



# State Enforcement Activity in the Consumer Financial Services Industry

**September 7, 2018**

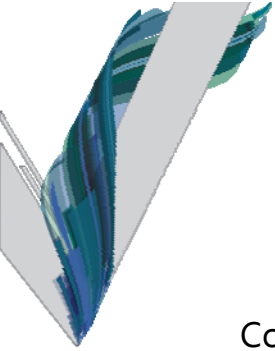
**Panelists:**

**Allyson B. Baker**, Partner, Venable LLP

**Peter J. Kadzik**, Partner, Venable LLP

**Meredith L. Boylan**, Counsel, Venable LLP

**Joseph L. Robbins**, Associate, Venable LLP



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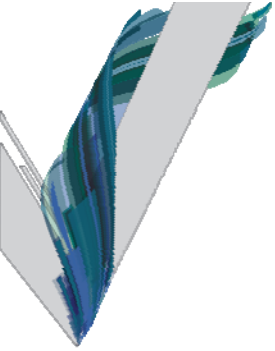
# Agenda

- 2:00 p.m. - 2:05 p.m.** Introduction – Enter the Bureau’s New Acting Director
- 2:05 p.m. - 2:15 p.m.** States' Dodd-Frank Act Authority to Enforce Federal Consumer Financial Protection Laws
- 2:15 p.m. - 2:25 p.m.** How States’ Investigative Powers Differ from Each Other and from Those of the Bureau in Important Ways
- 2:25 p.m. - 2:40 p.m.** Recent State Consumer Finance Enforcement Activity
- 2:40 p.m. - 2:55 p.m.** State Efforts to Influence Federal Consumer Finance Enforcement
- 2:55 p.m. - 3:05 p.m.** Federal Preemption of State Consumer Financial Protection Efforts
- 3:05 p.m. - 3:15 p.m.** Trends and Takeaways
- 3:15 p.m. - 3:30 p.m.** Questions



# Introduction – Enter the Bureau’s New Acting Director

- November 24, 2017: Former Bureau Director Richard Cordray resigns, and President Trump appoints new Acting Director Mick Mulvaney.
- December 12, 2017: Seventeen state AGs send letter to President Trump threatening to “redouble” state enforcement if the administration restrains the Bureau’s federal enforcement.
- Mulvaney responds: “[W]e are actually going to look to [states] for more leadership, not less. If there is an action you can bring in your state, and you are not bringing it, I’m going to want to know why before we bring it.”



# States' Dodd-Frank Act Authority to Enforce Federal Consumer Financial Protection Laws



## States' Authority Under the Dodd-Frank Act

- 12 U.S.C. § 5552 (“Preservation of enforcement powers of States”) gives state “attorney[s] general” and “State regulator[s]” broad authority to bring cases under the Dodd-Frank Act’s enumerated consumer laws (e.g., ECOA, FDCPA, TILA, RESPA, etc.) and the prohibition against unfair, deceptive, or abusive acts or practices (UDAAP).
- Prior notice to the Bureau is required.
- The Bureau can “intervene in the action as a party,” “be heard on all matters arising in the action,” and appeal the result.



## Reasons States May Find the Dodd-Frank Act to Be a More Effective Enforcement Tool Than State Law

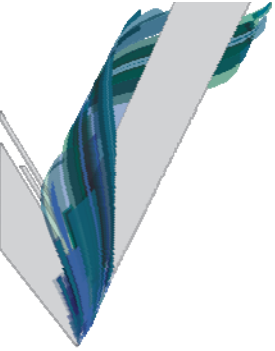
- The Dodd-Frank Act may cover a wider array of conduct (i.e., “abusive” conduct).
- It may confer more extensive remedies. *See* 12 U.S. Code § 5565 (“Relief available”).
  - Civil money penalties
  - Damages
  - Refund of money or return of real property
  - Restitution
  - Disgorgement or compensation for unjust enrichment
  - Contract rescission or reformation
  - Limits on activities or functions
  - Public notification regarding the violation, including the costs of notification
- It may empower more entities within a state to sue (e.g., state “regulators”).



