

Playing Your Best Hand When Dealt a State Attorney General Investigation

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Disclaimer

This information is not intended to be legal advice and may not be used as such. Legal advice must be tailored to the specific circumstances of each case.

Every effort has been made to ensure this information is up to date. It is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel.

Any opinions expressed are the opinions of the speaker and not their organization or RMA.

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Topics We Will Cover

- Role of State Attorneys General
- Debt Collection Related Laws and Regulations Enforced by State Attorneys General
- Focus on Debt Collection and Buyers
- The Role of Consumer Complaints and Other Factors That Influence Investigation Priorities
- What to Expect During Investigations and Litigation



Role of State Attorneys General

Role of State Attorneys General

- Chief Legal Officer of State
- Counselors to Legislatures and State Agencies
- Typical powers include:
 - Authority to issue formal opinions to state agencies
 - Act as public advocates
 - Consumer protection, and other areas
 - Propose legislation
 - Enforce state and federal law
 - Represent state agencies before the state and federal courts
 - Institute civil suits on behalf of the state
 - Operate victim compensation programs

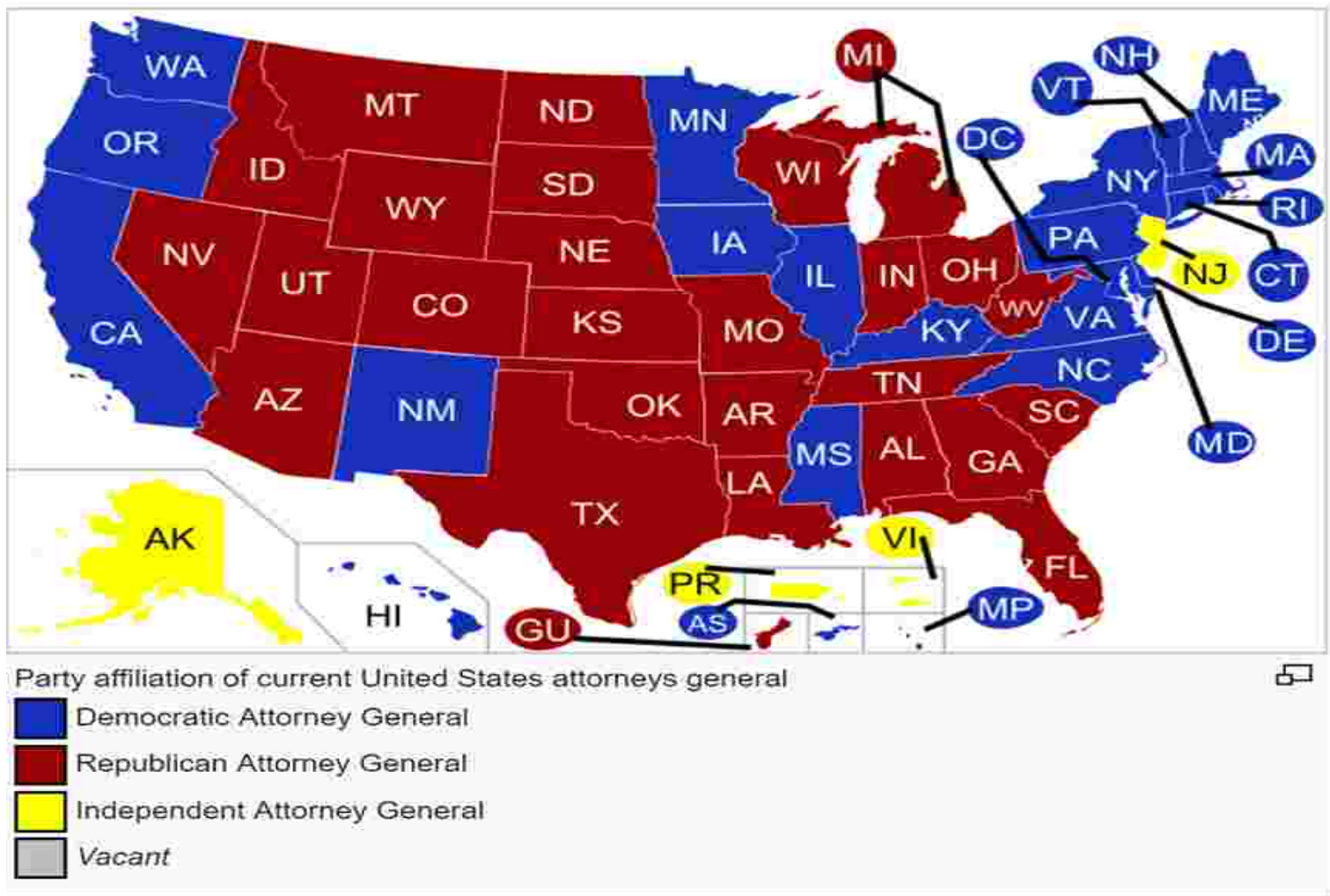


Who Are the State Attorneys General?

- Popular election in most states (43 states, DC, and Northern Mariana Islands)
- Governor-appointed in 5 states (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming) and 4 jurisdictions (American Samoa, Guam, Puerto Rico, and Virgin Islands)
- Maine – secret ballot of the legislature
- Tennessee – state supreme court

