

ACA International Hot Topics

Navigating the New Federal and State Debt Collection Enforcement Landscape

Presented by **Venable LLP**

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Thursday, January 26, 2017



Welcome to Today's Webinar

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Themes We Will Cover Today

- Enforcement priorities of federal and state regulators of debt collection and impact of new political landscape;
- The role of consumer complaints and other factors that influence investigation priorities;
- What to expect during individual, multistate, and federal co-investigations and litigation, including negotiating the scope of the inquiry, the settlement process, and litigation considerations;
- How state regulators and federal agencies (e.g., CFPB, FTC, banking agencies) exchange information and coordinate; and
- Ways to minimize enforcement overreach, including education and outreach efforts and voluntary industry self-regulation initiatives.

ACA International Hot Topics

Federal Regulatory Enforcement for Debt Collection



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Regulation of Debt Collection



Sources of Regulation & Enforcement



Consumer Financial
Protection Bureau



FTC's Enforcement Authority



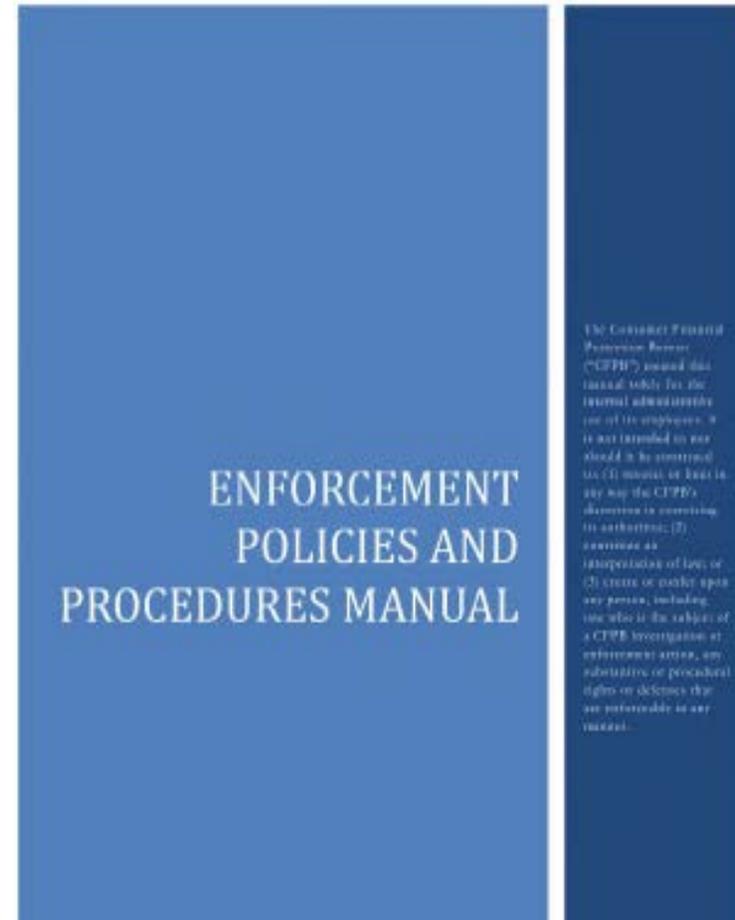
- The FTC is authorized to initiate an enforcement action if it has “reason to believe” that a law within its jurisdiction is being or has been violated.
- The basic consumer protection statute enforced by the FTC is Section 5(a) of the FTC Act, which prohibits unfair or deceptive acts or practices in or affecting commerce.
- The FTC also enforces the FDCPA (historically and to this day).
- Since 2010 alone, the FTC has sued more than 250 debt collection companies and secured judgments totaling nearly \$350M; more than 80 companies have been banned from the industry.
- In November 2015, the FTC announced Operation Collection Protection, a coordinated crackdown conducted with state and local partners.

