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## WHITE PAPER

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### What the Financial Services Industry Can Expect From State Attorneys General in a Biden Administration

State attorneys general have become significant players in the financial world, using a number of special investigative and enforcement tools to investigate and prosecute alleged wrongdoing by financial market participants. Coordinated and multistate action by state attorneys general, which have increased in recent years, is likely to continue, particularly in the consumer protection space. And, financial market participants should expect ongoing federal and state coordination under the new Biden administration, particularly as the states and federal consumer protection agencies like the CFPB and FTC take a revitalized view towards business oversight and enforcement.

## EXECUTIVE SUMMARY

**Background:** In the years since the financial crisis, state attorneys general have become significant players in the financial world. As the business community and financial markets prepare for a new administration, state attorneys general also prepare to take on companies that they perceive had benefited from the prior administration's reforms.

**Issues:** State attorneys general have numerous investigative and enforcement tools at their disposal and have frequently used them to investigate and prosecute financial market participants. The attorneys general for California, New York, and Massachusetts, for example, have historically been out in front of other attorneys general in their investigations and prosecution of financial institutions and other players in the financial world. Those, and other, state attorneys general have also recently teamed up for multistate investigations and lawsuits, putting even greater pressure on financial market participants.

**Looking Ahead:** In light of recent increased multistate action and anticipated coordination between federal and state agencies with state attorneys general, a substantially increased focus on financial markets and their members from numerous state attorneys general, working in tandem with other agencies, is likely to develop under the new federal administration. The financial industry should be aware of the broad investigative and enforcement powers enjoyed by state attorneys general, and ensure that appropriate compliance efforts remain in place.

## BACKGROUND

In the years since the financial crisis, state attorneys general have become significant players in the financial world. Their involvement spans as far as the markets reach—from consumer-facing issues to issues involving new markets like cryptocurrencies and 'fintech,' state attorneys general have broadened and deepened their reach. In addition to their heightened focus on financial markets, state attorneys general have special investigative and enforcement tools at their disposal, such as "Blue Sky" laws (including New York's Martin Act, which has been successfully used by several New York Attorneys General) as well as a panoply of state consumer protection and other federal statutes that expressly grant state attorneys general parallel enforcement authority, including the

Truth in Lending Act, the Fair Credit Reporting Act, and the Consumer Financial Protection Act. And, with respect to consumer-facing conduct in particular, state Unfair and Deceptive Acts and Practices ("UDAP") statutes have been interpreted to grant attorneys general sweeping authority to address allegedly improper business practices. As a result, state attorneys general have experienced recent success in treading into areas of financial enforcement and litigation that were traditionally handled by other state and federal regulators.

## CASE STUDIES: CALIFORNIA, MASSACHUSETTS, AND NEW YORK

Several states have taken the lead on regulation, enforcement and litigation in the financial space. California, Massachusetts, and New York, in particular, have often been out front of other attorneys general in their efforts to regulate participants in the financial space, through traditional investigations and lawsuits related to consumer lending, pension fund investments, and insurance.

California, for example, led the \$575 million settlement against a national bank in 2018 regarding its sales practices after the bank acknowledged opening millions of credit card and other accounts without customer authorization for a nearly fifteen year period. The nationwide settlement was joined by all 50 states and Washington, D.C., and resolved multistate investigations into the bank's alleged misconduct. The following year, California also entered a settlement with Morgan Stanley for its alleged deception of pension fund investors regarding the risk of mortgage-backed securities from 2003-2007.<sup>1</sup>

Since being one of the first states to pursue mortgage originators and other mortgage securitization parties in the wake of the financial crisis, the Massachusetts attorney general has continued its aggressive pursuit of alleged securitization misconduct. In the last several years, Massachusetts Attorney General Maura Healey has reached multiple settlements related to subprime auto lending and financing, including its 2019 settlement, joined by Delaware, with Exeter Finance following an investigation into its subprime auto loans.<sup>2</sup> These probes were part of Attorney General Healey's industry-wide investigation of securitization practices in the subprime auto market, which relied on both the traditional UDAP statute as well as laws governing unfair debt collection practices.<sup>3</sup>