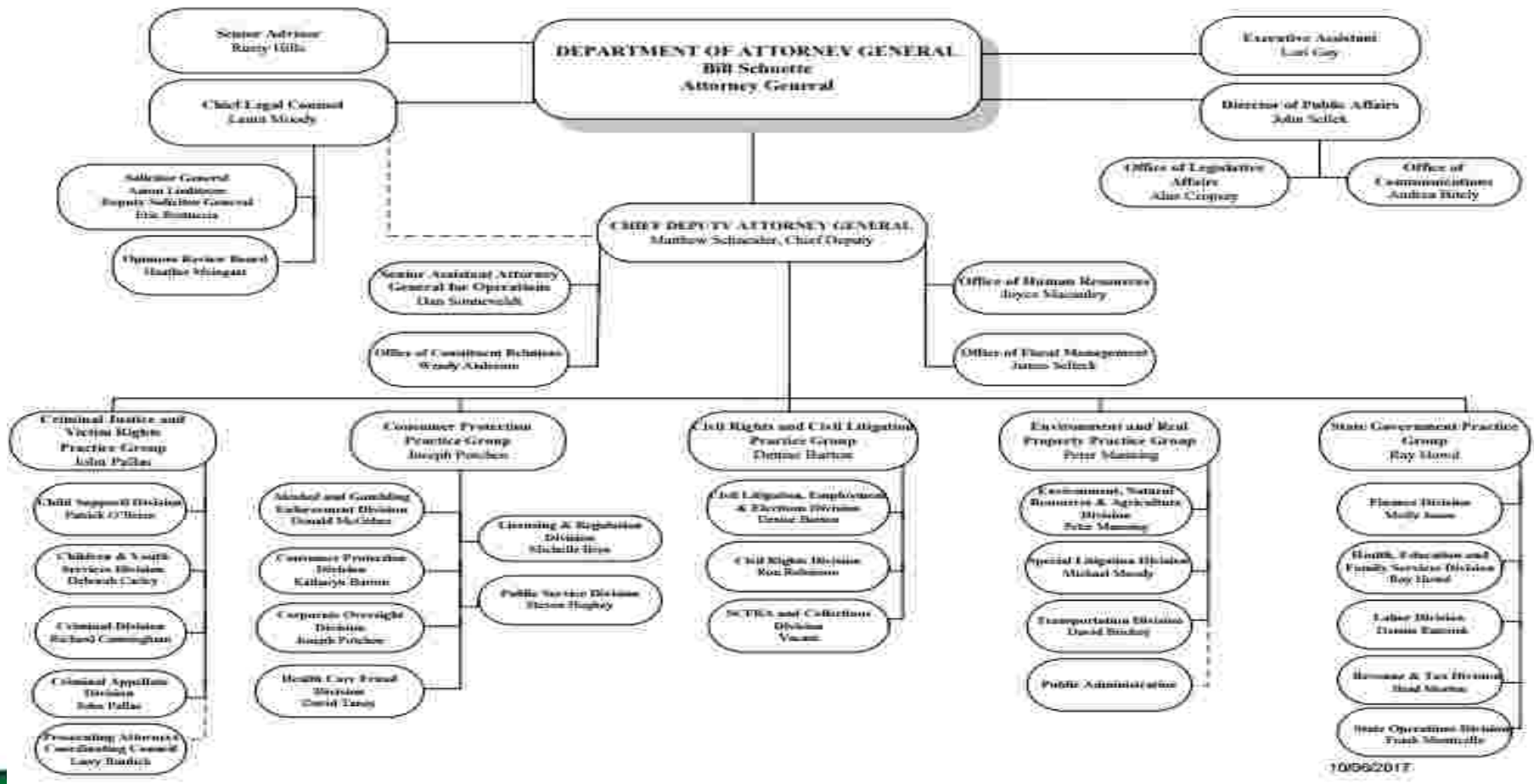


State Attorneys General



Example Attorney General Office Structure

Michigan Department of Attorney General



10/06/2017

National Association of Attorneys General

- NAAG's mission is "To facilitate interaction among attorneys general as peers and to facilitate the enhanced performance of attorneys general and their staffs."
- Publishes written reports and newsletters on a range of subjects.
- Liaison to federal government in consumer protection and other areas.



Proactive Outreach and Engagement

- Companies that are highly regulated and have frequent and/or high-impact consumer interactions should consider a strategy for proactively engaging the AG offices in states where they are headquartered and located and, depending on individual facts and circumstances, where they do business.
- There are many ways to implement such a strategy, including:
 - Attendance and participation in NAAG, DAGA, RAGA, and CWAG
 - One-on-one outreach efforts, such as visiting with AGs and staff
- Keep in mind that interactions with government officials are regulated by state ethics laws and regulations, so be sure to clear such engagements with counsel.



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Consumer Protection Committee

Assurance Statement
The Consumer Protection Committee is pleased to announce the formation of a new subcommittee, the National Association of Attorneys General's Consumer Protection Committee. This subcommittee will focus on consumer protection issues and will work closely with the National Consumer Protection Center (NCPC) to address these issues. The subcommittee will be composed of representatives from all 50 states and the District of