RESIDENTIAL

State Attorneys General Ramping Up

Are You Ready?

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No one in the financial services industry was surprised that the Trump Administration pulled back on enforcement and rule-making following Director Richard Corday's resignation from the Consumer Financial Protection Bureau ("CFPB"). CFPB-regulated lenders have kept their fingers on the pulse of what this agency has been doing in order to adapt their actions and budgets accordingly. For the past year industry associations, law firms, and consultants have opined on this shift in focus and predicted that state regulators would ramp up their supervision and enforcement in areas where the CFPB is pulling back. What has been predicted is exactly what is happening. Is your organization ready for the state attorneys general enforcement agenda?

The position of State Attorney General (AG) is the only top-level state executive office besides the governor to be found in all 50 states and the District of Columbia. It is important to understand the power that AGs hold, both individually and collectively. Individually, the AG is the chief legal advisor to the state government and the state's chief law enforcement officer. In some states, the AG serves as the head of the state department of justice, with responsibilities similar to those of the United States Department of Justice. This gives the AG significant power to pursue enforcement of regulations, including those pertaining to consumer harm.

In addition to power within their respective states, AGs have collective power. The state AGs belong to either the Democratic Attorneys General Association ("DAGA") or the Republican Attorneys General Association ("RAGA"), which have a mission to elect and support AGs of their party. In recent years, AGs of both parties have become more politically active and join AGs in their own party to respond to the current administration's policy positions.

The current composition of the state AGs by political party are 27 Republicans, 22 Democrats and 1 Independent, with an additional Democrat in the District of Columbia. Of the 43 states where AGs are directly elected, 30 will hold elections for the position in 2018 including California. This has the potential to shift the regulatory conversation. In most states, the parties hold primary elections to determine the candidates that will run in the general election. California, however, selects its candidates via a top-two primary election.

Xavier Becerra is California's AG and is a member of the Democratic Party. He was appointed to the position by Governor Jerry Brown when the former AG, Kamala Harris, won election to the U.S. Senate. Becerra was sworn in as the 33rd AG for the state in 2017. He is running against fellow Democrat, Dave Jones, and Republicans Eric Early and Steven

...State Attorneys continued on page 46

State Attorneys continued from page 24...

C. Bailey, in the June 5, 2018 primary election, with results determined by the voters in the general election.

AGs of both parties belong to the National Association of Attorneys General ("NAAG"), which is sometimes pejoratively referred to as the *National Association of Aspiring Governors* since many AGs follow their tenure with a run for governor or other political office. For example, former California AGs include:

- Jerry Brown, Governor of California, 1975-1983 & 2011-2018 (present)
- George Deukmejian, Governor of California, 1983-1991
- Dan Lungren, U.S. Congressman, 3rd District of California, 2005-2013

NAAG acts through both standing committees and special committees where the various state AGs work together on specific issues. For example, NAAG has a "standing" Consumer Protection Committee with two co-chairs and 10 members. The Financial Services Consumer Protection Enforcement, Education, and Training Fund Committee is a "special" committee that was established in 2012 to disseminate funds received from the National Mortgage Settlement to state AGs. This committee consists of five AGs who evaluate grant requests for expenses and training relating to the investigation and prosecution of cases involving fraud, unfair and deceptive acts and practices, and other illegal conduct related to financial services or state consumer protection laws. These committees continue to be focused on the mortgage industry, along and across party lines, and foster collaboration and coordination.

Former AGs, many who are affiliated with law firms, are now more in demand as counsel and speakers at industry conferences than their former CFPB colleagues. They confirm the collaboration that is ongoing with coordination of state regulatory examinations and a willingness to form special committees to investigate matters either through NAAG or DAGA/RAGA. The AGs have historically worked together on issues targeting the mortgage industry to negotiate settlements and have an impact on how the industry operates, from subprime lending to the mortgage settlement regarding foreclosures to the PHH case and servicing practices.

While the AGs are assuming a bigger profile, their general guidance is to commence discussion of state examination issues with your regulatory contacts and only escalate to the AG as necessary and through the appropriate channels. This is where a previously established relationship with your company and local counsel with the right connections is invaluable. Compliance counsel and legal counsel should partner on how best to respond to state regulatory issues.

The AGs will continue to be active, through their organizations and individually. Their authority to enforce federal laws including the broad umbrella of unfair, deceptive or abusive acts or practices ("UDAAP") is clear; section 1042 of the Consumer Financial Protection Act ("CFPA") authorizes state AGs to bring civil actions to enforce the provisions of the CFPA. While political motives will vary, the state regulators, led by their AGs, are taking actions to fill the void that the CFPB has chosen to no longer fill.

Notably, last year Pennsylvania's AG created a Consumer Financial Protection Unit to protect consumers from fraudsters. This year New Jersey's AG, together with the governor, announced the formation of their "state-level CFPB" charged with protecting consumers from fraudsters in light of the CFPB abandoning its efforts to do so. Groups of AGs have sent letters to the Trump Administration opposing Mick Mulvaney's appointment as Director of the CFPB. Recently, 17 Democratic AGs sent a public letter to Director Mulvaney encouraging the Bureau's continued use of civil investigative demands and opposing his intention to curtail this exercise of investigative authority. All of these actions demonstrate that AGs, supported by their state mortgage banking regulators, are staying focused on enforcement activity in addition to broadening their scope of examination and, if needed, state level enforcement. Some state examinations now mirror those of the CFPB to include both fair lending and HMDA data requests. The approach appears to be more risk-based in its inquiry.

Lenders and servicers need to

...State Attorneys continued on page 47

State Attorneys continued from page 46...

be prepared and adjust their focus to monitor these state level activities and changes. It is time to take a fresh look at your cost-benefit analyses regarding what level of compliance and risk mitigation your organization will maintain. The threat of CFPB enforcement may be off the radar for many, but the fact remains that in these political times, there are 51 AGs with consumers on their agendas, as well as re-election and political aspirations, and lots of opportunity to collaborate and demonstrate their value to voters. To survive that future examination and look-back of loan files, which may be very costly, requires a continued diet of compliance and monitoring. California MBA members are encouraged to stay engaged with the Association, to build relationships with regulators of both political parties, and to monitor the activities of the AGs in the states in which they do business.

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