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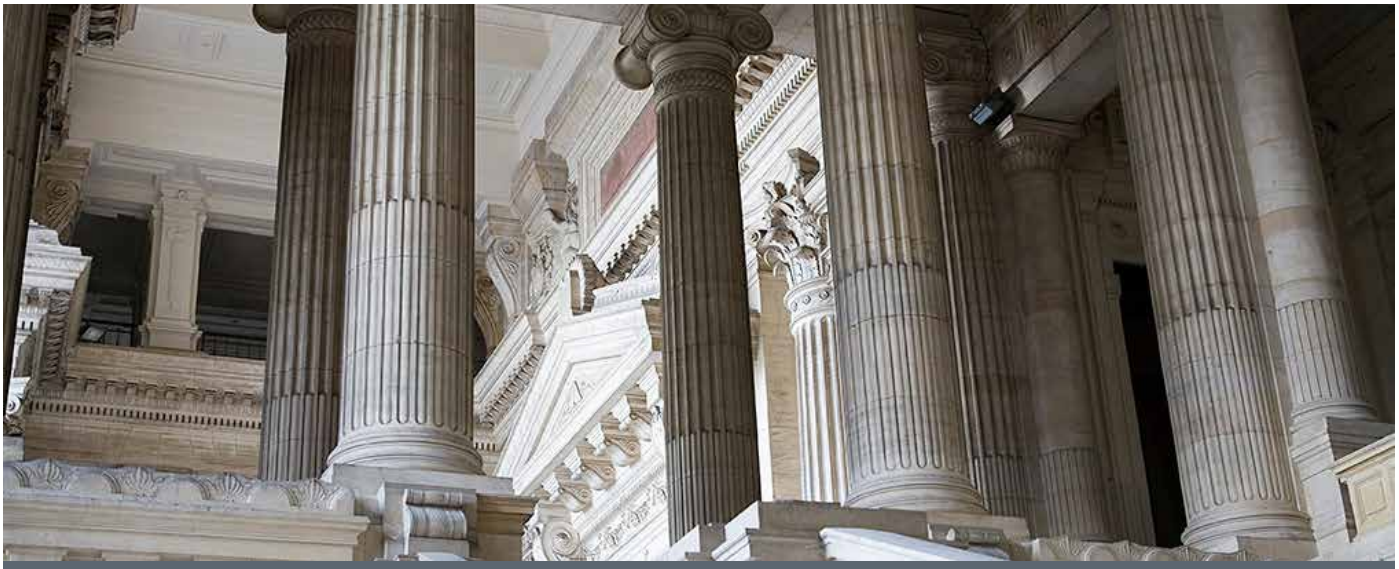

WHITE PAPER

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What Impact Will the New Trump Administration Have on State Attorney General Activity?

The Trump Administration's agenda could face a number of partisan battles at the state level, as Democratic attorneys general from several states have publicly announced their opposition to the President-elect's plans to completely eliminate certain legislative priorities of the outgoing Administration, such as the Affordable Care Act and the Wall Street Reform Act, and his promise to broadly scale back regulatory activity and enforcement efforts. Regardless of the ultimate changes to federal policies, companies in industries affected by the anticipated reforms—including financial services, health care, energy, and environmental—should be aware of the broad investigative and enforcement powers states have granted their attorneys general and ensure that appropriate compliance efforts remain in place.

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Some state attorneys general are already expressing their intention to challenge the new Trump Administration ("Administration") as it moves to implement a number of reforms affecting federal policies, including those concerning financial services, health care, energy, environmental regulations, consumer protection, and business conduct. As part of these efforts by attorneys general, businesses perceived to benefit from these federal changes may be directly in the line of fire. As noted in Jones Day's recent *Commentaries* concerning what the Administration may mean for various industries, there is an expectation that various legislative and regulatory changes, combined with new regulators with new priorities, will result in easing of regulatory activity and enforcement, and more dramatically the striking of entire legislative schemes such as the Affordable Care Act and the Wall Street Reform Act ("DoddFrank"). These "rollbacks" are seen as openings where state attorneys general can exert their own agenda to investigate, litigate, and regulate businesses.