## Examples of States Using the Dodd-Frank Act

- State use of the Dodd-Frank Act is not new.
  - *See, e.g., Illinois v. Alta Colleges, Inc.*, 2014 WL 4377579, at \*3 (N.D. Ill. Sept. 4, 2014) (denying defendant’s motion to dismiss where the Dodd-Frank Act “expressly authorizes states to sue on their own behalf”).
- That said, recent litigation around the Dodd-Frank Act’s constitutionality could impact states’ ability to sue under the Act.
  - *See, e.g., CFPB v. RD Legal Funding, LLC*, No. 17-890 (LAP), Dkt. Nos. 91, 93, 100-101 (S.D.N.Y. Aug. 2018) (after Bureau was dismissed from suit because Dodd-Frank Act Title X was found unconstitutional, parties disputed whether the NY AG’s Dodd-Frank Act claims were similarly defective).





# How States' Investigative Powers Differ from Each Other and from Those of the Bureau in Important Ways



## State AGs Highlight Their Own Investigative Powers in Letter to the Bureau

- On April 25, 2018, sixteen state AGs submitted a comment letter responding to the Bureau's "Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes" (Docket No. CFPB-2018-0001).
  - While the state AGs urged the Bureau not to "curtail" its investigative authority and efforts, the letter also sheds light on states' own investigative powers.
- AGs have the authority to bring multi-state actions, which broaden the resources and authority of the states' enforcement efforts. The tobacco multi-state effort is the most well known and, recently, the AGs engaged in a multi-state effort against PHH Mortgage Corporation.



## Differences Regarding What Conduct May Be Investigated

- The Bureau is authorized to investigate information “relevant to a violation” of “any provision of Federal consumer financial law.” 12 U.S.C. §§ 5561(5), 5562(c)(1).
- NY’s AG is authorized to investigate “repeated fraudulent or illegal acts or otherwise [] persistent fraud or illegality in the carrying on, conducting or transaction of business” or “[d]eceptive acts or practices in the conduct of any business.” N.Y. Exec. Law § 63(12); N.Y. G.B.L. §§ 349(a), (f).
  - These provisions have been interpreted to give the Attorney General “broad” investigative authority.
- In California, the head of each department in the state, including the state attorney general, is authorized to investigate “all matters relating to the business activities and subjects under the jurisdiction of the department” and “[v]iolations of any law or rule or order of the department.” Cal. Gov. Code §§ 11180(a), 11181.



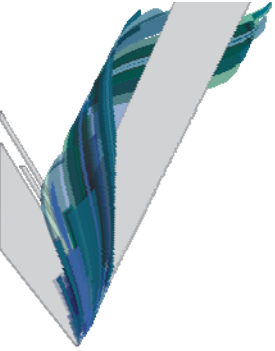
## Differences Regarding the Types of Information That Can Be Sought

- The Bureau can seek the production of documents or tangible things, written reports, answers to questions, or oral testimony. 12 U.S.C. § 5562(c).
- Similarly, the Virginia AG, like most, has authority to issue CIDs, written interrogatories, and take oral testimony when investigating suspected violations of consumer protection laws.
- In New Mexico, however, the CID provision only authorizes the state AG to seek “documentary material” and other records, but not oral testimony under oath. NMSA 1978 Section 57-12-12.



## Differences in the Standards for Challenging a CID or Subpoena

- “Whenever the Bureau has reason to believe that any person...may have any information, relevant to a violation,” the Bureau can serve a CID on that person. 12 U.S.C. § 5562(c)(1).
- In NY, for example, the information sought must “bear[] a reasonable relationship to the subject matter under investigation and the public interest to be served,” and “there is a presumption that [the state attorney general] is acting in good faith.” *Am. Dental Coop., Inc. v. Attorney-General*, 127 A.D.2d 274, 280 (N.Y. App. Div. 1987) (affirming denial of motion to quash subpoena).
- In many states (e.g., NM, PA, MD, and CA), AGs have the authority to “investigate merely on suspicion that the law is being violated.” *U.S. v. Morton Salt Co.*, 338 US. 632 (1950).