CFPB's Enforcement Authority

- The CFPB is authorized to conduct investigations to determine whether **any person** is, or has, engaged in conduct that violates **federal consumer financial law**.
- Includes “**service providers**” and “**related persons.**”
- Examples of federal consumer financial law:
 - The Electronic Fund Transfer Act
 - Fair Debt Collection Practices Act
 - Fair Credit Reporting Act
 - The Truth in Lending Act
 - The **Consumer Financial Protection Act**, which prohibits **unfair, deceptive, or abusive acts or practices** in connection with any transaction with a consumer for a consumer financial product or service.

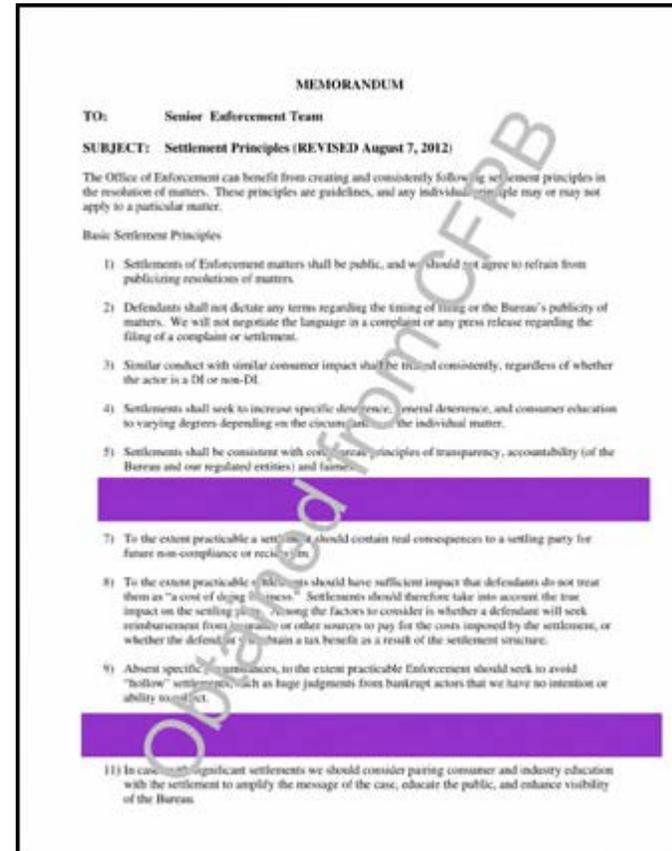
Enforcement Policies of CFPB

- The *CFPB Enforcement Policies and Procedures Manual* governs staff decisions and actions regarding opening and handling an investigation.
- Triggers for opening a matter can come from many sources, including informants, news media, market observation, supervisory exams, and law enforcement partners. Matters are divided into (1) Research Matters and (2) Investigations. The Assistant Director for Enforcement must approve the opening of a matter.
- The CFPB is authorized to investigate merely on suspicion that a person has violated any provision of federal consumer financial law *or to seek assurance that a violation has not occurred. It is not necessary to have evidence that a law has been violated before opening a formal Investigation.*



Enforcement Policies of CFPB

- The Manual includes a long list of factors that Enforcement staff is directed to consider when proposing to open an Investigation.
- Upon approval of a Research Matter and five days before opening an Investigation involving nonbanks, the CFPB staff must notify the FTC.
- CIDs issued by the CFPB are required to describe the nature of the conduct under investigation and potentially applicable provisions of law in order to withstand constitutional and other legal challenges.
- Regarding closing a matter, the Manual states that “staff should recommend the closure of an Investigation as soon as *it becomes apparent that no law enforcement action will be recommended, even if every possible investigative action has not been completed.*” The manual lists factors to consider when deciding on closure, including seriousness of conduct, staff resources, sufficiency and strength of evidence, extent of potential consumer harm, expectation of victim restitution, the expectation that action will be commended by other agencies, the expectation consumers will be compensated through private litigation, and age of conduct.