As the business community prepares for a new Administration with a Republican Congress, significant attention has been focused on what potential changes in federal law, regulations, prosecutors, and enforcement could mean for national public policy and corporate strategies and operations. These anticipated federal policy developments will not occur in a vacuum, and they certainly have not gone without notice by a number of state prosecutors. The attorneys general for New York, Massachusetts, and California, for example, are out front of other attorneys general who intend to take on the new President's agenda and companies that stand to benefit from the reforms.

In a press statement, New York Attorney General Eric Schneiderman said that he was "deeply troubled by reports that the Presidential Transition Team is considering ways to eviscerate some of the most basic consumer and investor protection laws in the country." Attorney General Schneiderman specifically called out Wall Street and consumer protection issues for scrutiny: "Every day, state and local law enforcement effectively utilize Blue Sky laws to root out the worst types of fraud, corruption, and abuse on Wall Street and across major industries. In many cases, these anti-fraud statutes are consumers' and investors' first line of defense against exploitation, particularly when retail and institutional investor dollars are in the hands of increasingly complex and opaque financial institutions."[1]

In Massachusetts, Attorney General Maura Healey said that "[state attorneys general are] the first line of defense against illegal action by the federal government and I won't hesitate to take Donald Trump to court if he carries out his unconstitutional campaign promises."[2]

The California governor's nomination for attorney general, Xavier Becerra, telegraphed a broad and aggressive posture from which to challenge the President-elect. As explained in the *Sacramento Bee* by Marc Sandalow, a political analyst and an associate academic director for the University of California's Washington Center, "[a]ccepting Gov. Jerry Brown's nomination to be attorney general of California's nearly 40 million people gives him an important new platform …. This puts him in the forefront of being able to stand up to Donald Trump as the top law enforcement official in the largest state in the country."[3] According to Dan Schnur, director of the Jesse M. Unruh Institute of Politics at the University of Southern California, "Jerry Brown has declared war on Washington, D.C. and he's appointed Xavier Becerra to lead that fight."[4] Becerra is expected to focus on combating the Administration on climate change, environmental, and immigration issues.

The challenges to the incoming Trump Administration by state attorneys general will largely fall along partisan lines—and will likely be done through collective action. State attorneys general all participate in the National Association of Attorneys General in a non-partisan collaborative fashion. But most attorneys general will also work with the party-based Democratic Attorneys General Association and Republican Attorneys General Association. While the attorneys general have taken on a number of issues devoid of politics, there have been a wide variety of partisan-influenced efforts. With respect to the incoming Trump Administration, the Democratic attorneys general seem poised to act together. Attorney General Schneiderman has indicated he has already contacted other states to coordinate their efforts. But these efforts will not be limited to individual state attacks against federal action.

These same states may also direct their attacks against companies and industries. The risks to companies are heightened when states act together. State attorney general use of multistate investigations and litigation has proven to be a significant threat to companies from virtually every industry. And while there may be efforts to reach more reasonable federal regulatory structures by the new Administration, it is expected

that the more aggressive attorneys general will look to expand their reach and effectively regulate these industries.

EXPECTED POST-ELECTION EFFORTS BY STATE ATTORNEYS GENERAL AND OTHER STATE REGULATORS IN THE FINANCIAL SERVICES INDUSTRY

State attorneys general and state financial services regulators have responded promptly to promises by President-elect Trump and members of his transition team to reduce federal regulation and law enforcement efforts regarding the financial services industry. Both New York Attorney General Schneiderman and Maria Vullo, the superintendent of New York's Department of Financial Services ("DFS"), for example, have made it clear that they stand ready to exercise their broad authority to fill any federal regulatory holes should the incoming Administration succeed in rolling back regulation of financial services. That would include any successful efforts to dismantle or curtail use of the 2010 Dodd-Frank Act, as President-elect Trump has promised to do, or legislative efforts to preempt state laws used to regulate the financial services industry in favor of federal regulation, as former SEC Commissioner Paul Atkins, a member of Trump's transition team, has threatened.