# Recent State Consumer Finance Enforcement Activity



## State Efforts to Beef up Their Enforcement Mechanisms

- New Jersey announced on March 27, 2018 the creation of a “state-level CFPB” to “fill the void left by the Trump Administration’s pullback of the [Bureau].”
- Pennsylvania AG announced on July 20, 2017 the creation of a new “Consumer Financial Protection Unit” to “better protect Pennsylvania consumers from financial scams.”
- Maryland enacts the Financial Consumer Protection Act of 2018 on May 15.
  - Expands definition of “unfair and deceptive trade practice” under the Maryland Consumer Protection Act to also include “abusive” practices.
  - Increases civil penalties to \$10,000 for the first violation and \$25,000 for each subsequent violation.
  - Requires the governor to appropriate funding for state enforcement.



## Recent Public State Enforcement Activity

- 49 states, D.C., and 45 state mortgage regulators announced on Jan. 3, 2018 a \$45 million settlement with PHH Mortgage Corporation over allegations of improper mortgage servicing and foreclosure practices that violated the Dodd-Frank Act and state law during the housing crisis.
  - Unlike past national settlements, the federal government was not party to this one.
- Georgia AG announced on April 4, 2018 an \$8.5 million settlement with debt collector, National Check Resolution, Inc., over alleged violations of the FDCPA and Georgia Fair Business Practices Act.





## Recent Public State Enforcement Activity (cont'd)

- New Mexico announced on April 18, 2018 a \$3.4 million settlement with Visa and MasterCard over alleged excessive interchange fees during credit and debit card transactions violating state law.
- Kansas AG obtained on Feb. 6, 2018 a default judgment against The Student Loan Help Center, LLC, which banned the company from doing business in Kansas and recovered more than \$39,000 in restitution plus the AG's investigation costs. The company allegedly violated state law by charging consumers for free loan consolidation services.



## Recent Public State Enforcement Activity (cont'd)

- Virginia:
  - Announced on Feb. 23, 2018 a settlement for over \$250,000 with 8 affiliated online lenders and debt collectors, which included refunds, debt forgiveness, civil penalties, and attorneys' fees. The companies allegedly violated state law by improperly offering open-ended credit plan loans, and contacting borrowers' employers and implementing wage garnishments in debt collections.
  - Announced on May 4, 2018 a suit against online lender, Net Credit, for allegedly violating state law by operating without a Virginia license, misleading borrowers about licensure status in order to charge excess interest rates, and improperly collecting debt from borrowers in bankruptcy.
  - Announced on March 7, 2018 a suit against Future Income Payments, LLC; FIP, LLC; and their owner Scott Kohn for allegedly violating state law by misrepresenting that they were "buying" portions of monthly pension payments, when they were actually making installment loans at excessively high interest rates.



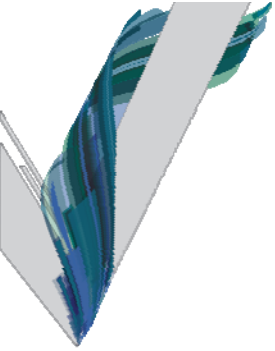
## **Recent Public State Enforcement Activity (cont'd)**

- Illinois AG announced on April 19, 2018 a suit against Future Income Payments LLC for violating state law by allegedly making installment loans without a license and at excessively high interest rates, and trying to disguise the loans as “pension sales.”
- Washington AG announced on May 18, 2018 a suit against Real Estate Investment Network, LLC for violating state law by allegedly scamming foreclosed homeowners out of foreclosure sale surplus funds.



## Some State-Federal Enforcement Cooperation

- FTC and 12 states announced on Oct. 13, 2017 a joint crackdown on student loan debt relief scams, titled “Operation Game of Loans.”
  - The effort “encompasses 36 actions by the FTC and state [AGs]” from CO, FL, IL, KS, MD, NC, ND, OR, PA, TX, WA, and DC.
- NY AG and FTC announced on June 27, 2018 that they are suing “phantom” debt brokers and collectors, Hylan Asset Management LLC and its owner Andrew Shaevel, for violating NY state law, the FTC Act, and the FDCPA by allegedly running a scheme to collect money from consumers on fake and unauthorized debts.
- President Trump issued a July 11, 2018 executive order creating a DOJ-led multi-agency “Task Force on Market Integrity and Consumer Fraud,” and calling for “enhance[d] cooperation among Federal, state, local, and tribal authorities in connection with the detection, investigation, and prosecution of fraud and other financial crimes.”

