

# State Attorneys General Fight Financial Fraud

By the National Association of Attorneys General

*As the chief legal officers of the states, commonwealths and territories of the United States, attorneys general serve as counselors to state government agencies and legislatures, and as representatives of the public interest. A large group of new state attorneys general were sworn in at the beginning of 2011, following the November 2010 elections. This year will bring a continued effort to fight financial fraud but attorneys general now have expanded enforcement authority under a new federal law. The National Association of Attorneys General (NAAG) is also making a priority of providing the highest quality legal training for those in state government service.*

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## **New Attorneys General**

Twenty new attorneys general began work in 2011. That is an approximate 35 percent change in membership for the National Association of Attorneys General (NAAG), with a total of 56 state and territorial attorneys general.

Fourteen attorneys general were elected in the November 2010 elections and five were newly appointed by a governor, state legislature or mayor (Alaska, Hawaii, Wyoming, Maine and District of Columbia). Additionally, Pennsylvania Attorney General Tom Corbett won in his bid for governor, so at press time, he was to appoint an attorney general to complete the term through 2012.

Two other attorneys general won in their bid for governor, California's Jerry Brown and New York's Andrew Cuomo. A former attorney general, Brian Sandoval, was elected Nevada governor. Connecticut Attorney General Richard Blumenthal won a U.S. Senate seat, as did former New Hampshire Attorney General Kelly Ayotte.

Also of note, voters in the District of Columbia approved a November 2010 ballot initiative to make the D.C. Attorney General an elected position, starting with the 2014 election. However, it is not a done deal, as there is a required congressional review by both the U.S. House of Representatives and Senate of amendments to D.C.'s Home Rule Charter. At press time there was no indication yet by the 112th Congress as to how or when the issue would be addressed.

New or incumbent, the attorneys general will work collectively and individually on a wide range of legal and law enforcement issues. Antitrust, bankruptcy, civil rights, consumer protection, cyberspace law, energy and environment, Medicaid fraud, tobacco and Supreme Court cases remain constant in the workload. However, fighting financial fraud is a primary focus this year.

## **Fighting Financial Fraud**

State attorneys general have been in the forefront in protecting consumers from mortgage fraud, and fraud arising from the resulting economic downturn, including foreclosure rescue, mortgage modification, debt settlement, debt collection, and work-at-home schemes. In July 2010, state attorneys general gained expanded enforcement authority under the federal financial reform law [*Dodd-Frank Wall Street Reform and Consumer Protection Act*, P.L. 111-203]. Combine that with more substantive collaboration with other law enforcement agencies and attorneys general will continue to be leaders in protecting consumers from many types of financial fraud.

## **A Decade of Combating Predatory Lending Practices**

State attorneys general have been one of few law enforcers actively investigating predatory lending practices, and fraud targeted at vulnerable consumers. In the past decade, state attorneys general, individually and collectively, have taken numerous enforcement actions against lenders that misrepresented the terms of their loans, made loans without regard to consumers' ability to repay, made loans with deceptive "teaser" rates, or packed loans with undisclosed charges and fees. For example, state attorneys general, along with state banking and financial regulators reached a \$484 million settlement in 2002 with Household Finance that resolved allegations Household violated state laws by misrepresenting loan terms and failing to disclose material information to borrowers. Consumers had complained that Household charged far higher interest rates than promised, charged costly prepayment penalties, or deceived consumers about insurance policies. Four years later, state attorneys general reached a \$325 million settlement with

Ameriquest, after investigations revealed Ameriquest employees deceived consumers as part of high-pressure tactics to sell mortgage refinances. Additionally, state attorneys general alleged that the high-pressure sales tactics were used to reach desired sales levels and high monthly individual sales quotas. In 2008, state attorneys general reached an \$8.7 billion settlement with Countrywide, one of the nation's largest mortgage lenders and servicers. The settlement resolved allegations that Countrywide engaged in unfair and deceptive conduct by marketing and originating unnecessarily risky and costly mortgage loans to homeowners. Under the settlement, Countrywide must implement a mandatory loan modification program to provide immediate relief to homeowners who were put into the riskiest types of loans. Most recently, state attorneys general announced in October 2010 an investigation into banks' and servicers' foreclosure proceedings and whether faulty procedures were used to sign foreclosures.