Columbia. The subcommittee will meet regularly and will report to the full committee. The subcommittee will also work closely with the NCPC to address consumer protection issues. The subcommittee will be a key part of the National Association of Attorneys General's commitment to consumer protection.



Debt Collection Related Laws and Regulations Enforced by State Attorneys General

Consumer Protection Laws That Are Enforced by State AGs

- AGs investigate and bring actions under their states' respective unfair, deceptive, and abusive practices laws (“UDAP laws”).
- UDAP laws tend to broadly prohibit “deceptive” or “unconscionable” acts against consumers.
- Most states also have specific consumer protection laws regulating:
 - Debt collection
 - Credit reporting
 - Credit services
 - Lending and loan servicing
 - Debt relief services
 - Money transmission
 - Often more...



States Attorney General Can Enforce Dodd-Frank

- Under the Dodd-Frank Act, state attorneys general (and regulators) can enforce:
 - The generic ban on unfair, deceptive, or abusive conduct against covered persons except national banks, federal thrifts, and certain merchants that offer credit. (Examples: New York, Illinois, Florida, Mississippi, Connecticut)
 - Rules of the CFPB against covered persons, including banks and thrifts, except certain merchants that offer credit.
 - Mortgage provisions regarding ability to repay, steering, prepayment penalties, escrows, appraisals, prompt crediting of payments, and payoff amount requests (including against banks and thrifts).
 - Federal statutes like the Truth in Lending Act and the Fair Credit Reporting Act, against banks, thrifts, and others, to the extent authorized by the statute.



