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Session 601

FEDERAL AND STATE ENFORCEMENT TRENDS



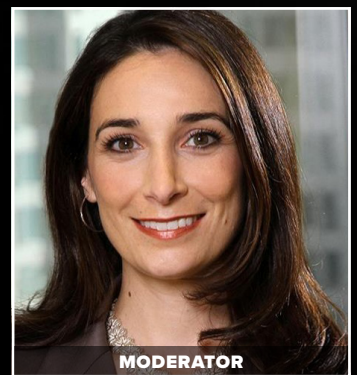
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EXECUTIVE SUMMARY



Federal and State Enforcement Trends

MODERATOR:

Emily Aviad, *Principal*, PwC

PANELISTS:

- Kalia Coleman, *Partner*, Riley Safer Holmes & Cancila LLP
- Maria Earley, *Partner*, Morrison & Foerster LLP
- Milton Marquis, *Partner*, Cozen O'Connor P.C.

OVERVIEW

This panel, all with experience in different facets of federal and state enforcement, shared insights into current enforcement trends. Consumer protection, antitrust, and financial services are areas attracting considerable enforcement attention. While the FTC's authority was limited by the Supreme Court, the CFPB is ramping up its expansive jurisdiction. Prudent companies will consider compliance, monitor consumer complaints, rely on experts when faced with questions, and cooperate thoughtfully with parallel investigations.

KEY TAKEAWAYS

The Biden Administration entered office focusing on increasing federal and state collaboration, with mixed results.

Although the Biden Administration pledged to strengthen the regulatory powers of state AGs through greater federal-state collaboration, it has not yet materialized. Some Republican AGs indicated they will resist collaboration with federal agencies, demonstrating tension between federal and state governments in certain areas.

BIG IDEAS

- The Biden Administration's ambitions for increased federal and state enforcement collaboration have not (yet) resulted in significant action, with the exception of consumer protection and antitrust.
- Compliance plays a key role for companies facing heightened enforcement scrutiny.
- The CFPB has broad authority, which it is extending to companies that do not consider themselves in financial services or directly serve consumers.
- When facing parallel investigations, companies need to proactively manage the flow of information to the different agencies.

“We have not actually seen this play out as of yet. And a large part of that is due to some opposition from GOP State Attorney Generals. There are 26 across the U.S. and there is always concern with federal infringement on states' rights and state authority.”

— Kalia Coleman, *Riley Safer Holmes & Cancila LLP*

Several priority areas where federal/state collaboration is needed but has been lacking are:

- **Civil rights.** The Civil Rights Division of the DoJ has been active in voting rights. The John Lewis Voting Rights Bill stalled in Congress would give the federal government more direct enforcement



avenues. Police reform and accountability also require state enforcement. Criminal justice reform under the civil rights umbrella raises prospects of federal and state collaboration.

- **Environment.** The EPA needs to collaborate with state regulators to enforce environmental laws.
- **White collar.** Last year's uptick in white collar prosecutions displays an enforcement emphasis that benefits from state, local, and federal alignment.

While collaboration in the above areas has been lacking, two areas where there is clear collaboration between federal and state level enforcement are **antitrust** and **consumer protection**.

“There seems to be a broad consensus that cooperation, collaboration will help to protect consumers.”

— *Milton Marquis, Cozen O'Connor P.C.*

A robust compliance program plays a vital role when a company faces enforcement scrutiny.

For any company looking to prepare for the heightened enforcement resulting from increased federal-state collaboration, the answer is compliance, especially in an area such as antitrust, where inflation and economic concentration and concerns around big tech and free speech are prompting calls for increased enforcement.

A strong compliance program is key to helping companies prepare for heightened scrutiny of pricing with elements like reviewing emails of individuals with pricing authority. Self-reporting plays an important role in mitigating any violations uncovered; the DoJ has an amnesty program and is encouraging data-driven compliance by companies.

The FTC's authority has been curtailed, but the CFPB is just ramping up.

A year ago, the Supreme Court delivered a blow to the Federal Trade Commission's enforcement authority in the *AMG Capital Management* case by denying its ability to obtain monetary equitable relief. While Congress is considering measures to restore this authority, no action is expected soon. This places a premium on partnering with state enforcement because the decision did not impact AGs' authority. Indeed, in a federal court case of joint FTC-state

enforcement last year, the judge held that the New York AG had authority to seek disgorgement and restitution nationwide on behalf of consumers outside of New York State.

