States Prepare to Step in If CFPB Enforcement Slows in 2018

Published: Dec 13 2017 17:39:19

* States ready to boost enforcement if U.S. watchdog lags
* Focus on payday loans, mortgage servicing, debt collection, student loans

By Chris Bruce

(Bloomberg Law) -- State bank regulators and attorneys general are ready to step into the breach in 2018 should the Consumer Financial Protection Bureau retrench under new Trump administration management.

Potential target areas include payday lending, debt collection, mortgage servicing, auto finance, student debt, and tribal lending. States expected to lead the charge include New York, Massachusetts, Washington, and Maryland, all of which have already challenged the Trump administration on issues like health care and immigration. Other contenders include Oregon and Pennsylvania, where Pennsylvania Attorney General Josh Shapiro (D) formed a new consumer financial protection unit in 2017 run by a former CFPB enforcement officer.

"One wouldn't have to look much further than the most proactive attorneys general who are already challenging the Trump administration and its agencies," said former Maryland Attorney General Douglas F. Gansler, a partner with Buckley Sandler in Washington. "They're the most likely to be the ones filling the gap."

There are some wildcards, such as whether states turn to federal consumer protection statutes that give them enforcement rights, including the 2010 Dodd-Frank Act, and whether new CFPB leadership finds certain state laws preempted by federal law.

The CFPB didn't respond to a request for comment. Acting Director Mick Mulvaney said Dec. 5 that he's reviewing all pending litigation. The agency has already signaled a new direction in at least two active cases.

More Activity Predicted

States that have partnered with the CFPB are almost certain to miss its first director, Richard Cordray, who left in November to run for governor in Ohio as a Democrat. Oregon Attorney General Ellen F. Rosenblum (D) described Cordray as "a fantastic partner" in an interview with Bloomberg Law.

Attorneys, regulators and others were nearly unanimous in predicting more state enforcement activity against financial institutions next year, especially if the CFPB pulls back. "They will clearly step up if the CFPB should be weakened," said Joann Needleman, a member of Clark Hill in Philadelphia who leads the firm's consumer financial services regulatory and compliance group. Pennsylvania's attorney general office - which hired former CFPB lawyer Nicholas Smyth in July to head a new consumer financial protection unit - may serve as a model for other states. "I expect additional AGs to restructure their offices in the same fashion," Needleman said in an email to Bloomberg Law.

Rosenblum said her office will intensify an ongoing focus on student loans and student debt in 2018 by increased attention to servicing. "I want to continue to make sure that's a strong area for us," she said.

Some Likely Targets

Ashley L. Taylor Jr., a partner with Troutman Sanders LLP in Richmond, Va., predicted more oversight of tribal lending arrangements by state authorities who see the potential for so-called rent-a-tribe schemes. He said states will have questions about how much control tribes have over lenders organized under tribal law, how many tribal members are employed at those lenders, and other questions. "The tribe has a right to create an entity regulated by tribal law, but if they don't do that properly, then tribal law will be seen as a fig leaf or a sham and state law will kick in," Taylor told Bloomberg Law.

Pinchus D. Raice, a partner with Pryor Cashman in New York, said he expects the New York Department of Financial Services to put a major focus on compliance with new anti-money laundering regulations. He said the main impact will be felt by the approximately 125 branches and agencies of foreign banks in New York. "This will be a continuing catalyst for enforcement actions," Raice told Bloomberg Law. "It will affect domestic banks, but their primary target will be branches of foreign banks."

Payday lending also is expected to get attention from state authorities. Jennifer Monty Rieker, counsel with Ulmer & Berne in Cleveland, said Ohio legislators are considering legislation that would close an existing loophole in a 2008 state law and require payday lenders to register with the state. Payday lenders in the state currently aren't registered. The question is important in Ohio because consumers can end up paying nearly 600 percent interest on payday loans.

"I think this is going to come to a head in 2018, especially given the uncertainty surrounding the CFPB and their payday lending rule," Monty Rieker told Bloomberg Law. "If this is put into place, it may mean more enforcement actions against payday firms here."

The Federal Toolbox

One question is the extent to which states will turn to federal consumer protection statutes to advance their goals. States already held rights of enforcement under the Truth in Lending Act, the Fair Credit Reporting Act, and the Real Estate Settlement Procedures Act, and were given more power to enforce federal consumer financial protection provisions under Dodd-Frank.

Annie Thompson, spokeswoman for Illinois Attorney General Lisa Madigan (D), said Madigan's office has been "very aggressive" in protecting consumers. "We will continue to do that - using our state law consumer protection authority as well as the authority to sue under Dodd-Frank," Thompson said.

Taylor said he expects federal law to play a role as states scrutinize online lenders. "There's a big focus on the online lending space in licensing and especially from a consumer disclosure perspective," Taylor said. "That's important because Dodd-Frank gave states the ability to enforce consumer protection provisions," he said.

Overall, though, state attorneys general usually have state laws that either mirror federal law or meet their enforcement requirements on other grounds, Gansler and others said. They also generally don't take advantage of their access to so-called UDAAP authority provided by Dodd-Frank, which allows them to pursue allegedly abusive practices in addition to unfair or deceptive acts or practices.

"They haven't really used it that much," Gansler said, referring to UDAAP authority. "They have their own UDAP statutes, and often their consumer protection acts cover what they need."

Claims Can Overlap

However, a case in Pennsylvania illustrates how companies may face overlapping claims by federal and state authorities, especially with regard to UDAP or UDAAP claims under federal and state law.

Last January, the CFPB sued Navient Solutions LLC, the nation's largest student loan servicer, alleging unfair, deceptive and abusive practices involving student loan borrowers.

In October, Pennsylvania Attorney General Shapiro sued Navient in the same court, alleging violations of state law but also alleging unfair, deceptive, and abusive acts and practices against the company under the Dodd-Frank Act. Both cases are ongoing. Shapiro's office did not respond to requests for comment.

Federal law could also be used to short-circuit state claims instead of giving them a platform. F. Paul Bland

Jr., executive director of consumer advocacy group Public Justice, said his biggest question is whether the new head of the CFPB, whether it's the acting director or the next permanent director, will be looking to preempt state law.

"In the long run, the question is whether the agency is going to be tilting heavily toward the industry around federal preemption issues," Bland said.

To contact the reporter on this story: Chris Bruce in Washington at cbruce@bloomberglaw.com

To contact the editor responsible for this story: Michael Ferullo at mferullo@bloomberglaw.com

To view the complete story, {BBLS DD PK000001602D89D586A1EF7FBDC8410002<GO>}
Run {BNA<go>} to subscribe to Bloomberg Law Reports.

The above story appeared in:
Daily Report for Executives

Notes

No Notepad Content Found