Focus on Debt Collection and Buyers

Highly Active Enforcement Agenda; Expected to Increase in Evolving Federal Climate

A.G. Schneiderman Announces Additional \$3.7m Settlement To Provide Financial Relief For Rome Finance Company Victims

Receive Partial Victim Compensation Exceeding \$3.7 Million

Protect the Financial Wellbeing Of Those Who Protect Us

State of California Department of Justice
OFFICE of the ATTORNEY GENERAL
 KAMALA D. HARRIS

Attorney General Kamala D. Harris, 49 Other Attorneys General, Reach \$95 Million Settlement with USA Discounters for Targeting Military Servicemembers with Deceptive Marketing and Illegal Debt Collection Practices

Friday, September 30, 2016
 Contact: (415) 703-5837, agpressooffice@doj.ca.gov



Attorney General Maura Healey

AG Healey Secures \$2.4 Million, Significant Policy Reforms in Major Settlement with Student Loan Servicer

ACS Failed to Supervise Income-Based Repayment Plans, Violated Debt Collection Laws and Uncharged Student Borrowers; Payment Includes Reimbursement for Massachusetts Students

Focus on Debt Collection 2010 Onward

- Hundreds of CIDs/subpoenas and requests for information
- Broad subject matter and cover range of policies, procedures, and practices
- Investigations also increasingly focused on state licensing and mini-FDCPA requirements

Common Areas of Collector Concerns

- FDCPA requirements that generate consumer complaints:
 - No Third-Party Violations
 - No Improper Communications
 - No Harassment or Abuse
 - No False or Misleading Statements
 - No Unfair/Unconscionable Practices
 - Dispute Rights
 - Proper Application of Payments
 - No Improper Forms

Common Debt Buyer Concerns

- Accuracy of Information: Credit application, account agreement, monthly statements, payment records, and customer service records reflecting disputes (some efforts to create a sell-by date)
- Concern: Wrong consumer or the wrong amount (e.g., service of process, and notice w/substantiation)
- Identity theft
- Flipping consumers into new credit lines to create new liability
- Robo-signing affidavits
- Validity of underlying debt



UDAAP? Reasonable Basis for Collection and Litigation

- String of CFPB consent orders, including Chase, Encore, PRA, Hanna, Citi, and Pressler & Pressler, imposing new requirements relating to debt substantiation, handling of disputes, and documentation.
- Emphasis on purported degradation of data integrity when debts are sold (and resold).
- Allegedly misleading affidavits, such as:
 - Robosigning (e.g., Chase, Pressler & Pressler)
 - Representing that debts have been selected for legal action based on a review by an attorney (e.g., PRA)
 - Changes to dates and signatures after affidavits executed (e.g., Citi)
 - Implying that failure to dispute debt means debt is assumed to be valid (e.g., Encore)
- Meaningful attorney involvement before initiating lawsuit (e.g., Hanna)

In Depth: Information Integrity and Substantiation

- Collectors would have to “substantiate” claims that a particular consumer owes a particular debt
 - Substantiate = have reasonable support that the individual owes the debt and amount claimed, and that the collector is legally entitled to collect the debt
 - Proposals define types of information and documentation that would constitute “reasonable support,” and collectors would bear the burden of justifying an alternative approach
- Collectors would be required to substantiate debt:
 1. Before collecting
 2. During the course of collections a) following the appearance of a warning sign, or b) following a dispute
 3. Prior to filing litigation



Common Substantiation Requirements?

