CLIENT ALERTS & INSIGHTS

If You Run, I Will Chase: Proactive Postures Towards State Attorneys General

Firsthand Perspectives from Democratic Attorneys General Filling the Federal Void

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Featured Practices: State Attorneys General Investigations & Enforcement

Key Takeaways

- Democratic state attorneys general are stepping up enforcement in areas like artificial intelligence, consumer protection and antitrust, especially as federal oversight wanes. They are using creative strategies and regulatory leverage to impose new requirements on businesses, particularly in emerging tech and merger reviews.
- Businesses face heightened regulatory and litigation risk at the state level, with AGs willing to pursue aggressive enforcement and use any available leverage to achieve policy goals. Companies that ignore or evade AG inquiries may face even tougher scrutiny and less favorable outcomes.
- A proactive and cooperative approach with state AGs builds goodwill-engage early, be transparent and seek experienced counsel to help navigate investigations or regulatory reviews. This can help shape the narrative and increase the likelihood of a favorable resolution.

I. Introduction

The Benesch State Attorneys General team recently sat down with many of the Democratic state attorneys general to better understand their priorities for the upcoming year and approaches towards enforcement. The AGs were especially focused on artificial intelligence ("AI"), consumer protection efforts and antitrust enforcement. Below are some key insights for businesses as they strategize interactions with these AGs and weigh their enforcement and regulatory risk.

II. Critical Insights

a. AI Regulation Will Focus on Safety Issues

Democratic AGs view child safety as the paramount consumer protection concern for the AI industry and expect this to be the next big multistate regulatory fight. While the AGs are working with state legislatures on potential legislative actions, they uniformly identify this as a consumer protection issue rife for enforcement. Comparing AI to the early days of the internet, they lamented the lack of foresight to use enforcement mechanisms from the beginning. They plan to avoid repeating that "mistake." While there have not been many actions to date in this space, the aggressive undertones portend future enforcement in this area. But one notable case keeps coming up: the Delaware and California attorneys general have been quick to tout the concessions they extracted from OpenAI using regulatory leverage.

OpenAI-a Delaware nonprofit organization-needed state AG approval for the creation of a for-profit related entity it wanted to establish to help with its capitalization efforts. Both Delaware and California leveraged their gatekeeping roles to impose restrictions on the company related to AI safety, including the imposition of an independent board member solely focused on safety initiatives related to OpenAI products. While the unique corporate structure of OpenAI made this specific maneuver by the AGs possible and unlikely to be replicated, it demonstrates the creative strategies that will be used by AGs on this issue and their willingness to utilize any leverage to achieve their goals in this arena. Companies in the AI space should be cognizant of this hyper focus and evaluate any potential leverage spots that may be used to negotiate for restrictions or changes in business practices.

b. **Regulation through Antitrust Enforcement**

Historically, federal antitrust enforcement has been the primary hurdle for mergers. But with the growing perception that federal enforcement has diminished, state AGs intend to fill the void. Antitrust enforcement is an area that has joint federal and state jurisdiction. While state jurisdiction is more limited, companies should be attentive to the enforcement priorities of the AGs in their home states, the home states of merger targets and in states likely to feel the impact of a merger.

The Democratic AGs view their merger review function as an effective vehicle to achieve their consumer protection aims. A strategic buyer, looking to integrate the target business into their own and expand the target's operations, will be viewed more favorably than a financial buyer, who purchases a target purely as an investment opportunity to be sold off for a return. The latter will receive heightened scrutiny in antitrust investigations and enforcement by Democratic AGs.

This heightened enforcement posture is going to particularly impact mergers in the healthcare space. Recently, California used its merger approval powers to require a hospital system that stopped providing LGBTQ-related medical procedures (in reaction to federal posturing) to resume those procedures as a condition for merger approval. Any industry that has a state regulatory component should expect more antitrust review and anticipate that AGs may pursue seemingly unrelated regulatory priorities in this context.

c. **Cooperative Posture is Key**

During these conversations, one attorney general made a point about businesses dealing with AGs that stuck with the Benesch team: "If you run, I will chase." This AG was trying to highlight the benefits of an early cooperative posture in state AG investigations. In other words, running away from the investigation is not going to make it go away and will likely make it worse.

An early cooperative posture provides two crucial benefits. First, by not making an AG "chase" the business, it keeps the AG in a more conciliatory and open mindset. This tends to lead to more favorable outcomes. Second, it allows the company to shape the narrative early, rather than combat a narrative potentially established by an adverse party. It is important in such a posture, however, to remain forthright, as any deceptive or obfuscatory practices will eliminate any goodwill that might have been gained. The AG will eventually obtain the information, so there is no benefit to trying to hide it. This does not mean that a company should completely give in to the demands and arguments of an AG. But working from a common framework greatly increases the amenability of the state AG to advocacy and the chance of a favorable outcome.

III. What Can You Do?

The Democratic AGs plainly intend to be active regulators, filling perceived voids in federal oversight. There are two important steps businesses can take to mitigate the chance of burdensome individual regulation and enforcement in this environment. First, take a proactive approach. Rather than wait for an AG to issue a CID, use experienced counsel to proactively bring problems and transactions to the relevant state AG to engender goodwill and start the conversation on the right foot. Second (but related), be transparent and cooperative. This does not mean to immediately relent to the AG's position, but withholding information sours a relationship and limits the ability to come to a mutually agreeable resolution or solution.

Benesch's deep relationships with the attorneys general across the country can help facilitate both and lead to more favorable outcomes in this active state of play.