The FTC and Consumer Financial Protection Bureau have coextensive enforcement on many consumer finance matters, but with notable differences in their governing statutes. Both address unfair and deceptive acts or practices (UDAP), but the CFPB adds “abusive” (UDAAP), a new prong that is still being defined but is broader than the traditional authority. In addition, state AGs are authorized to use the UDAAP authority under the law.

In the fintech space, federal regulators are focusing on big tech and financial services and payments; the CFPB recently declared its ability to examine a broader set of institutions. And they are scrutinizing any consumer-facing aspect. Even pure B2B companies, providing data aggregation, payment processing, and services to a consumer-facing company, are receiving subpoenas and CIDs (civil investigative demand).

“It's shocking sometimes when companies get these subpoenas or CIDs, and they go, ‘We don't touch consumers, we don't do consumer products.’”

— *Maria Earley, Morrison & Foerster LLP*

Subscription auto-renewals are an area of widespread enforcement interest.

A focus of state, federal, and local collaboration is automatic renewal laws governing consumer subscription services, which increased during COVID. Many states have specific statutes in this area that add to those at the federal level. The enforcement focus usually centers on questions of affirmative consent. In California there is a dedicated task force of DAs enforcing compliance to any entity offering products in California.

It is vital for companies to monitor complaints they receive, because the majority of cases begin with complaints before rising up to the regulators. Many times customer service is disconnected from the legal department, hampering the ability to identify trends in complaints and get ahead of potential problems. It is important to have a mechanism for tracking, because even a carefully designed auto-renew feature may cause unanticipated confusion.



It is critical to take a strong role managing parallel investigations.

Because so many matters are subject to overlapping jurisdiction, companies can take proactive steps to mitigate the impact. With white collar crime fraud and public corruption investigations overwhelmingly stemming from a whistleblower or a victim complaint, being prepared to act quickly is useful. Panelists' tips include:

- **Be pragmatic.** It is generally beneficial to take a pragmatic approach to an investigation, as the agency decides the scope of its jurisdiction. Litigation carries reputational risk and costs and is best reserved for situations of clear overreach.

“Pragmatism should rule the day. Obviously if an agency is grossly overreaching and it’s extremely burdensome, then maybe you make a different call.”

— *Milton Marquis, Cozen O’Connor P.C.*

- **Conduct an internal investigation.** Companies are advised to hire outside counsel to conduct their own internal investigation to understand the facts, act proactively, and, above all, avoid a criminal investigation.
- **Look to specialists.** Because many white collar investigations lead to different agencies looking at the same matter, a primary concern is understanding precisely the type of investigation the company is facing, which affects strategy. Using expert outside counsel who know the culture and attorneys at the different agencies is valuable to getting information early on.

“One of the primary concerns in a parallel investigation is determining from the intake process what type of investigation this is going to be. Is it going to be a criminal investigation? Is there going to be a civil investigation? Is it going to be a regulatory investigation? Is an administrative remedy appropriate?”

— *Kalia Coleman, Riley Safer Holmes & Cancila LLP*

- **“Upjohn” warnings.** As part of compliance, it is vital to ensure that employees understand that when the company hires outside counsel for an internal investigation or to deal with the investigating agencies, that counsel represents the company and not the employee. Statements employees make may not be protected by attorney-client privilege. At some point, employees’ interests may diverge sufficiently to warrant separate counsel.

- **Coordinate the flow of information.** Collaborations between agencies are not always seamless, but the company can take the lead to reduce the burden on its resources and ensure consistency. Negotiating what information will be provided by the company and giving the same information to all agencies is a key step.

When subject to a joint, multi-agency investigation, it is wise to simultaneously assume that one agency is sharing information with other involved agencies—so be prudent about what is shared—and to also assume they are not sharing information, which makes it necessary to ensure that each agency gets the information it needs.

“You don’t want to be flip or informal or not take things seriously. There are a lot of MOUs between these agencies that allow them to share and then they can start their own investigation. So you might start small and end up big.”

