

# Preparing companies for a new day in multistate AG investigations

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Until the early 2000s, companies developing innovative business models or technologies could make reasoned predictions regarding how their innovations would be treated by government by analyzing the text of statutes and implementing regulations and interpreting case law, enabling them to make calculated decisions about how to proceed based on risk tolerance.

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Business models or technologies that pushed the envelope sometimes would be tested when a single state regulator, like a state Attorney General, launched a regulatory investigation and subsequent enforcement action. Upon notice of such an investigation or lawsuit, a company could revisit and revise its business practices and make changes in other states to avoid additional regulatory scrutiny and enforcement actions.

But, as Bob Dylan once sang, the times — they are a’changin’. The 1998 Master Settlement Agreement with tobacco manufacturers was a watershed event for state Attorneys General, illustrating the power of coordinated action. Today, companies often find themselves facing state AGs across the country who are increasingly collaborating and bringing investigations through parallel or multistate investigations, which typically raise numerous concerns about multiple facets of a company’s business practices.

These multistate investigations do not permit companies the time to revise and recalibrate their business practices, as companies may have been able to do decades in the past.

Businesses today that face a deluge of regulatory actions — and often tag-along private litigation — typically find themselves in

crisis mode, unable to even take a breath to develop a unified strategy for handling these actions. In-house counsel in highly regulated industries must prepare in advance for bet-the-business investigations because they will not have the time to do so once the wave of subpoenas and follow-on litigation hit.

## When is a multistate investigation likely to be triggered?

To best prepare for regulatory activity before it comes, businesses should monitor evolving trends among regulators to ensure that novel regulatory enforcement actions do not harm or eradicate their company’s new products or services.

When a general counsel receives a regulatory inquiry, she or he should determine whether the inquiry is routine, or whether it represents an existential threat to the company or one of its business lines. In making this determination, a general counsel should focus on the following three primary questions:

- (1) How far-reaching is the issue’s impact?
- (2) Is this an issue likely to generate publicity?
- (3) How novel is the issue?

Determining the nature of the threat matters because the business’ response to a “bet the company” regulatory inquiry should be qualitatively different from its response to, for example, to run of the mill consumer litigation.

As recommended in this article, businesses should consider adopting a “SWAT team” approach, similar to those used by premier law firms operating in the regulatory space, which incorporates investigations attorneys, litigators, and compliance lawyers, working closely with personnel in the affected business lines to develop and implement an effective global response.

## How far-reaching is the company’s impact?

A thoughtful analysis of a company’s size, practices, and consumer impact helps calibrate the degree of risk that a multistate or other parallel regulatory investigation poses.

First, at an obvious and fundamental level, a company’s risk of multiple states being involved correlates positively with the

number of states in which a company operates and the number of consumers it services.

Second, companies that utilize uniform practices nationwide rather than state-specific practices have a greater likelihood of facing a multistate investigation because (1) any general issue with a uniform practice is likely to be problematic in multiple states and (2) that uniformity makes it less likely that the company's practices are compliant with the unique and nuanced regulatory scheme of each state.

Indeed, state AGs evince immediate skepticism toward a company's likelihood of compliance when discovering that the company employs a uniform national practice.

Third, companies operating in a field regulated by both state and federal law are more likely to face a multistate investigation because federal regulators (e.g., FTC, CFPB, SEC, etc.) often coordinate with states to bring parallel enforcement actions. Indeed, what may begin with the Federal Trade Commission coordinating an investigation with one state AG may morph into the FTC coordinating with a 50-state multistate investigation after other states are alerted about the practices of a target of the investigation.

### **Does the topic covered by the CID or subpoena implicate a high-interest issue?**

Another reliable predictor of widespread regulatory interest in an industry or subject matter exists when there is a recent trend of proposed and enacted statutes and promulgated regulations across states about the topic that is the subject of the civil investigative demand (CID) or subpoena. Analyzing these proposed laws can help in-house counsel identify potential topics of concern.

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Although enacted laws are most helpful for understanding the regulatory landscape, proposed laws that have not yet passed — or even those that failed — often highlight areas that regulators want to scrutinize. Commonly, state AGs propose laws that would help them bring enforcement actions against a certain industry, business, or practice. If those laws fail to pass, some state AGs, undeterred, will nonetheless continue their efforts to fight the industry, business, or practice by using the general enforcement tools available to them like general consumer protection laws.

Other related indicators of widespread regulatory interest are (i) a substantial or increasing number of inquiries to other

companies from regulators addressing the same issue and (ii) Better Business Bureau complaints and negative online reviews (i.e., Google Reviews) from consumers about a company or industry. State AGs monitor both the actions other regulators are bringing and consumer complaints to look for patterns regarding the demographics, location, and prevalence of an issue in seeking out violations and companies to investigate.

### **How novel is the issue?**

Regulators sometimes pursue investigations where no consumer harm has occurred (or is likely to occur) because it is unclear how an emerging industry or business practice fits into an existing regulatory scheme and because they are under political or public pressure to investigate to better understand its lawfulness. Given this reality, in-house counsel would be wise to consider how a business unit's advertising and marketing to consumers around a new good or service could be misconstrued by unfriendly interest groups or sectors of the population, which could be lobbying for regulatory scrutiny behind the scenes.

Companies concerned about regulatory scrutiny should also consider engaging regulators thoughtfully to help them understand the business — and why it complies with existing law. Such a proactive approach can save companies significant resources and money in the long run.

Similarly, investigations are more likely when the business practices or technologies do not fit within existing federal or state regulatory schemes. When state AGs sense a significant mismatch between the law and a new business practice or technology, they may consider launching an inquiry genuinely intended to understand the subject matter better.

Although enforcement actions often follow these inquiries, thoughtful navigation of the initial investigation can help mitigate that likelihood. Additionally, a cooperative approach that builds a relationship with the regulator during the investigation can help shape the regulator's enforcement priorities.

### **How is a legal department best structured to handle bet-the-business investigations and litigation?**

Businesses that operate in areas of regulatory focus also should consider whether the in-house legal team structure, which often is designed to handle traditional litigation matters, will function effectively when faced with major regulatory investigations and litigation. Law firms with dedicated state Attorney General practices that focus on emerging enforcement priorities and initiatives may provide a helpful model for businesses that anticipate regulatory action.

As discussed above, top regulatory groups have developed a SWAT team model consisting of enforcement, litigation and compliance attorneys who work closely with both their clients' in-house counsel and key business personnel to respond to the investigation. Such an approach is particularly helpful in proactively implementing any necessary remedial measures that are identified. This will, in turn, help prepare the company to address state AGs' concerns during settlement negotiations.

A SWAT team approach can also help to ensure that all parts of the company are thoughtfully included in defense, settlement, or post-settlement implementation. This coordination helps achieve alignment across the company by, for instance, ensuring that one business unit does not agree to an injunctive relief term as part of a settlement when another business unit is unable to implement or operationalize the term.

### Looking forward

Although each regulator operates differently, some factors are helpful in determining the likelihood of a multistate AG

investigation, including the company composition and range of regulatory schemes triggered by the company's practices. While the previously mentioned questions can help predict a regulator's future action, they are only first steps. Most importantly, businesses that want to be prepared for regulatory action should consider not only whether their current business practices are likely to draw scrutiny, but also whether the structure they have in place in their general counsel's office is appropriate to identify and effectively respond to bet-the-business regulatory investigations and litigation.

### About the authors



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