Federal Regulation by Enforcement

- Aggressive use of UDAAP:
 - FDCPA already prohibits use of deceptive and misleading representations and unfair or abusive practices to collect debt.
 - Statute includes nonexhaustive list of what may be considered deceptive, unfair, or abusive.
 - Long line of cases interpreting FDCPA have augmented the list and better defined the standards for applying these concepts.
 - The CFPB almost always relies on its UDAAP authority built into the CFPA – not the FDCPA.
- Enforcement priorities mirror the topics the CFPB's pending rulemaking will address, including reasonable basis to collect and litigate and time-barred debt and related disclosures.

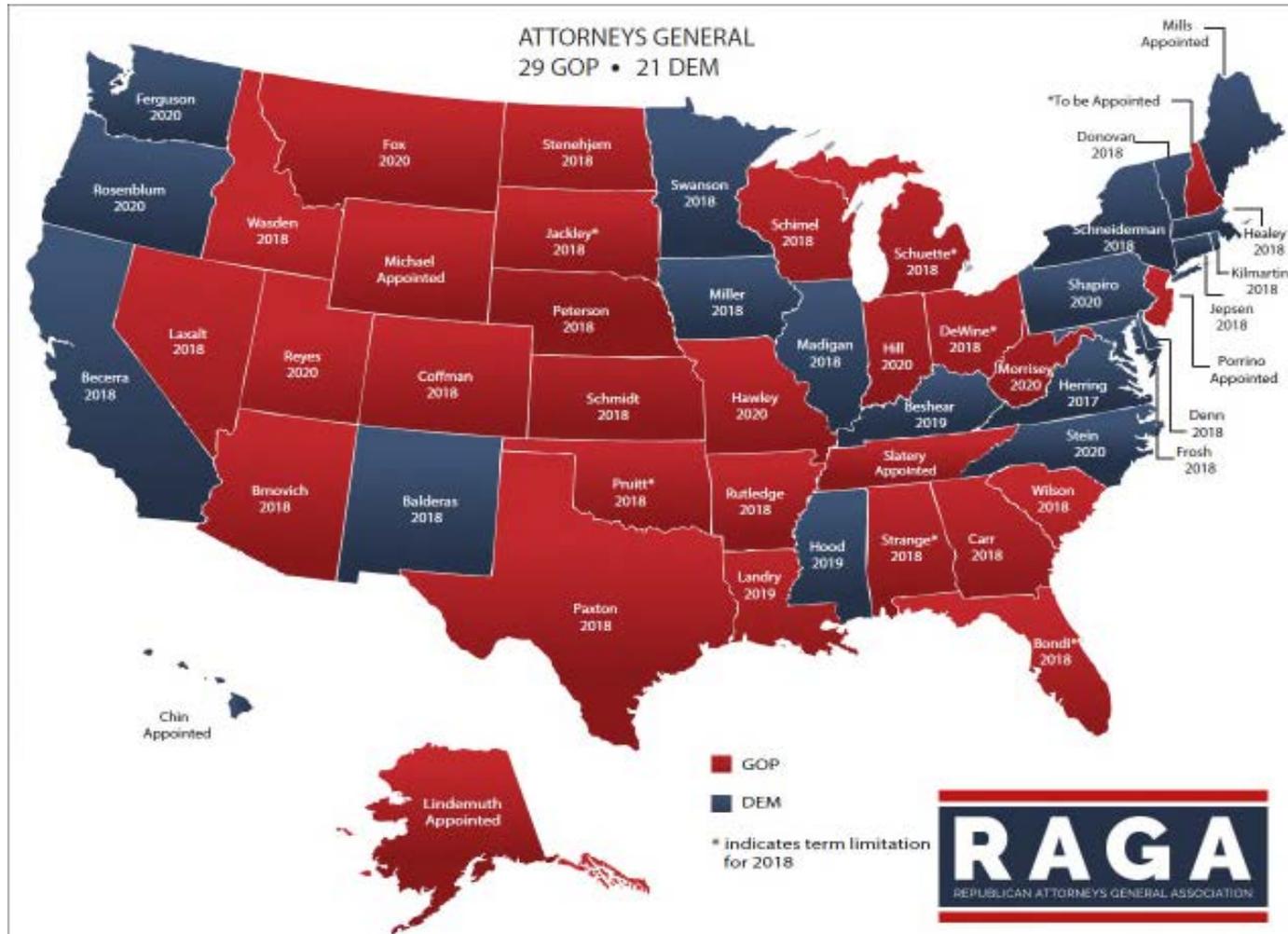
ACA International Hot Topics

The Role of State Attorneys General in Enforcement



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Who Are the State Attorneys General?