In addition to these significant multistate actions, state attorneys general have been protecting their consumers from other types of financial fraud.<sup>1</sup> For example, the Illinois attorney general has brought lawsuits against more than 24 mortgage rescue fraud schemes and recovered more than \$1.8 million in restitution for homeowners. Florida, Missouri, New York, Texas, and other states have taken action against debt settlement companies that use monies paid by consumers to settle their debts for company fees and profits. Other attorneys general, including those in Colorado, Pennsylvania, and West Virginia, continue to be active in their investigations of illegal debt collection practices. Lastly, state attorneys general have worked with the Federal Trade Commission to announce numerous enforcement actions against individuals and companies that offer bogus work-from-home business opportunities.

### **An Era of Preemption**

Despite the successful enforcement efforts of the state attorneys general to address the deceptive and unfair practices by lenders and financial institutions, the Office of the Comptroller of the Currency (OCC) in 2003 invoked a clause from the National Bank Act to issue formal opinions preempting all state predatory lending laws. This bold move seemed to contradict the OCC's previous position, in accordance with the Supreme Court case of *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.* that

held that state laws can regulate national banks where doing so does not "prevent or significantly interfere with" a national bank's exercise of its powers. The OCC made another bold move by promulgating new rules that prevented states from enforcing any of their own consumer protection laws against national banks.

State attorneys general actively fought the OCC by issuing formal comments to the OCC opposing its preemptive rules; meeting with OCC representatives to discuss its preemption position; testifying before Congress on legislation aimed at restoring state authority against federally chartered national banks; and initiating various litigation strategies. Despite these efforts, the OCC's actions appeared to have a chilling effect on state predatory lending laws and state consumer protection efforts in this area. There was a reluctance to bring state action against national banks.

### **New Enforcement Authority**

In July 2010, the largest overhaul of financial-industry regulation known as the Dodd-Frank Wall Street Reform and Consumer Protection Act (The Act) was signed into law in an effort to prevent another collapse of the financial system. In addition to creating oversight for systemic risk posed by large, complex financial companies, products, and activities, the Act enhances the role of the states in the regulation of federally chartered institutions and clarifies federal preemption of state laws. It establishes a new framework for federal preemption of state consumer financial laws by curtailing the OCC's preemption authority. Under the bill, the OCC may preempt a state law only in accordance with *Barnett Bank*, on a case-by-case basis and on the basis of "substantial evidence." Furthermore, preemption authority is not granted for subsidiaries, affiliates or agents of national banks that are not national banks themselves, contrary to the Supreme Court's ruling in *Watters v. Wachovia Bank, N.A.*

The Act expands the role of state attorneys general and clarifies the June 2009 Supreme Court holding in *Cuomo v. Clearing House Association, L.L.C.* by stating that no provision of the National Bank Act relating to state visitorial authority may be construed so as to limit the authority of state attorneys general to bring action to enforce any applicable law against a national bank.

State attorneys general enjoy dual enforcement authority with the newly created Consumer Financial Protection Bureau (CFPB) and other entities

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and may bring civil actions against national banks and federal thrifts to enforce the regulations prescribed by the CFPB under Title X, but not to enforce Title X itself. State attorneys general may bring civil actions to enforce Title X or CFPB regulations with respect to any state-chartered entity. Any actions brought by state attorneys general may be brought in a federal court or state court in the attorney general's own state.

### Moving Forward

Many state attorneys general have already begun the process of developing relationships with the CFPB. NAAG President and North Carolina Attorney General Roy Cooper formed a Presidential Initiative Working Group to develop protocols and principles to formalize the working relationship between state attorneys general and the CFPB on its dual enforcement responsibilities. The working group is tasked with addressing data sharing, coordination of enforcement, and preemption. In addition, Attorney General Cooper will hold his NAAG Presidential Initiative Summit, titled "America's Financial Recovery: Protecting Consumers While We Rebuild" in April 2011. The summit will bring together representatives from the financial industry, academia, government, and consumer advocacy organizations to share perspectives on these issues and provide a forum for meaningful exchange.

State attorneys general will continue their vigorous enforcement efforts against many types of financial fraud that harm consumers, as well as our nation's economy. With the preservation of their roles in protecting consumers from financial fraud, enhanced enforcement authority, and active collaboration with other law enforcement agencies, state attorneys general will continue to lead and make significant contributions in this vitally important area.