Before Collecting	Warning Signs
<p>Prior to commencing collection activity, collector would have to obtain fundamental information about the debt and a representation of accuracy from the debt owner.</p> <p><u>Fundamental information:</u></p> <ul style="list-style-type: none"> • Full name, last known address, and phone • Account number at default • Date of default, amount owed at default, and date and amount of any payment or credit applied after default • Each charge for interest or fees imposed after default and contractual or statutory source for such charges • Complete chain of title default <p><u>Representation of accuracy:</u></p> <ul style="list-style-type: none"> • Owner has reasonable written policies and procedures to ensure the accuracy of transferred information • Transferred information is identical to the information in the owner's records 	<p>Collectors would have to perform an initial review for “warning signs” before collecting and an ongoing review during the course of collections, and cease collecting if warning signs arise until additional support is obtained.</p> <p><u>Initial review “warning signs”:</u></p> <ul style="list-style-type: none"> • Information is facially implausible, contradictory, or not understandable • Significant percentage of debt in the portfolio has missing or implausible information or unresolved disputes <p><u>Ongoing review “warning signs”:</u></p> <ul style="list-style-type: none"> • Dispute is filed about the debt and underlying documents needed to respond to dispute cannot be obtained • Receipt of disputes for significant percentage of debt in portfolio



Common Substantiation Requirements? (cont'd)

Following a Dispute and Prior to Filing Litigation

Obtain specific types of documentation before proceeding with collections upon receiving a dispute and before filing litigation

- Dispute = oral or written challenge to the validity of the debt (e.g., amount of the debt or identity of the debtor) or the right of the collector to seek payment on the debt

Types of documentation:

- Generic dispute = charge-off statement; most recent billing statement, and/ or contract, note, application, or service agreement
- Specific dispute as to amount of debt = copy of a billing or periodic statement(s) covering the relevant time period, and/or underlying agreement describing the applicable interest rate or fees
- Specific dispute as to wrong consumer = copy of the credit application, new patient form, or document reflecting information from creditor's Customer Identification Program, and copy of the contract, note, application, or service agreement
- Specific dispute as to right of the collector = copy of the bill of sale or assignment of the debt
- Prior to litigation = all of the types of documentation listed above

Emerging Issues

- Privacy and Data Security
- Fintech Lending and Receivables
- Electronic Communication
 - Email
 - Social Media (e.g., Facebook, Twitter, etc.)

The Role of Consumer Complaints and Other Factors That Influence Investigation Priorities

What Could Trigger a State AG Investigation?




Role of Consumer Complaints


- Each AG office has a dedicated team of staff responsible for receiving, investigating, and addressing consumer complaints.
- The offices track and analyze complaint volumes and trends.
- High volumes of complaints, poor complaint handling by companies, and the nature of the complaints have a significant impact on an AG office's enforcement priorities.