After commenting that the reports on the Presidential transition team's plans regarding consumer and investor protection laws were "deeply troubl[ing]," Attorney General Schneiderman added that "[a]ny attempt to gut these consumer and investor protections would severely undercut state police powers and only embolden those who seek to defraud and exploit everyday Americans."[5] Further responding to the incoming Administration's threat to reduce federal regulatory and law enforcement efforts, Attorney General Schneiderman has remarked that, "The States are the back stop, the states are the next line of defense [after the federal government]," and "[i]t is embedded in our system of jurisprudence that state laws must be respected. There are folks out there who may try to show disrespect for the laws, and it is important for us to all be united across the country in standing up for the states' ability to protect its citizens, which is at the heart of the Founders' vision for America."[6] Acting on his concerns, Schneiderman has said that since Election Day, he has conferred with other attorneys general about joining efforts to fill regulatory gaps created by the incoming Trump Administration.[7]

New York DFS Superintendent Vullo has similarly responded, emphasizing that her agency "will not shrink" from its regulatory mission to oversee banks, insurers, mortgage servicers, and other financial firms operating in New York and prevent them from harming consumers.[8] Expressly opposing any efforts by a Trump Administration to preempt or further federalize state regulation, Superintendent Vullo released a statement noting that "[p]articularly now, with so much uncertainty at the federal level, New York will not allow consumer protections to fall into the void. The New York State Department of Financial Services (DFS) opposes any effort to federalize what states have been doing—and doing well—for over a century."[9]

Each state has some form of "Blue Sky" law regulating the offer and sale of securities and certain other financial products. Perhaps the best known of such laws is New York's Martin Act. Enacted in 1921, the Martin Act has been used by a succession of New York attorneys general—starting primarily with Attorney General Spitzer and continuing through Attorneys General Cuomo and Schneiderman—in front-page cases against individuals and entities across all sectors of the financial services industry. Unique in its breadth, the Martin Act has been interpreted to have no scienter requirement. Courts interpreting the statute have held that the New York attorney general does not need proof of an intent to deceive or defraud to initiate an investigation or enforcement action. In fact, New York courts have held that Martin Act liability can arise from an unintentionally false statement that has induced no reliance but simply has the potential to deceive. We have written extensively about the Martin Act and the other equally broad statutes the New York attorney general has frequently used, including New York's Executive Law and General Business Law, and defenses individuals and entities can consider in responding to New York attorney general investigations and enforcement actions.[10]

New York's DFS also has broad statutory authority to respond at the state level to any slowdown in federal financial services regulation and law enforcement. Formed by statute in 2011, New York's DFS combined the functions and authority of the New York Banking Department and New York's Insurance Department. Superintendent Vullo and the DFS have the

authority to bring both criminal and civil law enforcement actions. New York's DFS regulates in excess of 4,000 entities that collectively have literally trillions of dollars of assets, including all insurance companies in New York, all depository institutions chartered in New York, many United States-based branches and agencies of foreign banking institutions, mortgage companies operating in New York, and many other financial service providers. Despite its relatively new existence, New York's DFS has initiated or joined sister regulators and law enforcement agencies in investigating and initiating enforcement actions against a number of the largest participants in the financial services industry for violations of New York's Financial Services Law, Banking Law, and Insurance Law. Jones Day has issued *Commentaries* that discuss DFS's formation and initial activities.[11]

Apart from the formidable investigative and enforcement authority granted state attorneys general under broad state consumer protection and other statutes, multiple federal statutes expressly grant state attorneys general parallel enforcement authority, including the Truth in Lending Act, Fair Credit Reporting Act, the Real Estate Settlement Procedures Act, the Dodd-Frank Act, and the Consumer Financial Protection Act. For example, under Dodd-Frank Section 1042, a state attorney general or state regulator is authorized to bring a civil action to enforce the provisions of Dodd-Frank Title 10 or regulations thereunder, including the Dodd-Frank prohibition of unfair, deceptive, or abusive acts or practices. Multiple state attorneys general and state regulators, including the New York DFS, have brought enforcement actions under their Section 1042 authority, a practice likely to increase should the Administration reduce the enforcement authority of federal agencies, such as the Consumer Financial Protection Bureau, among others.