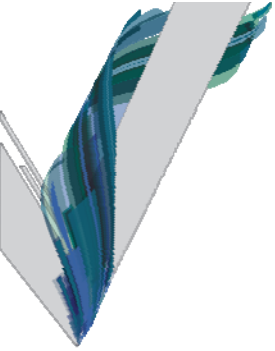


# State Efforts to Influence Federal Consumer Finance Enforcement



# State Efforts to Influence Federal Consumer Finance Enforcement

- State AGs have banded together and submitted a number of letters seeking to influence federal consumer finance enforcement. These include letters:
  - To Congress opposing FDCPA amendments;
  - To Congress opposing *Madden*/true lender 'fixes';
  - To the Bureau supporting its CID process;
  - To the Bureau supporting its complaint database;
  - To the Bureau opposing removal of disparate impact liability under ECOA;
  - To the Department of Education regarding fraudulent student loan activity; and
  - To the FTC regarding collaboration with state AGs, consumer privacy, data security, online commerce, and big data.
- 13 Republican state AGs and the Republican governor of Maine filed an amicus brief in the Fifth Circuit arguing that the CFPB's structure is unconstitutional.



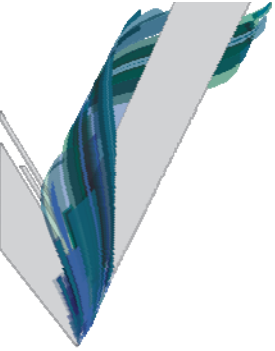
# Federal Preemption of State Consumer Financial Protection Efforts



## Federal Preemption of State Consumer Financial Protection Efforts

- Dodd-Frank provides that a state law is preempted if it “prevents or significantly interferes with the exercise by a national bank of its powers.” 12 U.S.C. §25(b)(1)(B).
- OCC filed on April 24, 2018 an amicus brief asserting that a California mortgage escrow interest law was preempted by the National Bank Act. *See Lusnak v. Bank of America*, 883 F.3d 1185 (9th Cir. 2018) (rejecting that argument), petition for cert. pending.
- OCC clarified on June 13, 2018 that its guidance encouraging small-dollar lending compliant “with applicable state laws” was not a “retreat[] from preemption.”





# Trends and Takeaways



## Trends and Takeaways

- Conduct in Focus:
  - Excessive interest rates, fees, and charges (and misrepresentations about same)
  - Failure to have proper state licenses (and misrepresentations about same)
  - Debt collection
  - Consumer privacy, data security, and use of big data
- States are using all tools available – both state and federal (Dodd-Frank Act) – to pursue consumer finance enforcement.
  - States are also taking steps to make their own enforcement mechanisms more effective (e.g., MD, NJ, and PA).
- Recently active states: MD, PA, NJ, VA, and NM. Also, CA, CO, DC, FL, GA, IL, KS, NC, ND, OR, TX, and WA.
- Litigation like *RD Legal funding* could thwart states' ability to use the Dodd-Frank Act, while federal preemption could hinder states' ability to use their own state laws.



# Questions and Closing Observations



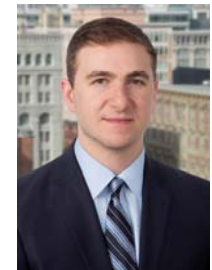
**Allyson B. Baker**, Partner  
202.344.4708  
[abaker@Venable.com](mailto:abaker@Venable.com)



**Peter J. Kadzik**, Partner  
202.344.4147  
[pjkadzik@Venable.com](mailto:pjkadzik@Venable.com)



**Meredith L. Boylan**, Counsel  
202.344.8062  
[mboylan@Venable.com](mailto:mboylan@Venable.com)



**Joseph L. Robbins**, Associate  
202.344.4061  
[jrobbins@Venable.com](mailto:jrobbins@Venable.com)