

Client Alert

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State Attorneys General Continue to Fill the Enforcement Gap for Consumer Protections

Financial institutions and lenders must remain vigilant with compliance measures moving into 2019 to avoid violation of enhanced federal and state consumer protection laws and increased scrutiny by state attorneys general, both individually and through multistate enforcement actions.

After the scale-back in enforcement actions by the Consumer Financial Protection Bureau (CFPB) under interim director Mulvaney's deregulation initiatives, enforcement actions by state attorneys general have increased and appear poised to continue to ramp up in consumer protection actions, including the lending and mortgage servicing sectors. Following Mulvaney's leadership, the Senate confirmed Kathy Kraninger as the new CFPB director on December 6, 2018. Within the first month of her appointment, Kraninger stated that the CFPB must "vigorously enforce the law," operate "without presumption of guilt" and "carefully weigh the costs and benefits" of its enforcement actions in order to provide for the best interest of consumers and the marketplace.

Several commentators speculate that, as director, Kraninger will take a middle-of-the-road approach between the policies of her predecessors Richard Cordray and interim director Mick Mulvaney, but her full priorities for the bureau's agenda and initiatives remain to be seen. We know, however, that a significant regulatory change in 2018 was the enactment of the Economic Growth, Regulatory Relief, and Consumer Protection Act, which became effective in September 2018.¹ While the act raised the threshold of assets that subjects institutions to stress tests and subjects community banks to certain reporting requirements, it notably expanded consumer protections, including new identity theft protections, consumer credit report "security freezes" and limitations on credit reporting relating to certain student loans and veteran medical debts. We anticipate that these newly enacted laws will become a source of focus and investigation in 2019 by the CFPB.

During the changes at the CFPB and uncertainty regarding the level of action that will be taken under Kraninger's lead, state attorneys general have made clear that they will exercise their authority under state laws and the Dodd-Frank Act to enforce consumer protection statutes and will work together in multistate actions against entities in violation of consumer protection regulations. State attorneys general have authority to enforce the Dodd-Frank Act, the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA) and state unfair, deceptive or abusive acts and practices regulations (UDAAP).²

Even institutions in so-called "red states" must be wary of these risks. As more and more consumer products and services involve multi-state activity, institutions may find themselves subject to investigation by active state attorneys general, such as New York, Massachusetts, and California, even though the entity is incorporated or has a principal place of business elsewhere. Further, virtually every state has been involved in various consumer protection enforcement actions. For example, even though Massachusetts was the first state to formally file suit in the Equifax data breach, Texas Attorney General

¹ Pub.L. 115-174, S. 2155, 115th Cong. (2018).

² 12 U.S.C. § 5552.

Ken Paxton and numerous other so-called “red state” attorneys general were quick to initiate formal investigations.

Unfair, Deceptive or Abusive Acts and Practices

Enforcement actions for violation of state UDAAP statutes are of particular concern for financial institutions, lenders, and servicers because many states’ statutes are extremely flexible in permitting enforcement actions for any act deemed unconscionable or unfair. A \$575 million multi-state settlement with Wells Fargo Bank, N.A. in December 2018 demonstrates the expansive reach of UDAAP actions and multi-state examinations.³ Similarly in early 2018, 49 states and the District of Columbia reached a \$45 million settlement with PHH Mortgage Corp. (PHH) for UDAAP violations related to alleged improper mortgage servicing practices, including charging unauthorized fees, failing to respond to borrowers’ requests for information or assistance, failing to maintain complete loan servicing files or adequate documentation of its standing to foreclose and threatening foreclosure to borrowers in loss mitigation programs.⁴ In addition to the monetary settlement, the consent order required PHH to implement internal audits and compliance programs for its servicing practices.

These UDAAP-related multistate actions demonstrate the expansive authority given to state attorneys general to investigate and take action against alleged violations in consumer protection areas. Further, these settlements illustrate the trend that state attorneys general, often from all 50 states, will work together on examinations and enforcement actions.

Redlining

Even with the scale-back at the CFPB, federal and state regulators have continued to focus on redlining, as seen through the 2018 DOJ settlement with KleinBank.⁵ Pennsylvania Attorney General Shapiro also announced a plan to focus on redlining and solicited input from consumers with potential “redlining tactics or irregularities,” for example, difficulty obtaining in-person appointments with loan officers, return phone calls, pre-approval quotes or loan applications.⁶ We anticipate that this regulatory focus on redlining will lead to increased enforcement actions by state attorneys general, as trends in these consumer complaints are monitored in 2019. In the past, the New York attorney general has been particularly active in bringing enforcement actions for discriminatory lending practices. For instance, in 2015 Attorney General Schneiderman entered a \$825,000 settlement agreement with Evans Bank, N.A., to resolve allegations of mortgage redlining in Buffalo.⁷

As Pennsylvania and New York continue to solicit consumer complaints to investigate allegations of redlining or other loan discrimination, other states are likely to implement similar initiatives or join existing examinations and actions. Financial institutions, lenders and servicers should proactively evaluate their risks and compliance by monitoring for potential “redlining tactics or irregularities,” as noted by Pennsylvania Attorney General Josh Shapiro. Entities should also review and immediately remedy consumer complaints involving difficulty in obtaining applications, pre-approval quotes or contact from loan officers via phone or in-person meetings, to mitigate the need for further action on these topics.