What Do the State Attorneys General Do?

- As the chief legal officers of the states, commonwealths, and territories of the United States, the attorneys general serve as counselors to their legislatures and state agencies and as the "People's Lawyer" for all citizens.
- Primary responsibility is enforcement of criminal and consumer protection laws.
- The majority of AGs are elected officeholders in the states, commonwealths, and territories; the rest are appointed.
- Major trends over the last decade:
 - Shared enforcement authority between state and federal agencies over many areas traditionally considered the exclusive responsibility of either the states or federal government.
 - Increasingly cooperative working relationships among state AGs and between AGs and their federal counterparts.
 - Due to decreased productivity on federal side, state AGs are more active in pursuing policy agendas.

Highly Active Enforcement Agenda; Expected to Increase in New 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, agpressoffice@doj.ca.gov



The Official Website of the Attorney General of Massachusetts

**Attorney General
Maura Healey**

Home > News and Updates > Press Releases > 2016 Press Releases > AG Secures \$2.4 Million from Student Loan Servicer

MAURA HEALEY

For Immediate Release - November 22, 2016

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

ACS Failed to Implement Income-Based Repayment Plans, Violated Debt Collection Laws and Overcharged Student Borrowers; Payment Includes Restitution for Massachusetts Students

State of Connecticut
Governor Daniel P. Malloy

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STATE OF CONNECTICUT
ATTORNEY GENERAL GEORGE JEPSEN

February 5, 2016

AG Jepsen: Connecticut Joins \$470 Million Joint State-Federal Settlement with HSBC to Address Mortgage Servicing and Foreclosure Abuses

The Laws Enforced by State Attorneys

General

- State AGs are the chief legal officers of their states and have the authority to bring actions against companies operating in their states on behalf of consumers or the public in almost any area of law.
- 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 and credit reporting.
- Many federal statutes authorize state AGs to enforce the federal statute (or portions thereof).
 - Under Dodd-Frank Section 1042, a state AG or state regulator is authorized to bring a civil action to enforce the Consumer Financial Protection Act.

Proactive Outreach & 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 NAGA, 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

Mission Statement

The Consumer Protection Committee's mission is to assist and enable attorneys general concerning consumer protection issues and matters by providing information, communication and support; to facilitate cooperation among the various attorneys general Consumer Protection Divisions through open dialogue and communication; to plan, organize and conduct training and annual seminars for the exchange of ideas and information on matters relevant to consumer protection divisions and their issues; and to promote the development of effective consumer protection programs and education for the protection of citizens and increasing consumer awareness.

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ACA International Hot Topics

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



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What Could Trigger a Federal or State Investigation?



Role of Consumer Complaints

- The CFPB's complaint portal collects, handles, and analyzes consumer complaints on many industries, including debt collection.
- FTC maintains a database, Consumer Sentinel, that collects consumer complaints across multiple law enforcement agencies, directly from consumers, and non-governmental organizations like the BBB.
- 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/or the nature of the complaints have a significant impact on an AG office's enforcement priorities.