EXPECTED POST-ELECTION TRENDS IN HEALTH CARE ENFORCEMENT BY STATES

Over the last several years, there has been a notable increase in health care fraud enforcement at the state level. No longer is it the case that the Department of Justice is the sole, or even primary, government agency focused on health care fraud. State attorneys general, led by state Medicaid Fraud Control Units ("MFCU"), have emerged as a driving force in health care enforcement and prosecutions. Based on data for fiscal year 2015, MFCUs were responsible for 1,553 convictions (71 percent involving allegations of fraud), 731 civil settlements and judgments, and $744 million in criminal and civil recoveries.[12]

This increased activity is likely attributable to several factors that could lead to even greater activity on the state level and increases in investigations and filings. Whistleblowers are more frequently filing cases at the state level. This has been facilitated by the now 29 states and the District of Columbia that have enacted analogous false claims acts, as incentivized by the Deficit Reduction Act of 2005. As many states face increasing financial pressure, sizeable health care fraud settlements and judgments provide a source of additional revenue. Additionally, as health care cases continue to generate media attention and public scrutiny, state attorneys general may seek to demonstrate responsiveness to constituent concerns, leading to an increase in investigations and filed actions. Finally, the large number of varied state regulations, along with recent developments in case law, may further fuel aggressive whistleblowers and regulators to seek to expand the scope of False Claims Act liability.

Using recent history as a guide, we would not expect state enforcement activities to change course, regardless of the positions that may be taken by the Administration with regard to health care fraud enforcement. In fact, depending upon what happens with the Affordable Care Act, states may be forced to navigate a situation that involves providing health care services to millions of newly uninsured patients.[13] If that is the case, one would assume that states are going to take aggressive measures to safeguard funds and, where necessary, take appropriate actions to recover those funds. This may also, in turn, lead to an increase in health care consumer protection enforcement by state attorneys general and the Consumer Protection Bureaus against health care providers who are alleged to have engaged in practices that have harmed consumers, health care companies for false or misleading advertising, and pharmaceutical and device companies regarding pricing. Thus, it seems likely that state-level health care enforcement will continue on its present trajectory, with yearly increases in the numbers of investigations and cases filed.

EXPECTED STATE ATTORNEY GENERAL EFFORTS RELATED TO ENVIRONMENTAL REGULATIONS

In the environmental sector, Democratic attorneys general are likely to oppose any efforts to roll back environmental rules established by the Obama Administration, especially climate

change rules such as the Clean Power Plan for power plants,[14] fuel economy standards for vehicles,[15] and the greenhouse gas endangerment findings that underlie these and similar rules.[16] One way they might accomplish this is by continuing to defend existing regulations in pending court cases where the state has already intervened in support of the law (note that states may be granted permission to do so even if the U.S. Justice Department refuses to defend the rule). In addition, if the EPA attempts to relax or abolish existing regulations (which typically must be completed through notice-and-comment rulemaking), Democratic attorneys general may bring challenges to those actions in the appropriate court. For many EPA rules, the U.S. Court of Appeals for the D.C. Circuit has jurisdiction, but petitions against certain rules, such as the Clean Water Rule,[17] can potentially be filed in other federal courts.

Another weapon that Democratic attorneys general have already deployed is their authority to investigate securities disclosures filed by publicly traded companies. For example, some oil companies have recently been subject to massive requests for climate change documents from the attorneys general for New York and Massachusetts. The reported basis for the requests is to give those states an opportunity to evaluate if the information provided to the public in securities filings accurately reflects each company's internal evaluation of climate change issues.[18] Similar investigations may be initiated if these initial efforts bear fruit.