In New York, Attorney General Letitia James has expressed her willingness to target participants in the financial markets, explaining that “maintaining the integrity of our financial markets is of paramount importance to [her] office.”<sup>4</sup> Attorney General James has successfully utilized her office to investigate traditional financial participants as well as non-traditional areas of the financial sector. Last year, for instance, the Industrial Bank of Korea (IBK) resolved an investigation led by Attorney General James and the U.S. Attorney for the Southern District of New York into IBK’s anti-money laundering programs. In reaching the settlement, Attorney General James stated that she “will never hesitate to use the vast powers of this office to hold accountable those who try to skirt our laws to enrich themselves or the banks that act as a conduit for this illegal conduct.”<sup>5</sup> Also last year, the First Department upheld the broad reach of the New York Attorney General’s investigative powers of the Martin Act, reading an expansive definition of the word “commodities” to include virtual currencies following New York’s investigation into iFinex. We have written extensively about the Martin Act and the other equally broad statutes the New York Attorney General has frequently used, including the First Department’s July 9, 2020, decision in *James v. iFinex*.<sup>6</sup>

## **INCREASED COORDINATED AND MULTISTATE ACTION IS LIKELY TO CONTINUE**

During the last several years there has been an increased number of multistate and other coordinated actions by numerous state attorneys general aimed at the financial services industry. While there remains some lingering controversy over what state attorneys general can do with respect to banking, state attorneys general have engaged in several efforts since Dodd Frank to investigate and prosecute issues involving nationally chartered banks that traditionally fall within the purview of federal agencies. Within the last year, for instance, several states joined together in objecting to proposed rules by the Office of the Comptroller of the Currency (“OCC”), and later joined in multistate lawsuits challenging those same rules.<sup>7</sup> The OCC has also recently issued an interpretive letter regarding federal preemption, which has again drawn the ire of several state attorneys general. In a statement about the preemption letter, New York Attorney General Letitia James noted that the letter “makes every attempt to evade the limits Congress placed on [the OCC’s] authority to preempt state law, and it would

give the agency wide latitude to open up consumers and our economy to predators. We will continue to fight any attempt to water down New York’s consumer protections.”<sup>8</sup>

Many of these multistate actions, and particularly those in the consumer protection space, cross partisan lines. State attorneys general are more likely to team up in bipartisan fashion on issues of common concern, enabling their offices to conserve resources in order to pursue more partisan activity, like lawsuits against the incoming administration. The risks to companies are heightened when states act together in such coordinated manners, and state attorneys general’s use of multistate investigations has proven to be a significant threat to companies in virtually all industries, including in the financial markets and financial services industries. In the last several years alone, multistate investigations have culminated in numerous multimillion dollar settlements against various financial market participants. A multistate investigation of LPL Financial LLC’s sale of unregistered, non-exempt securities, for instance, resulted in a 2019 settlement requiring that company to repurchase unregistered securities as well as make a \$26 million payment to be paid out to affected investors.<sup>9</sup> And in May 2020, Santander Consumer USA Inc. agreed to a \$550 million settlement with 35 state attorneys general related to its subprime auto loans.<sup>10</sup>

State attorneys general also teamed up in response to scams and other illegal acts arising out of the COVID-19 pandemic, engaging in several coordinated investigations of alleged price gouging and hoarding of resources and supplies. For example, on March 25, 2020, 33 state attorneys general sent a letter to Amazon, Facebook, and eBay, among others, to request that they implement procedures to protect against price gouging on their respective platforms.<sup>11</sup> Financial institutions should expect coordinated, bipartisan attorney general scrutiny into lending and debt collection practices during the COVID-19 pandemic, particularly with respect to loans made during the pandemic and actions with respect to loans that defaulted during the pandemic.

