

Enforcement Trends: The States Step Up

By Michelle L. Rogers, Andrea K. Mitchell, and Katherine L. Halliday



Who Should Read This?

Companies that offer consumer financial services and products and want to prepare for emerging issues in state enforcement

The new leadership at the Consumer Financial Protection Bureau has explicitly stated that it expects to pursue fewer enforcement actions than it has in the past. While the anticipated reduction in CFPB enforcement activity may cause some companies to feel a sense of relief, there may be less cause to celebrate than we might think. As the CFPB curtails enforcement activity, the states have already begun ramping up their efforts to close the gap with an open invitation to do so by the bureau. Indeed, Acting Director Mick Mulvaney publicly stated in February 2018 that he would depend heavily on state attorneys general to enforce consumer protection laws.¹

States and their attorneys general are generally well-positioned and motivated to take the reins in pursuing consumer protection matters involving financial service companies and third-party service providers, having worked closely with the CFPB and other federal enforcement agencies under the Obama administration and in multistate commissions following the financial crisis. After witnessing and participating in an unprecedented period of consumer protection enforcement on a path paved by the CFPB — a path of “aggressively pushing the envelope” that Acting Director Mick Mulvaney has explicitly rejectedⁱⁱ — state agencies now have a road map to follow. In addition, attorneys general in Democratic-leaning states face considerable political pressure to maintain active enforcement dockets, both to demonstrate their commitment to defend consumers against perceived corporate overreach and as a way to resist publicly the Trump administration’s efforts to pull back on burdensome regulations and aggressive enforcement strategies. Election-year politics only heighten these pressures, setting off a potential firestorm of state-specific enforcement agendas that could force companies to



Why Read This?

- *State attorneys general are expected to increase enforcement efforts as momentum shifts away from the CFPB*
- *State attorneys general overcome geographic limitations on their enforcement power by forming multistate task forces to pursue shared consumer protection priorities*

¹Buckley Sandler, *Buckley Sandler Special Alert: Mulvaney Says the CFPB Will Depend Heavily on State Attorneys General for Enforcement of Consumer Protection Laws* (Mar. 1, 2018), <https://buckleysandler.com/articles/2018-03-01/buckley-sandler-special-alert-mulvaney-says-cfpb-will-depend-heavily-state-attorneys-general-enforcement-consumer-protection-laws>.

ⁱⁱMick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, Wall St. J. (Jan. 23, 2018), <https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561>.

operate in perpetual defense mode through seriatim or concurrent state-level inquiries and investigations.

Such enforcement initiatives have not been reserved for attorneys general — or even states for that matter. Numerous consumer protection investigations have been launched over the past several months by state agencies other than attorneys general in addition to municipal agencies with consumer protection investigative powers.ⁱⁱⁱ

RECENT STATE ATTORNEY GENERAL EFFORTS

State laws prohibiting unfair and deceptive acts and practices are in many instances rooted in established case law interpreting Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices.^{iv} While those laws generally lack the abusiveness standard that the Dodd-Frank Act established under its prohibition of unfair, deceptive, or abusive acts and practices, they pack the same punch insofar as policies and practices that are permitted by a product-specific statute or regulation, e.g. state mortgage servicing regulations, may still be deemed a UDAP violation.

Adding fuel to the fire, states have a history of coordinating with each other and federal regulators on enforcement initiatives. Perhaps the most notable post-financial crisis example is the 2012 joint action targeting the nation's five largest mortgage servicers.^v In that sweeping settlement, the federal government and 49 states coordinated with each other to provide a series of protections to, and financial recompense for, borrowers whose loans were subject to certain origination, servicing, and foreclosure practices.

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State enforcement activity has only increased since the multistate mortgage servicing settlement. State attorneys general have worked with the CFPB, other federal agencies, and each other under their respective UDAP, UDAAP, and other consumer protection enforcement authority to take on issues either deemed to be a direct fallout of the financial crisis, or resulting from the perceived laxity in consumer protection regulation, supervision, and enforcement that led to it. Areas of ongoing scrutiny include predatory and discriminatory lending, deceptive advertising, errors in credit reporting, and abusive debt collection practices. Emboldened by the aggressive posture of the CFPB prior to the current administration, state attorneys general have set their sights on broader issues than traditional mortgage lending

