review's* Go-To-Thought Leadership Award in Consumer Finance, 2019
- Charter member of the American College of Consumer Financial Services Lawyers
- Former Chair of the Subcommittee on Fair Lending of the ABA Committee on Consumer Financial Services

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## Lisa M. Lanham

- Lisa Lanham co-leads the firm's Fintech and Payments Solutions Team.
- Her practice focuses on financial services matters related to the state licenses and federal approvals necessary to conduct business for a variety of asset classes and market participants.
- Her clients include residential and commercial mortgage brokers, lenders, servicers, and loan fulfilment providers; student, consumer, and solar loan lenders and servicers; entities offering retail installment contracts for the purchase of consumer goods; marketplace lenders; and investors who engage in secondary market activities related to these business lines.
- Lisa has robust experience and positive working relationships with key regulators, including the New York State Department of Financial Services, and leverages them to usher her clients through the process of obtaining and maintaining any required licenses and approvals, completing audits and examinations, explaining difficult disclosure issues, and reporting changes of ownership, executive management, and qualifying individuals.
- *The Best Lawyers in America* Ones to Watch, Corporate Governance and Compliance Law, 2021