What to Expect During Investigations and Litigation

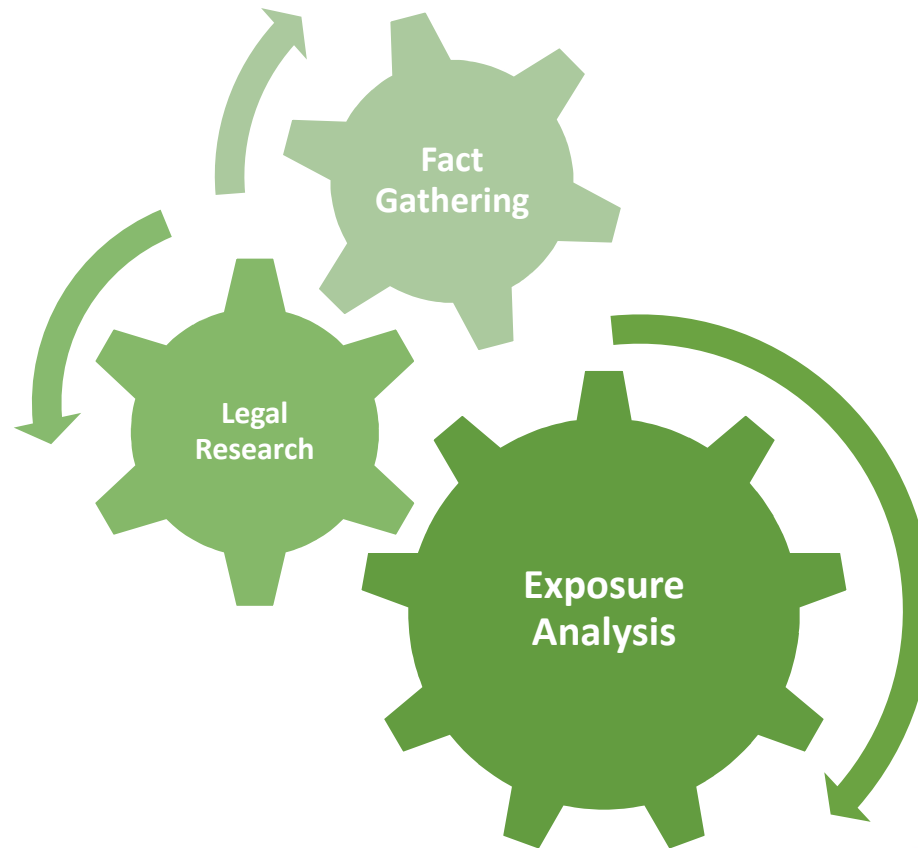
What to Expect When Under Investigation

- 
- Receipt of CID or civil subpoena
 - Assessing its scope
 - Weighing options

- 
- Engaging with enforcement staff to limit burden and understand basis for investigation

- 
- Record hold
 - ESI considerations
 - Collection, review, and production of documents

Preparing the Defense



Strategies for Navigating a State Attorney General Investigation

- Know the state's open record laws and negotiate a confidentiality agreement with the AG office that will protect sensitive company information and documents. Not all states are identical, and how states may share such information with each other and third parties, including private plaintiff's attorneys, should be considered at the outset.
- Treat every AG inquiry as if it is litigation – preserve documents (paper, electronic, and emails) from the moment there is an inquiry. A document hold should be sent out to all those who may have responsive documents, and to the company's IT department.



Strategies for Navigating a State Attorney General Investigation (cont'd)

- Negotiate the scope of the inquiry, and seek to focus on the areas of concern. If possible, sync multiple state inquiries (and other requests) and consider requesting a formal multistate inquiry, if multiple states are investigating at the same time.
- Maintain open communication with the AG office on items such as document collection, ESI issues, custodians, search terms (many AG offices question the use of computer-assisted review), document review, and timelines for completing production of documents.



Strategies for Navigating a State Attorney General Investigation (cont'd)

- Many AG offices expect a privilege log to be prepared and provided at the end of the document production.
- Be responsive. This can help narrow the inquiry and assist in lowering the cost of defending against the investigation and ultimately reducing the cost of the inquiry and settlement.
- If your company receives an inquiry from an AG, either formally or informally, you should obtain counsel that is experienced with AG offices. Your counsel can ensure responsiveness and help narrow the scope of the inquiry.