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What to Expect During Investigations and Litigation



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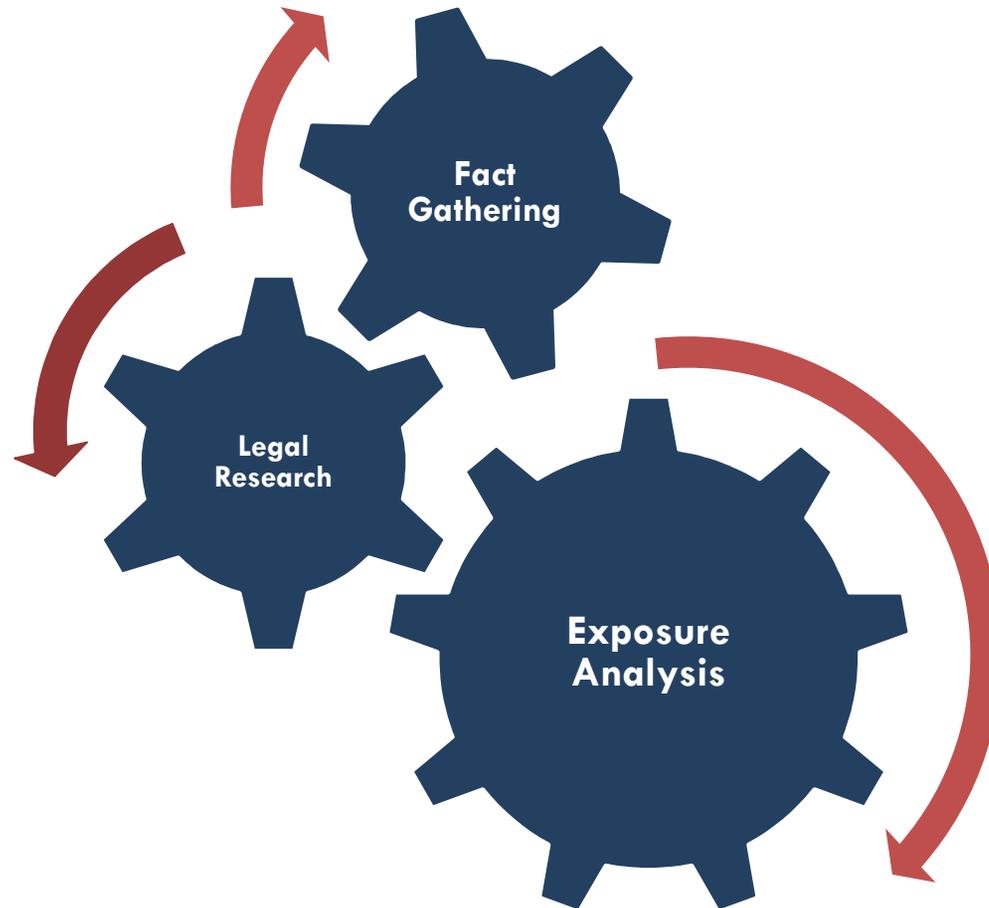
What to Expect When Under Investigation

- 
- Possibility of an ex parte TRO
 - Receipt of CID or civil subpoena
 - Assessing its scope
 - Weighing options