³ *Protecting Utah Consumers: Wells Fargo Settlement*, UTAH OFFICE OF THE ATTORNEY GENERAL (January 1, 2019), available at https://commerce.utah.gov/releases/2018-12-28_wells-fargo-multistate-settlement.pdf.

⁴ See, e.g., *State of Ala. et al., v. PHH Mortgage Corp.*, No. 1:18-cv-00009-TFH (D. D.C. Jan. 3, 2018).

⁵ Settlement Agreement, *United States v. KleinBank*, No. 17-cv-136 (D. Minn. May 7, 2018).

⁶ *Attorney General Shapiro Puts Spotlight on Redlining*, PENNSYLVANIA OFFICE OF ATTORNEY GENERAL (Oct. 22, 2018), available at <https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-shapiro-puts-spotlight-on-redlining/>.

⁷ *A.G. Schneiderman Secures Agreement With Evans Bank Ending Discriminatory Mortgage Redlining In Buffalo*, NEW YORK STATE ATTORNEY GENERAL (Sept. 10, 2015), available at <https://ag.ny.gov/press-release/ag-schneiderman-secures-agreement-evans-bank-ending-discriminatory-mortgage-redlining>.

Force-Placed Insurance Policies

Force-placed insurance issues were another focus area for state enforcement actions. With the significant storm seasons over the past few years, financial institutions, lenders and servicers should be particularly cautious of multistate examinations and actions in this area. In September 2018, QBE Insurance Corp. (QBE) was required to pay \$2.4 million in settlement funds to Massachusetts consumers who were charged for duplicative force-placed insurance policies despite having their own coverage or were charged higher rates based on misclassification of their homes as commercial properties for the insurance policies.⁸ As part of the settlement, QBE was required to take action to ensure further violations or duplicative policies did not occur and pay restitution to nearly 2,100 homeowners. Prior to this action, the New York attorney general reached a settlement with QBE for similar violations during the same time period as the Massachusetts investigation, resulting in a \$10 million penalty.⁹ Thus, as the uptick in consumer protection actions by attorneys general continues, entities should be aware of the risk of exposure to multistate examinations and actions for similar alleged violations.

Proactively Mitigating and Responding to Enforcement Actions

Given this regulatory environment, it is important that financial institutions, lenders and servicers proactively work to mitigate consumer protection risks. As part of this process, entities should consider:

- *Reviewing and updating their compliance management systems with respect to consumer protection regulations.*

Entities should remain vigilant in maintaining comprehensive compliance management systems to address federal and state consumer protection laws. This includes not only having strong policies and procedures in place to address the highly flexible federal and state UDAAP laws, but also actively monitoring to ensure that products or services are not viewed as potentially confusing or misleading to consumers in their design or implementation. This monitoring should run the full spectrum from UDAAP reviews in the product development and marketing campaign stage, through servicing and collections. Institutions should particularly focus on reviewing for potentially complex or opaque terms, products or services that could be viewed as having relatively low value to the consumer compared to the overall price, or products or services that target individuals who could be perceived as “vulnerable” (for example, the elderly, students, military and people in financial distress).

- *Reviewing and responding to consumer complaints early on.*

A key component to a strong compliance management system is policies and procedures for tracking, monitoring and resolving customer complaints. The best line of defense for entities in avoiding enforcement actions is to be proactive in listening to and addressing consumer complaints. As noted above, state attorneys general are actively listening to consumer complaints to discover violations of consumer protection statutes and bring enforcement actions or investigations. For example, Pennsylvania Attorney General Shapiro created a hotline for consumer complaints and solicited complaints from consumers regarding potential scams or violations. These state-level consumer complaint systems are in addition to the extensive consumer complaint database maintained by the CFPB. By addressing consumer complaints early and analyzing consumer complaints for potential patterns that could suggest consumer confusion with respect to products or services, entities can work to mitigate scrutiny from regulators based on the same consumer issues and proactively adapt products or services before an enforcement action.

⁸ *Commonwealth of Massachusetts v. QBE Insurance Corp., et al.*, Case number 1684-CV-02793 (Mass. Dist. Ct., Suffolk Cty. Ct., Sept. 7, 2016).

⁹ Consent Order, In the Matter of QBE Insurance Corp., File No. 2018-0024-S (Mar. 15, 2018), *available at* <https://www.dfs.ny.gov/about/ea/ea180315.pdf> (last visited Jan. 17, 2019).

- *Taking any examination or action by state regulators seriously.*

If a state examination or action is initiated, entities should take the potential scope of such actions seriously. As exemplified above, state attorneys general have continuously collaborated in multistate examinations. What initially may start as an informal inquiry, can easily escalate and expand to an examination in 50 jurisdictions. It is thus critical that institutions consult with counsel experienced in consumer protection and defending against state and federal investigations early on in the process to aid in preventing such escalation.

Authors

Abigail M. Lyle
alyle@HuntonAK.com

Nikki Skolnekovich
nskolnekovich@HuntonAK.com

Abigail Lyle and Nikki Skolnekovich are members of the Consumer Financial Compliance and Litigation practice group at Hunton Andrews Kurth LLP. This article presents the views of Ms. Lyle and Ms. Skolnekovich and does not necessarily reflect those of Hunton Andrews Kurth or its clients. The information presented is for general information and education purposes. No legal advice is intended to be conveyed; readers should consult with legal counsel with respect to any legal advice they require related to the subject matter of the article. Ms. Lyle writes and speaks frequently on topics of interest to financial institutions, and regularly defends institutions in enforcement actions. She may be reached at (214) 979-8219 or alyle@huntonak.com.

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