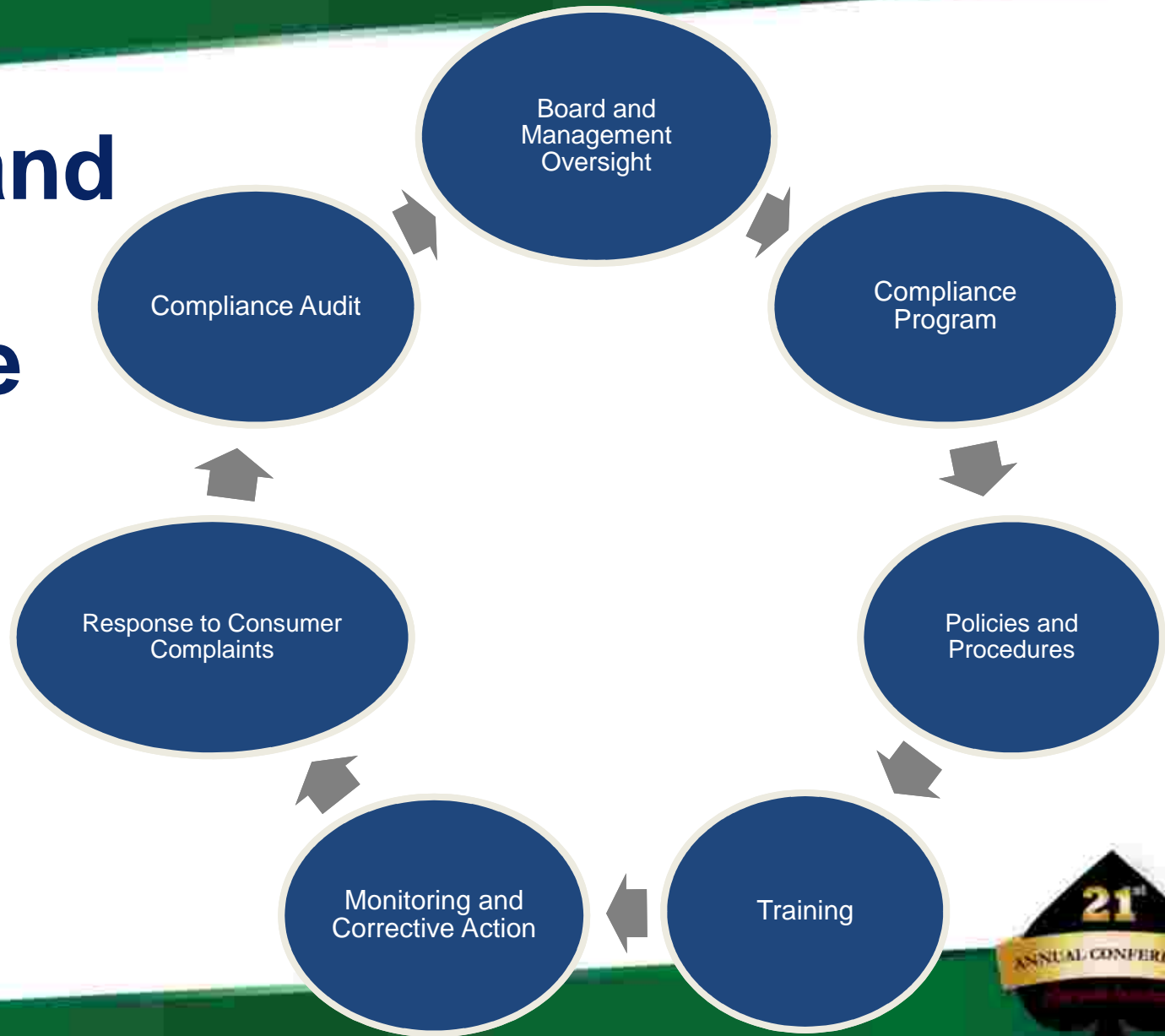


Strategies for Avoiding a State Attorney General Inquiry

- Stay in compliance. Knowing the laws and potential risks and penalties can avoid the loss of time and money spent on a state attorney general investigation. For example, in many states the penalties for violating the UDAP law are “per violation.” In some instances, UDAP penalties are increased if the deception is against an at-risk population, such as the elderly, debtors, and others.
- Complaints should be taken seriously and resolved immediately. State attorneys general do the same and so should you.
 - AGs often talk to AGs in other states to see if there is a trend in consumer complaints and, if so, whether a multistate investigation can be encouraged.
 - An AG is more likely to take action if there are numerous consumer complaints about a company.
 - Multistate investigations can lead to significant costs for a company when it has to defend and settle an investigation. Settlements are often based on per-unit sales in each state – which can be costly.
- Actively engage and educate regulators.
- Be responsive. State attorneys general often make an informal inquiry before issuing a subpoena. An open, honest conversation with your outside counsel and company executives may resolve the issue.



Managing and Enhancing Compliance



Questions and Closing Observations



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