

## State AGs Responding To Trump Policies: 3 Areas To Watch

By **Michael Rossetti, Raphael Prober and George Wolfe**

*Law360, New York (June 26, 2017, 1:30 PM EDT)* -- President Donald Trump has prioritized realigning the federal government's enforcement priorities by revising immigration policy, chipping away at financial sector regulation, restructuring government health care spending and initiating a governmentwide hiring freeze. These changes, among others, have galvanized state attorneys general into action. State AGs are responding to the federal government's unfolding enforcement priorities by bringing more enforcement actions to protect their citizens. We expect this trend to continue and highlight three likely areas that the AGs will continue to scrutinize closely.

### Consumer Protection

Consumer protection has traditionally been a top priority for state AGs because bringing consumer protection actions goes to the heart of the attorney general's role of enforcing the state's laws to protect its citizens. As the level of federal consumer protection enforcement unfolds, state AGs are likely to eagerly fill any void. Recent illustrative examples include:

- Florida Attorney General Pam Bondi suing a financial lending institution for allegedly filing illegal foreclosures, mishandling loan modifications, misapplying mortgage payments and escrow funds, and collecting excessive fees;<sup>[1]</sup>
- New York Attorney General Eric T. Schneiderman led a coalition of seven states in challenging the U.S. Environmental Protection Agency's alleged violation of federal law in connection with the Chlorpyrifos pesticide.<sup>[2]</sup>
- California Attorney General Xavier Becerra suing two charities for allegedly personally spending funds raised to help veterans;<sup>[3]</sup>



Michael Rossetti



Raphael Prober



George Wolfe

AGs are likely to continue vigilantly protecting their citizens, especially if the Trump administration places a decreased emphasis on consumer protection.

### **Financial Industry Oversight**

The Trump administration has begun removing regulation that was enacted in response to the recent financial crisis in order to increase consumer choice and reduce regulatory burdens on private businesses. On Feb. 3, 2017, President Trump signed an executive order that overturned the fiduciary duty rule that requires financial advisers managing retirement accounts to work in the best interest of their clients. The U.S. Department of the Treasury is also currently undertaking a thorough review of the Dodd-Frank Act that was enacted to place limitation on financial institutions after the recent financial crisis.

State AGs are likely to ramp up their financial industry oversight in response to any partial or full repeal of Dodd-Frank, change or proposed elimination of the Consumer Financial Protection Bureau, or other deregulation of the financial industry. Recent examples include New York Attorney General Schneiderman issuing consumer alert warnings of financial gift card scams,[4] and settling an alleged securities fraud suit that was brought under the Martin Act, New York General Business Law Article 23-A.[5] The Martin Act enables the state attorney general to bring both civil and criminal actions against securities fraud, market manipulation and other financial services crimes. This continued enforcement trend is likely not only to continue, but to pick up steam.

### **Antitrust Enforcement**

The U.S. Department of Justice and the Federal Trade Commission have traditionally taken the lead role in promoting competition under the antitrust laws. In past administrations when the federal agencies have not prioritized particular matters, state AGs have expanded their antitrust enforcement efforts. Two prominent recent examples include:

- Twenty AGs jointly filed a lawsuit on Dec. 15, 2016, against a number of generic drug manufacturers, alleging that the companies entered into a conspiracy to restrain trade, raise prices and reduce competition for a drug used to treat respiratory tract infections and an oral diabetes medication.[6] Twenty additional states joined the amended complaint on March 1, 2017.[7]
- New York sued Actavis PLC for allegedly impeding the sale of generic formulations of the Alzheimer's drug Namenda by "hard switching" patients to a new formulation before the generic drugs could lawfully enter the market. The U.S. Court of Appeals for the Second Circuit ultimately issued a nationwide injunction preventing Actavis from preventing generic drug competition, which "preserv[ed] patient choice for hundreds of Alzheimer's patients, and protect[ed] the public from bearing hundreds of millions' of dollars in unnecessary drug costs." [8] This case is particularly noteworthy because New York brought the case despite the federal agencies exercising restraint.

We expect similar state enforcement of the antitrust laws to continue, with AGs looking to protect their constituencies and fill any enforcement void that exists on the federal level.

### **How This May Impact Your Business**

State attorneys general issue subpoenas, conduct investigations, interview and depose witnesses, and engage in remedy discussions in a markedly different manner than their federal counterparts.[9] The decentralized nature of state enforcement may also give rise to unaligned interests, conflicting requests, attorney-client privilege issues, and a labyrinth of state-specific nuances that require careful consideration before acting.[10] States can also form coalitions through the National Association of Attorneys General that expand a small investigation into large multistate enforcement actions.[11]

Understanding the rules of each jurisdiction is just the beginning: Each forum has its own characteristics and enforcement tendencies that help guide investigations. Following these unwritten “rules of the road” is essential to minimizing company risk and securing favorable investigatory outcomes. Companies are well-advised to secure legal counsel experienced in dealing with state AGs to ensure that state investigation and enforcement actions are handled efficiently and appropriately so that an isolated issue does not spiral out of control.

---

*Michael G. Rossetti is a partner at Akin Gump Strauss Hauer & Feld LLP and a former chief deputy in the New York Attorney General's Office. Raphael A. Prober is a partner and co-head of the firm's congressional investigations practice. George Wolfe is an associate at the firm and vice chair of the American Bar Association Section of Antitrust Law's State Enforcement Committee. They are based in the firm's Washington, D.C., office.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Press Release, Attorney General Bondi and OFR Commissioner Breakspear File Action Against Ocwen, Florida Office of the Attorney General (Apr. 20, 2017).

[2] Press Release, A.G. Schneiderman Challenges Trump EPA Over Toxic Pesticide, New York Office of the Attorney General (June 6, 2017).

[3] Press Release, Attorney General Xavier Becerra Sues Charities For Falsely Claiming to Help Veteran, California Office of the Attorney General (Apr. 17, 2017).

[4] Press Release, A.G. Schneiderman Issues Consumer Alert Warning Of Financial Scams Involving Gift Cards, New York Office of the Attorney General (Apr. 20, 2017).

[5] Press Release, A.G. Schneiderman Announces Settlement Of Martin Act Case Against Former AIG CEO Maurice R. Greenberg And Former AIG CFO Howard I. Smith, New York Office of the Attorney General (Feb. 10, 2017).

[6] Connecticut v. Aurobindo Pharma., 16-cv-02056-VLB, Compl. (D.Conn. Dec. 15, 2016).

[7] Connecticut v. Aurobindo Pharma., 16-cv-02056-VLB, Am. Compl. (D.Conn. Mar. 1, 2017).

[8] Press Release, A.G. Schneiderman Announces Resolution Of Lawsuit That Protected Alzheimer's Patients From Anticompetitive Tactic Aimed At Maintaining Higher Drug Prices, New York Office of the Attorney General (Nov. 25, 2015).

[9] See George Wolfe, Multiple Choice Merger Remedies: Examining Why Federal and State Antitrust Enforcers Sometimes Disagree, ABA Section of Antitrust Law, State Enforcement Committee Newsletter, Vol. VIII, No. 2 (Spring 2016).

[10] See, e.g., Steven R. Ross and Raphael A. Prober, Attorney-Client Privilege in Congressional investigations, Law Journal Newsletters, Vol. 16, No. 5 (Jan 2009).

[11] Akin Gump's Michael Rossetti previously served as a Chief Deputy for the New York Attorney General and was appointed as the general's principal liaison to the National Association of Attorneys General.