Even with this increased coordination, companies should not underestimate the risk from states who break from these coordinated ranks. For example, the Indiana and Massachusetts attorneys general broke from the multistate resolution with Equifax related to its data breach and received more than four times the amount of restitution for consumers in their states.<sup>12</sup>

California similarly went out on its own in a settlement with Anthem related to a 2014 data breach and was not only able to extract a higher penalty from Anthem, but also negotiated additional injunctive terms.<sup>13</sup>

## ANTICIPATED FEDERAL AND STATE COORDINATION UNDER THE NEW BIDEN ADMINISTRATION

Despite the perception that the Consumer Financial Protection Bureau (“CFPB”) and other federal agencies had significantly rolled back enforcement efforts under the Trump administration, in the last several years, state attorneys general have joined with the CFPB and other state and federal agencies in a number of coordinated investigations and settlements. For instance, in 2020, 48 attorneys general joined the CFPB in a \$330 million settlement with the loan servicing division of ITT Tech following allegations that student loans were made to individuals despite knowing those students could not repay the loans.<sup>14</sup> And, following a six year investigation, mortgage servicer Nationstar Mortgage LLC agreed to a \$110 million settlement with the CFPB, the Department of Justice, and 50 state attorneys general related to alleged servicing misconduct.<sup>15</sup> These coordinated actions among state and federal agencies are likely to increase under the new federal administration as the states and federal consumer protection agencies like the CFPB and FTC take a revitalized view towards business oversight and enforcement.

The Federal Trade Commission and state attorneys general also regularly pursue investigations both independently and concurrently with varying levels of cooperation. In the financial sector, the FTC and state attorneys general have pursued issues involving, among others, marketing and advertising, mortgage and fair lending, use of financial technology, student loans, credit scores and reports, payment processing, and consumer disclosures. Many of the state attorneys general have even expressed their support for the FTC’s ability to seek restitution. For instance, in December 2020, California Attorney General Xavier Becerra, along with a bipartisan, multistate coalition of 30 state attorneys general, filed an amicus brief with the United States Supreme Court in *AMG Capital Management v. FTC* asking the Supreme Court to allow the FTC’s authority to “return illegally acquired money to victims of scams.” In that brief, the attorneys general “argue that the FTC’s ability to recover victims’ money from

the defendant is essential to deterring illegal conduct and to supplement the states’ efforts in protecting consumers.”<sup>16</sup> In his press release discussing the amicus brief, Attorney General Becerra stated, “Today’s amicus brief highlights how the FTC and the state attorneys general frequently collaborate in litigation and other enforcement efforts to secure restitution for consumers across the country.”

Indeed, CFPB Acting Director Dave Uejio has made clear that the CFPB will be closely scrutinizing financial services companies with respect to fair lending and treatment of minorities and vulnerable populations.<sup>17</sup> This stated focus on “identify[ing] and root[ing] out unlawful conduct that disproportionately impacts communities of color and other vulnerable populations” has also been echoed by other incoming members of the Biden administration, and is expected to be a top priority at all agencies under the new administration. It can be expected that these agencies, and state attorneys general coordinating with them, will take an expansive view of unfair or unlawful conduct. And, it remains to be seen the extent to which companies will be held responsible for disparities in outcomes alleged to have been caused by a failure to take affirmative steps to ensure minority outcomes are equal to their representation in the overall population. In all events, financial institutions should expect to see increased coordinated focus amongst the states and federal consumer protection agencies regarding consumer protections and fair lending practices.

At the same time, Republican attorneys general are likely to challenge the new administration’s policies in court. This is particularly likely to be the case if the new administration attempts to reverse regulatory policies seen to be protective of financial market participants that were instituted or bolstered in the prior administration. Players in the financial markets should therefore be prepared for increased activity and litigation that affects them both directly and indirectly.