ⁱⁱⁱ See, e.g., Press Release, Pennsylvania Treasury, Treasurer Torsella Opens Inquiry into Findings of Lending Disparities at Financial Institutions Handling PA Funds (Feb. 21, 2018), <http://www.patreasury.gov/newsroom/archive/2018/02-21-Lending-Disparities.html> (announcing investigation by Pennsylvania's State Treasury Office into alleged discriminatory mortgage lending practices); Phillip Jackson, *City Council Action on Home-Lending Bias is Urged*, Philadelphia Tribune (Feb 23, 2018), http://www.phillytrib.com/news/city-council-action-on-home-lending-bias-urged/article_7afe25c4-237e-5236-b35f-d9c2b1b118ef.html (Philadelphia City Council calls for hearings to investigate racial disparities in home lending); N.Y. Dep't Fin. Servs., Statement by DFS Superintendent Maria T. Vullio Regarding CFPB's Troublesome Policy Shift Away from Consumer Protection (Jan. 25, 2018), <https://www.dfs.ny.gov/about/statements/st1801251.htm> (statement from New York Department of Financial Services Superintendent reiterating that agency's commitment to lead efforts to fill federal regulatory voids).

^{iv} Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) ("[U]nfair or deceptive acts or practices in or affecting commerce[] are ... declared unlawful."); Dee Pridgen & Richard M. Alderman, Consumer Protection and the Law § 3:23 "FTC jurisprudence as interpretive source — Statutory provisions" (2017).

^v See Press Release, U.S. Dep't of Justice, \$25 Billion Mortgage Servicing Agreement Filed In Federal Court (Mar. 12, 2012), <https://d9kfgibkqcqcloudfront.net/Settlement-USDOJ-FILING-news-release.pdf> ("The Justice Department, the Department of Housing and Urban Development [HUD] and 49 state attorneys general announced today the filing of their landmark \$25 billion agreement with the nation's five largest mortgage servicers to address mortgage loan servicing and foreclosure abuses.")

and servicing concerns, taking aim at an array of products in any given household financial portfolio, from payday and auto finance, to credit card, debt collection, and student loan practices. States have also pursued unlawful practices outside the traditional ambit of financial services companies and expanded their efforts to include the wireless telephone industry and for-profit colleges.

However, unlike the CFPB, the jurisdiction of which is limited to certain enumerated federal laws and covered entities, states have assumed a wider reach. Health care, social media, manufacturing, and privacy protections, for example, are areas that can fall within the scope of state UDAP and anti-discrimination laws. Broadly-constructed state consumer protection laws enable state attorneys general to mobilize around a wider range of products, services, and industries than the CFPB or prudential banking regulators. And because state attorneys general are popularly elected in the overwhelming majority of states and U.S. territories, their enforcement agendas can be tailored to the interests of constituents, influential advocacy groups, and political parties. State elected officials can visibly demonstrate they are tough on consumer protection abuse by swiftly engaging in headline-grabbing enforcement matters that carry hefty price tags for restitution and penalties. The recent string of massive data breaches is among the most notable examples of rapid state attorney general response and intervention.^{vi}

THE FUTURE OF STATE ATTORNEY GENERAL ENFORCEMENT

As the CFPB's enforcement role diminishes, states are poised to expand their reach not only through their own laws, but also through federal laws. Some states, like Pennsylvania, Maryland, and New Jersey, have announced the creation of special offices dedicated to consumer protection.^{vii} Others, like New York, Massachusetts, and California, have unequivocally stated that they stand ready to fill any void left by a weakening of the CFPB. In fact, the attorneys general of 17 states signed a December 2017 letter to President Trump, drafted by New York Attorney General Eric Schneiderman, expressing their support for an independent CFPB and reiterating their commitment to enforce federal and state consumer protection laws. They wrote that they would “redouble [their] efforts at the state level” if “incoming CFPB leadership prevents the agency’s professional staff from aggressively pursuing consumer abuse and financial misconduct.”^{viii}

They have the power to follow through on that promise.

Though they are nominally the chief law enforcement officers

^{vi} See, e.g., Press Release, New York Attorney General Eric T. Schneiderman, A.G. Schneiderman Launches Formal Investigation into Equifax Breach, Issues Consumer Alert (Sept. 8, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-launches-formal-investigation-equifax-breach-issues-consumer-alert> (announcing investigation by New York Attorney General into data breach of major credit reporting agency); *Massachusetts AG Launches Investigation into Uber Data Breach*, Boston Globe (Nov. 22, 2017), <https://www.bostonglobe.com/business/2017/11/22/mass-launches-investigation-into-uber-data-breach/3pQEgG4FkiplYAxKL6uKN/story.html>; Press Release, New Jersey Attorney General Gurbir S. Grewal, Statement of Attorney General Gurbir S. Grewal on Facebook Data Breach (Mar. 20, 2018), <http://nj.gov/oag/newsreleases18/pr20180320d.html> (announcing investigation by New Jersey Attorney General regarding Facebook data breach)