### Legal Training

NAAG is also making a priority of providing the highest quality legal training for those in state government service. State budget cuts mean funding for continuing legal education and training for lawyers working in attorneys general offices is extremely limited or nonexistent.

The National Attorneys General Training and Research Institute (NAGTRI) is NAAG's research and training arm. NAGTRI offers between 25–30 national programs annually providing high-quality, responsive and innovative legal training to assistant attorneys general across the country. In the

two years since it launched, NAGTRI has trained approximately 6,200 assistant attorneys general in important legal topics such as charities fraud, e-discovery, computer forensics for attorneys, predatory lending, ethics, bankruptcy, trial advocacy, depositions, negotiations and management, among others. NAGTRI provides full scholarships, including all travel and lodging costs, for all participants. The states have also recognized NAGTRI trainings as satisfying continuing legal education (CLE) credits.

NAGTRI also organizes, on request, "mobile training teams" to conduct training at attorneys general offices at no cost to individual states. These programs offer a cost effective and direct approach by providing training onsite. Approximately 25–30 mobile-based programs are offered each year. Faculty for these programs includes some of the nation's preeminent experts in various legal fields.

NAGTRI has also leveraged other approaches to maximize its reach. Intellectual property theft training is underway in partnership with the National White Collar Crime Center and funding from the Bureau of Justice Assistance (BJA). BJA is also funding a NAGTRI course this year for prosecutors and judges on human trafficking issues in cooperation with the Upper Midwest Community Policing Institute and the National Judicial College. NAGTRI offers "train the trainer" courses where assistant attorneys general are supplied with the expertise and materials necessary to return to their states and train others.

NAGTRI provides training through a number of different methods including the use of intensive, practical and hands-on "learning by doing" method and through seminar/lecture formats. NAGTRI sponsors the best, brightest and most experienced assistant attorneys general from around the country to serve as faculty.

Lastly, NAGTRI is further developing its website, <http://www.naag.org/nagtri-courses.php>, so that all training materials, and all videotaped courses are available online, eventually providing an extensive research library.

### International Training

NAGTRI has an international component, started in 2009 but expanding in 2011. In April 2009, NAGTRI trained 26 Mexican prosecutors in oral trial advocacy as Mexico switches to an adversarial system similar to the U.S. courts. It was done in conjunction with the U.S.-Mexico State Alliance Partnership and funded by the U.S. Agency for International Development.

In June 2010, a memorandum of understanding (MOU) was signed between NAAG and the Iraq Jurists Union (IJU). The IJU is an organization that represents Iraqi government attorneys, including judges, prosecutors and attorney general equivalents. The goals of the MOU include the provision by NAAG of training and technical assistance to the IJU, as well as the exchange of personnel and ideas. It is the U.S. justice system that Iraq has chosen as a model as it rebuilds its legal system.

To begin the Iraqi training, as well as involve other international partners of NAAG, NAGTRI will hold an international fellowship program this year with representatives from at least nine different countries.

### Conclusion

Virtually every issue in today's complex society has a legal component, and articulation of this perspective falls within the scope of the attorneys general responsibilities. Through their actions, and on a daily basis, they play a critical role in the preservation of the rule of law and in protecting the citizens they are sworn to serve. The attorneys general and the men and women who work in their offices are dedicated public servants making important contributions to state government.

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### Notes

<sup>1</sup>It would be nearly impossible to capture every state attorney general's initiative. The purpose of this section is to provide a sampling of state initiatives. It is neither exhaustive nor all-inclusive.

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### About the National Association of Attorneys General

The **National Association of Attorneys General** (NAAG), [www.naag.org](http://www.naag.org), was founded in 1907 to help attorneys general fulfill the responsibilities of their office and to assist in the delivery of high quality legal services to the states and territorial jurisdictions.

The association provides a forum for the exchange of views and experiences on priority issues, fosters interstate cooperation on legal and law enforcement issues, conducts policy research and analysis of issues, improves the quality of legal services provided to the states and territories, and facilitates communication between its members and all levels of government. The association's members are the attorneys general of the 50 states and Washington, D.C., and the chief legal officers of the commonwealths of Puerto Rico (secretary of justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam and the U.S. Virgin Islands.

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