## CONCLUSION

State attorneys general have become significant players in the regulation, investigation, and enforcement of financial market participants in the last several years. From consumer-facing issues to matters involving non-traditional financial

markets like cryptocurrency and fintech, state attorneys general have broadened and deepened their reach. Multistate action, including multistate investigations and settlements, have become the norm and pose considerable risk to financial markets participants. Coordinated actions among state

attorneys general and state and federal agencies is expected to increase under the new federal administration. State attorneys general will coordinate with the CFPB and FTC, among others, in part due to the perceived lack of enforcement by those agencies under the prior administration.

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## ENDNOTES

- 1 Press Release, *Attorney General Becerra Announces \$150 Million Settlement Against Morgan Stanley for Misleading California's Teachers and Workers with Pensions*, Apr. 25, 2019.
- 2 Press Release, *AG Healey Secures \$5.5 Million for Consumers, State in Subprime Auto-loan Settlement*, Apr. 8, 2019.
- 3 Attorney General Healey's investigation of the auto loan industry is expected to continue; in August 2020, in connection with the announcement of a lawsuit against auto lender Credit Acceptance Corporation, Attorney General Healey noted that her office was "taking a close look at this industry and [ ] will not allow companies to profit by violating our laws and exploiting consumers." Press Release, *AG Healey Sues Major Subprime Auto Lender for Unfair and Deceptive Practices in Its Subprime Auto Loan Business in Massachusetts*, Aug. 31, 2020.
- 4 Press Release, *AG James Imposes \$12.5 Million Penalty On Brokerage Firms For Martin Act Violations*, Oct. 2, 2019.
- 5 Press Release, *Attorney General James Announces Agreement with Industrial Bank of Korea Related to Illegal Transfer of Over \$1 Billion to Iran*, Apr. 20, 2020.
- 6 Jones Day Commentary, "First Department Upholds NY AG's Authority to Investigate Virtual Currency Under the Martin Act" (Aug. 2020); Jones Day Alert, "New York's Martin Act Restored to Full Strength" (Aug. 2019); Jones Day Commentary, "The Investigative Authority of the New York Attorney General Is Not Without Its Limits" (Feb. 2016); Harold K. Gordon, "Enforcement Proceedings Under New York's Martin Act," *Practical Law* (Oct. 2014).
- 7 *People of the State of California v. OCC*, 4:20-cv-05200 (N.D. Cal. July 29, 2020) (challenging OCC "Madden fix" rule); *People of the State of New York v. OCC*, 1:21-cv-00057 (S.D.N.Y. Jan. 5, 2021) (challenging OCC "true lender" rule).
- 8 *American Banker*, "OCC's preemption letter opens new front in battle with states," Dec. 23, 2020.
- 9 Press Release, *Attorney General James Announces Multistate Settlement With LPL Financial After Firm Violated Laws*, June 28, 2019.
- 10 Press Release, *Attorney General Shapiro Announces \$550 Million Settlement with Santander*, May 19, 2020.
- 11 Multistate letter to Amazon, Facebook, and eBay.
- 12 *SecurityWeek.com*, "Massachusetts, Indiana Settle With Equifax Over 2017 Data Breach," April 20, 2020.
- 13 Press Release, *Attorney General Becerra Announces \$8.69 Million Settlement Against Anthem, Inc., Over Failure to Protect Patients' Personal Data*, Sept. 30, 2020.
- 14 *NY Times*, "ITT Tech Students Will Get \$330 Million in Loan Relief," Sept. 15, 2020.
- 15 *Bloomberg*, "Nationstar to Pay \$110 million to Settle Borrower Claims," Dec. 7, 2020.
- 16 Press Release, *Attorney General Becerra Calls on Supreme Court to Allow Federal Trade Commission to Continue Protecting Consumers*, Dec. 7, 2020.
- 17 Consumer Financial Protection Bureau, *The Bureau is taking much-needed action to protect consumers, particularly the most economically vulnerable*, Jan. 28, 2021.

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