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

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

Preparing the Defense



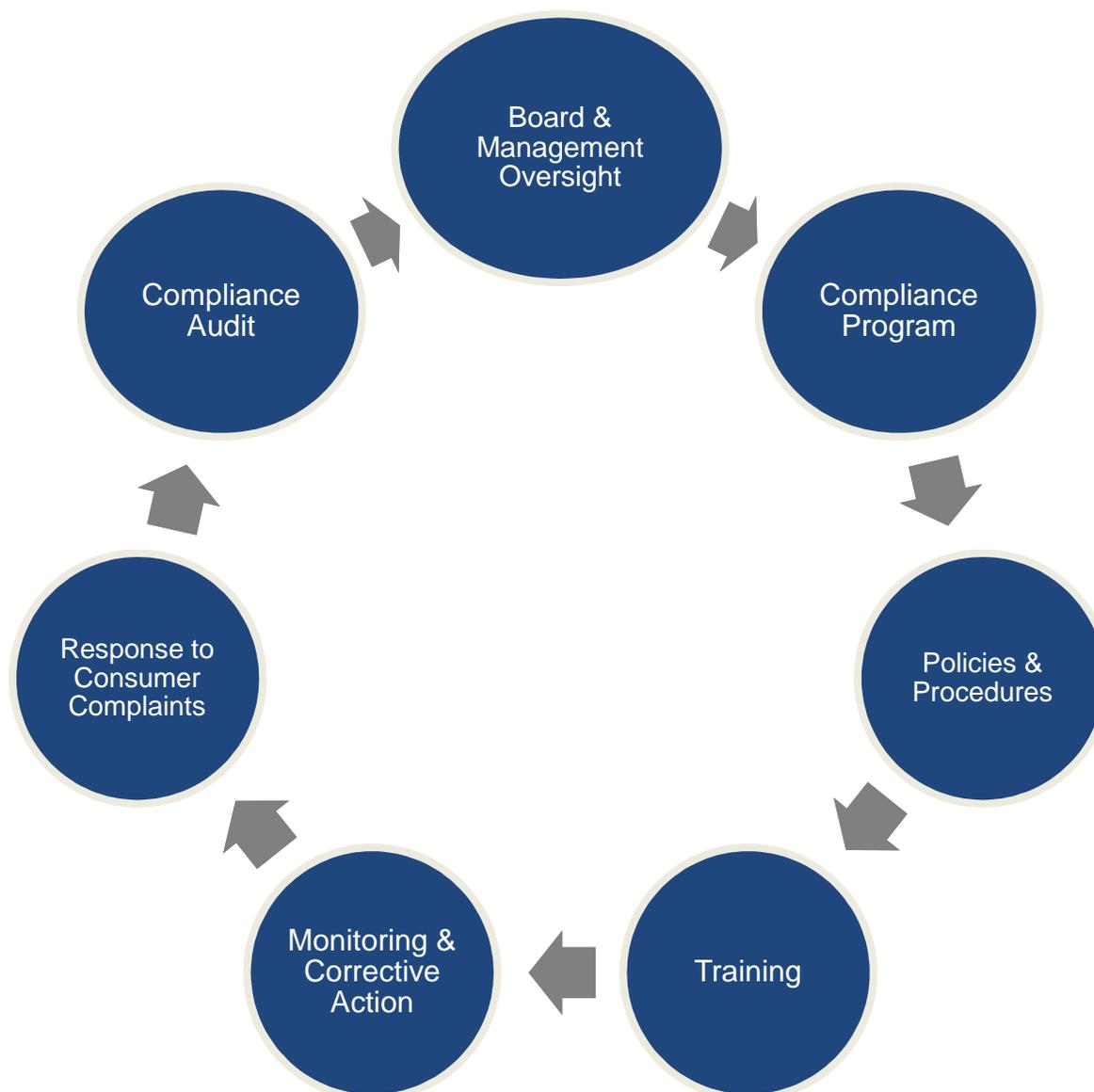
Strategies for Navigating a Law Enforcement Investigation

- Know the specific rules that govern the investigation process of the relevant agency to ensure you preserve all rights. For example:
 - Does the agency require parties to conduct a meet and confer by a certain date?
 - Are there deadlines for submission of requests for modification or requests to withdraw the CID/subpoena?
 - What rules do the agency and staff have to comply with when sending a CID/subpoena?
 - What protections can you avail yourself of with respect to confidentiality of materials produced to the agency?
- Treat every 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, as well as the company's IT department.
- Negotiate the scope of the inquiry, and seek to focus on the areas of concern. If possible, sync multiple inquiries (and other requests) and consider requesting a formal joint inquiry if multiple agencies are investigating at the same time.
- Maintain open communication with the enforcement staff on items such as document collection, ESI issues, custodians, search terms, document review, and timelines for production of documents.
- 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.

Strategies for Avoiding a Law Enforcement Inquiry

- Stay in compliance. Knowing the laws and potential risks and penalties can avoid the cost in time and money spent on a federal or state investigation. Under many federal and state laws, penalties 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. The CFPB, FTC, and state attorneys general do this, 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 multi-state investigation can be encouraged.
- 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 & Enhancing Compliance



Questions and Closing Observations



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