— *Maria Earley, Morrison & Foerster LLP*



BIOGRAPHIES



MODERATOR

Emily Aviad

Principal, PwC

Emily Aviad is a principal in PwC's Investigations & Forensics group, where she leverages her experience as a legal advisor and white-collar criminal defense attorney to help clients tackle their investigative, regulatory, and compliance needs. Emily's areas of expertise include the Foreign Corrupt Practices Act, the False Claims Act, accounting fraud, insider trading, reporting disclosure violations, and market manipulation. Her experience spans industries, including media and technology, retail, and defense contracting. As a native Spanish speaker, Emily works closely with clients, attorneys, and experts in both English and Spanish to execute coordinated, cross-border solutions where nothing is "lost in translation." Prior to joining PwC, Emily spent fourteen years at Skadden, guiding corporate and individual clients through high-stakes U.S. and multinational investigations and litigation. Emily holds a JD from the University of California, Berkeley, an MPhil from the University of Cambridge, and a BA from Harvard University.

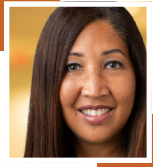


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Former federal prosecutor Kalia Coleman is an experienced investigator and trial lawyer who represents clients in white collar and corporate investigations and commercial dispute litigation. During her six-year tenure as a federal prosecutor, she led complex and high-stakes criminal investigations involving a broad range of issues, including public corruption, extortion, mortgage fraud, mail, wire and bank fraud, aggravated identity theft, money laundering, and Racketeer Influenced and Corrupt Organizations (RICO) Act violations. While serving in the U.S. Attorney's Office for the Northern District of Illinois, most recently as deputy chief of the General Crimes Division, Kalia led trial teams through multiple federal jury trials, briefed and argued multiple appeals before the U.S. Court of Appeals for the Seventh Circuit, and supervised other Assistant U.S. Attorneys in handling investigations and prosecutions around narcotics and money laundering, racketeering, bank robbery, and various white collar fraud issues. Before joining the U.S. Attorney's Office, Kalia was an Assistant State's Attorney for the Cook County State's Attorney's Office where she litigated over 100 bench trials and numerous jury trials.

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Maria B. Earley is a financial services regulatory and enforcement partner in the Washington D.C. office of Morrison & Foerster. Maria is a former Consumer Financial Protection Bureau (CFPB) enforcement attorney with significant experience advising on issues related to consumer protection laws and emerging technology. She advises financial services and fintech companies with respect to product development, regulatory compliance, state and U.S. federal enforcement and examination, state licensing, and transactional matters. Maria works with early- and growth-stage startups as well as large incumbents, providing strategic, business-focused support and often serving as outside general counsel. Her advice spans a range of loan products, bank-enabled products, payments, income share agreements (ISA) and other alternative financing arrangements, and mortgage technology. She represents companies that touch all aspects of these products, including marketplace lending participants, ISA providers, program managers and investors, money transmitters, credit-reporting agencies, and numerous platform service providers. Maria has handled numerous matters involving federal and state regulators, including the CFPB, several state attorneys general, the California Department of Financial Protection and Innovation (CA DFPI) and other state regulatory agencies, the FTC, OCC, and FDIC.

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Milton Marquis is a partner in the State Attorneys General (AG) Group at Cozen O'Connor. He represents Fortune 50 companies in a range of industry sectors—including pharmaceuticals, hospitality, automotive, telecommunications, and technology—in connection with investigations and litigation by state AGs and other enforcement agencies, including the FTC and U.S. DOJ, across the United States. His first objective is to help companies avoid attracting enforcement agency attention. However, should an organization become the target of an investigation, he uses his many years of experience to guide clients toward achieving the best possible outcome, while minimizing interruption to their business, cost, and reputational damage. Prior to joining Cozen O'Connor, Milton was senior counsel to the Assistant Attorney General for Antitrust, U.S. DOJ, where he served as the Antitrust Division's first liaison to state attorneys general. Milton also served as a litigator in the offices of the attorneys general of Massachusetts and Virginia. Milton is a member of Cozen O'Connor's board of directors and long-time member of the National Bar Association. He serves on the Advisory Board of the American Antitrust Institute and is a trustee of Case Western Reserve University. Milton has a B.A. from the University of Georgia and a J.D. from Case Western Reserve University School of Law.

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