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Newly Elected State Attorneys General Will Impact Enforcement

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The political coverage from last week's midterm elections focused on key swing state races at the top of the ticket. But there were also important changes to the roster of state attorneys general who have increasingly expanded their litigation and enforcement roles in recent years. This cycle marked historic spending on these state attorney general campaigns—with over \$100 million spent in 2018.¹ This is two to three times more than has ever been spent on attorney general campaigns in previous election cycles.² This political spending and electoral attention coincides with steady increases in action from state capitals nationwide as state attorneys general take on an ever-growing role in consumer protection, financial enforcement, and healthcare reviews. State attorneys general are often joining to form multistate committees that investigate and punish wrongdoing. In light of these trends and partisan gridlock in Washington, state attorneys general have become critical political players.

In all, 30 states and the District of Columbia held races for attorney general last Tuesday. Democrats picked up attorney general seats in four key battleground states—Colorado, Michigan, Nevada, and Wisconsin. When inaugurated, Democrats will now hold a majority of the nation's attorneys general offices next year at 27-24.

Several key new Democratic attorneys general also succeeded others from the same party. Of note, Letitia James was elected to serve as New York's Attorney General after winning a hotly contested Democratic primary. She will be the first black woman elected to statewide office and the first black person to serve as New York State Attorney General. James has already vowed to continue to use the Martin Act to investigate and prosecute financial fraud on Wall Street.³

With more Democratic attorneys general in office, there will certainly be an increase in enforcement activity in those states. For example, Dana Nessel

vowed to aggressively sue companies that contributed to Perfluoroalkyl substances chemical contamination in Michigan's drinking water.⁴ Newly elected Josh Kaul said he would seek new firearms regulations, including universal background checks in Wisconsin.⁵ Aaron Ford promised to protect the environment through regulations in Nevada.⁶

Partisanship aside, we expect continuing and increased enforcement from states, in part based on the perceived lack of enforcement by federal agencies such as the Food and Drug Administration (FDA), Consumer Financial Protection Bureau (CFPB), and Federal Trade Commission (FTC). Such efforts will touch on all sectors, including prosecutions of pharmaceutical, consumer products, and healthcare companies as well as oil & gas companies, banks and other financial institutions, and telecommunications.

State laws have also expanded attorney general authority, particularly in California and New York, which have some of the most far-reaching consumer protection laws in the nation. This puts state attorneys general in the position of agencies like the FTC and FDA. Dodd-Frank preserved the power of state attorneys general to bring civil actions to enforce unfair, deceptive or abusive acts or practices. State attorneys general can also bring actions against organizations to enforce any CFPB regulation under the authority of Title X, such as the Consumer Financial Protection Act.⁷ Given that CFPB Director Mick Mulvaney stated that his bureau will no longer "push the envelope" on enforcement matters, this leaves the field ripe for the action of state attorneys general to aggressively bring cases on behalf of consumers.⁸

California's Unfair Competition Law provides for injunctive and other relief for any business practice that is "unfair," "unlawful," or "fraudulent."⁹ This power gives the California attorney general wide-ranging regulatory and enforcement authority over several major sectors of the economy.

In New York, the Martin Act broadly regulates the advertisement, issuance, exchange, purchase or sale of securities, commodities, and certain other investments within or from New York. It authorizes the attorney general to conduct investigations of potential securities or commodities fraud and to bring civil or criminal actions against alleged violators of the act. Notably, courts interpreting the Martin Act have held that the attorney general does not need proof of scienter—an intent to deceive or defraud—to begin an investigation or, for that matter, even to initiate an enforcement action. New York's executive law expands on that investigative authority.¹⁰

State False Claims Acts are also creating new incentives for budget-strapped states to bring more litigation. California was the first state to adopt a False Claims Act (CFCA), modeled after the federal False Claims Act. Like the federal FCA, the CFCA prohibits any person or entity from knowingly presenting or causing to be presented "a false or fraudulent claim for payment or approval" or knowingly making, using, or causing "to be made or used, a false record or statement material to a false or fraudulent claim."¹¹ To violate the CFCA, the conduct at issue must usually be done "knowingly" but a specific intent to defraud—a higher standard—is not required.¹² Actions undertaken with deliberate ignorance of the truth or in reckless disregard of the truth of a claim are sufficient to satisfy the required state of mind.

In some instances, state legislatures have adopted novel definitions of a claim that go beyond the federal counterpart. For example, the New York False Claims Act allows a plaintiff to bring an FCA cause of action based on “claims, records, or statements made under the tax law.”¹³ The installation of these new state attorneys general and the increased prominence of their roles will create new legal challenges for companies.

Recent major multistate settlements include a \$220 million settlement with Deutsche Bank for conduct involving the alleged manipulation of the London Interbank Offered Rate (LIBOR).¹⁴ The states alleged that Deutsche Bank colluded with other banks to skew borrowing rates in its favor, illegally profiting on contracts with municipalities linked to LIBOR. Through the settlement, California governmental and non-profit entities that invested with Deutsche Bank received approximately \$29 million. Similarly, a coalition of 42 attorneys general announced a \$100 million multistate settlement against Citibank for fraudulent conduct involving the manipulation of the LIBOR.¹⁵ The California Attorney General’s investigation into the conduct of several other banks involved in setting LIBOR is ongoing.¹⁶

The reach of state attorneys general has never been longer. And with strong injunctive terms, state attorneys general are increasingly becoming actual regulators who prescribe private sector conduct. This is a time of tremendous opportunity for state attorneys generals—and a new challenge for many businesses. Companies need to be aware of what is likely to become their most feared regulator and plan accordingly.

¹ <https://democraticcags.org/35-days-35-seats-most-important-race-in-november/>

² <https://thehill.com/homenews/campaign/404014-attorneys-general-races-in-spotlight-as-parties-build-bench-fight-feds>

³ <https://www.nytimes.com/2018/11/04/opinion/letitia-james-new-york-attorney-general.html>

⁴ <https://www.detroitnews.com/story/news/politics/elections/2018/11/06/michigan-attorney-general-winner-dana-nessel-tom-leonard-results/1825585002/>

⁵ <https://www.jsonline.com/story/news/politics/elections/2018/11/07/wisconsin-elections-kaul-declares-victory-and-promises-doj-changes/1918481002/>

⁶ <https://thisisreno.com/2018/10/ford-a-fresh-perspective-for-nevada-attorney-general-opinion/>

⁷ The Dodd–Frank Wall Street Reform and Consumer Protection Act

⁸ <https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561>

⁹ California Business and Professions Code § 17200

¹⁰ New York General Business Law Article 23-A

¹¹ California False Claims Actions, § 12650(a)(1)

¹² California False Claims Actions, § 12650(b)(3)

¹³ New York State Finance Law, Art. 13, § 189 (4)(a)

¹⁴ <https://ag.ny.gov/press-release/ag-schneiderman-announces-220-million-multi-state-settlement-deutsche-bank>

¹⁵ <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-100-million-multistate-settlement-against>

¹⁶ <https://www.reuters.com/article/us-deutschebank-settlement/deutsche-bank->

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