Interested attorneys general also have the ability to bring enforcement cases directly against companies that violate environmental standards, an approach that may be pursued if federal agencies slow enforcement efforts. These cases could proceed under independent state authority or federal citizen suit authority, but they are typically limited to activity occurring within the state. In theory, an attorney general could use federal citizen suit authority to pursue activity occurring in other states if the activity causes an injury to citizens of the state where the attorney general is located.

Of course, the Republican attorneys general who have been active in opposing EPA over the past eight years are not going to disband quietly. They are likely to continue to pursue any pending challenges and may file new actions (in particular with regard to last-minute Obama Administration rulemakings or policy declarations). To the extent that they favor any challenged regulations or policies of the new Administration, Republican attorneys general can also can be expected to intervene in support of such rules.

THE COMPLEX AND UNCERTAIN FRAMEWORK OF A STATE ATTORNEY GENERAL INVESTIGATION

Overall, the authority state attorneys general are granted, pursuant to relevant state statutes, to investigate and pursue civil and criminal enforcement actions is quite broad. For example, in some states, such as New York, the decision whether to conduct an investigation is left entirely to the discretion of the attorney general and is generally not reviewable by the courts.[19] These powers allow states to play a significant role in how a company, or entire industry, operates.

The investigative tools state attorneys general deploy are powerful not only due to the breadth of authority granted but also because the relevant state statutes conferring investigative powers on state attorneys general are often devoid of certain basic procedural and substantive protections that are common in private litigation, either as the provisions themselves are written or as interpreted by the acting attorneys general and reviewing courts. To the extent state statutes do provide clarity on investigative procedure, each state sets its own rules, and there is little uniformity among such provisions. These issues become even more blurred when the rules of several states are at play, such as in multistate investigations. This combination of resources and cooperation by multiple states to conduct an investigation is an increasingly common phenomenon that the states will continue to utilize under the new Administration.

The lack of clarity associated with the rules and procedures governing state attorney general investigations presents enhanced risks for companies, as compared to private litigation or federal government investigations where the process is more codified and commonly understood. This underscores the need for counsel representing an individual or entity served with an attorney general investigative subpoena to carefully consider appropriate mechanisms to challenge the investigation or navigate it in a way that protects the business's rights, prevents minor procedural and regulatory issues from growing into major problems, and ultimately advances

the ball toward resolution. As certain states look to ramp up their investigative and regulatory efforts, companies should be mindful of the special considerations investigations by the states present, no matter what the topic.

CONCLUSION

The recent comments by certain state attorneys general, as well as the latest focus and trends of state investigative and enforcement activity, make clear that state attorneys general will challenge the Trump Administration not only directly but by an expansion of state-level activity to monitor and control industries benefiting from a decrease in federal regulation. The expected continuation, and in some cases increase, in efforts by state attorneys general is most likely to impact those industries affected by the anticipated reforms to federal policies, including financial services, health care, and energy. Thus, businesses operating in such sectors should not become complacent in their compliance efforts in anticipation of regulatory rollbacks. Rather, they should be mindful of the broad authority granted to state attorneys general and prepare for the next fight. As New York Attorney General Schneiderman remarked, "the states are the next line of defense."

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ENDNOTES

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12 Department of Health and Human Services, Office of Inspector General, Medicaid Fraud Control Units FY 2015 Annual Report (OEI-07-16-00050) (September 2016).

13 For more information on potential changes to the Affordable Care Act, *see Jones Day Commentary*, "The Future of the Affordable Care Act" (November 2016).

14 EPA Clean Power Plan for Existing Power Plants.

15 EPA Regulations for Emissions from Vehicles and Engines.

16 *See, e.g.*, "Finding that Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution that May Reasonably Be Anticipated to Endanger Public Health and Welfare," 81 Fed. Reg. 54422 (Aug. 15, 2016); "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 66496 (Dec. 15, 2009).

17 EPA Clean Water Rule.

18 *See, e.g.*, *Exxon Mobil Corp. v. Healey*, Case No. 4:16-cv-00469 (N.D. Tex.).

19 *See People v. Bunge Corp.*, 302 N.Y.S.2d 785, 788 (1969).