^{vii} See Buckley Sandler, Buckley Sandler Special Alert: New Jersey’s Office of Attorney General Creates “State-Level CFPB” (Apr. 6, 2018), <https://buckleysandler.com/blog/2018-04-06/buckley-sandler-special-alert-new-jersey%E2%80%99s-office-attorney-general-creates-%E2%80%9Cstate-level-cfpb%E2%80%9D>; see also Press Release, Commonwealth of Pennsylvania Office of Attorney General Josh Shapiro, Attorney General Josh Shapiro Announces Consumer Financial Protection Unit (July 20, 2017), <https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-josh-shapiro-announces-consumer-financial-protection-unit/>; State of Maryland, Formation of Maryland Financial Consumer Protection Commission (June 2017), <http://msa.maryland.gov/msa/mdmanual/26excom/html/14financialcons.html> (discussing the creation of the commission for the purpose of “assess[ing] the impact of potential changes to federal financial industry laws, regulations, budgets, and policies.”).

^{viii} See Press Release, New York Attorney General Eric T. Schneiderman, 17 AGs to President Trump: Mulvaney’s Attacks on CFPB Should Disqualify Him From Leading Agency (Dec. 12, 2017), <https://ag.ny.gov/press-release/17-ags-president-trump-mulvaney-s-attacks-cfpb-should-disqualify-him-leading-agency>.

^{ix} See Dodd-Frank Act, 12 U.S.C. § 5552(a)(1).



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for their state, attorneys general can, in certain circumstances, enforce federal laws. The Dodd-Frank Act specifically grants states the authority to bring a civil action to enforce certain provisions of the act, including its UDAAP prohibition.^x Indeed, several states have already relied on this provision to bring suits against financial service providers. In addition, many federal consumer protection laws expressly grant states enforcement authority, affording them a bigger toolbox to challenge perceived misconduct.^x These measures expand the states' reach and give them leverage to levy the larger fines associated with federal statutes.

Cooperation remains a tried-and-true enforcement method. With increasing frequency, states align to conduct parallel investigations, or coordinate joint investigations led by one state or a number of states through a committee. Given enough interested states, cooperation is akin to a federal action, with the ability to combine resources and put greater pressure on an enforcement target. It is a formidable thing for an institution to be in the crosshairs of a single federal agency with ample resources, but being in the sights of a collection of separate but coordinated states can be equally, if not more, challenging.

The knowledge and experience that the CFPB has developed in recent years may literally relocate to state offices. CFPB enforcement staff have already begun to depart for other agencies or organizations that offer a more vigorous enforcement agenda — a trend that seems likely to continue if they find themselves with little to do under the bureau's new leadership. A natural home for outgoing CFPB staff is in consumer protection divisions at state attorneys general offices, where they can continue to investigate the same issues they did at the bureau.

HOW TO PREPARE NOW

There are things your company can do now to prepare for increased scrutiny from state enforcement authorities.

- First, do not let your first interaction with the office of your state attorney general be a response to a subpoena. Rather, seek out opportunities to introduce the company to the attorney general or front office staff and educate them about your business. Opening the line of communication can be beneficial to both parties and provide opportunities to address concerns before a formal inquiry commences.
- Second, do not back off compliance efforts. Even if the CFPB were to cease enforcement efforts tomorrow, for the reasons discussed above, the states stand ready to step into its shoes on enforcement, not to mention the fact that licensing authorities, banking regulators, and the CFPB still examine covered institutions for the integrity of their compliance management systems. Moreover, the lifecycle of an enforcement matter is long, and nobody can predict what a state or federal agency might find worth investigating in the years to come — actions with heightened

^x See, e.g., Truth in Lending Act, 15 U.S.C. § 1640(e), Fair Credit Reporting Act, 15 U.S.C. § 1681s(c), Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d)(4) (granting enforcement authority to state AG).



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compliance risk today can cause enforcement trouble in the future. Stay the course on compliance regimes put in place post-financial crisis, as those who revert to looser standards will be easier targets when the next enforcement wave inevitably cycles back.

- Finally, monitor activities of interest in your industry and your state. If business practices spark consumer complaints and pique media interest, assume your state's attorney general's interest is piqued, too. Proactive efforts to identify and address potential issues before an investigation begins are meaningful from a risk mitigation standpoint, but are also a best practice from a customer service perspective.