

August 2009

Federal

Pending Legislation

Financial Services Reform & the Consumer Financial Protection Agency Act

On June 17th, the Obama Administration sent legislative language to the Congress for the Consumer Financial Protection Agency Act of 2009 (“the CFPA Act”). The language was accompanied by a Treasury Department press release containing statements by both President Obama and Secretary Geithner. This personal, very hands-on approach is unusual for the Obama Administration and in contrast to other matters of major importance, e.g., the emergency economic stimulus bill, the energy “cap and trade” bill, the health care reform legislation. In each of these cases, the President and his Administration have allowed the process of bill drafting to occur within the Congress. However, for the restructuring of federal regulation of financial services, the Administration is sending Congress already-drafted legislative language. The Administration’s proposal fill 13 titles of a very large bill, links to most of which can be found at the Treasury Department’s website at <http://www.ustreas.gov/initiatives/regulatoryreform/>. The CFPA Act is Title X of this package, and is the only title so directly and personally endorsed by the President.

On July 8, Financial Services Committee Chairman Barney Frank (D-MA) introduced the Administration’s CFPA Act language as a bill in the House of Representatives (H.R. 3126). The bill has only a few minor differences from the Administration’s language, relating primarily to the Community Reinvestment Act. Chairman Frank at the time announced his intention of marking the bill up and reporting it out of his Committee by July 31. However, the legislation’s extremely broad scope and numerous practical implementation difficulties generated considerable questioning by the business community, other federal regulators, and Members of Congress (including many Democrats). In late July, Chairman Frank amended his original commitment to a July mark-up, saying instead that his Committee would take up the bill in early September, upon their return from the August recess.

On August 4, in the Senate, Chairman Christopher Dodd’s (D-CT) Committee on Banking, Housing and Urban Affairs held a hearing entitled “Strengthening and Streamlining Prudential Bank Supervision”—another dimension of the financial regulatory reforms package. It was

clear from that hearing that there are many open issues in the entire package and also, specifically, within the CFPA Act.

Among the CFPA issues, first and foremost is the question of whether the creation of a consumer financial protection agency, separate from all the existing prudential regulators, represents sound policy. One senior individual who has expressed deep concerns with the concept is J. Thomas Rosch, Commissioner, Federal Trade Commission (“FTC”). In a July 16 letter to Rep. Spencer Bachus (R-AL), the Ranking Member of the House Financial Services Committee, Commissioner Rosch (a Republican) wrote:

“The proposal to create a brand new Executive Branch agency to protect consumers of financial products and service would replace the current flawed system with an even more fundamentally flawed system. ...As proposed, the new agency would have unlimited jurisdiction, yet the extent to which the new agency would be subject to Congressional oversight is completely unclear. The only thing about which the public can be certain is that creation of this new agency would result in considerable delay in protecting consumers, wasteful and inefficient consumer protection law enforcement, and very substantial (if still indeterminate) costs to taxpayers.”

Many others, including Paul Kanjorski (D-PA), the Chairman of the Subcommittee for Capital Markets, Insurance and the Government-Sponsored Enterprises, are calling to slow down the pace for more deliberation. Comptroller of the Currency John Dugan, for example, in his August 4 testimony before Senate Banking, expressed strong concerns over the proposed CFPA’s enforcement authority over national banks and with the erosion of national standards caused by the elimination of current preemptions in the CFPA Act. The American Bankers’ Association, in a July 2009 white paper of the CFPA Act, wrote:

“ABA supports filling gaps in the existing regulatory structure and strengthening the consumer protection mission of the prudential bank regulators. However, H.R. 3126 creates an enormous and unnecessary new federal bureaucracy that would harm the safety and soundness of insured depository institutions and would micro-manage the way consumer products and services are priced, developed, marketed, and delivered.”

There are many specific concerns regarding the CFPA Act itself. Here are just a few:

- Broad Rulemaking and Enforcement Authority. The new agency would have rulemaking and enforcement authority over the provision of financial products and services. Persons covered under the Act would be anyone engaged in provision of financial products and services and any person providing a material product or service to a covered person, in connection with the provision of such products or services.
- Duplicative (and potentially contradictory) Oversight. The sweep of the CFPA’s oversight would include consumer reporting but would subject TransUnion to “back up” enforcement authority by the FTC. In essence, TransUnion would have two federal regulators. Similarly, the national banks would continue to have the OCC as their prudential regulator, but would also be subject to enforcement and oversight by the CFPA for consumer laws.
- Definition of Standard Products. The new agency would be required to define standards for financial products and services and empowered to approve or disapprove variations from those standards. Product innovation would be greatly impeded.

- No Congressional Oversight. Although the new agency would be required to provide certain reports to Congress, there would be no annual appropriations review process to continue their funding. Instead the agency would be self-funding via the collection of an annual fee, or tax, upon all covered persons. The agency would decide the formula for calculating the fee.

The Administration hopes that Congress will pass the complete package of financial services reforms—the CFPB Act and the other 12 or 13 Titles—by the end of 2009. At present that timeline appears to be unrealistic. The many controversies over the CFPB Act are in some respects overshadowed by major concerns in other parts of the financial services package. Among these are the role of the Federal Reserve (systemic risk regulator vs. monetary policymaker), whether industrial loan corporations and other “non-bank” banks will continue to exist, and whether the FDIC should continue to have oversight for state banks or be reduced only to an insurer of deposits. Given the long road ahead on the health care and energy legislation—both of which are also expected (at least nominally) to be completed in 2009, it seems very likely that financial services reform will be pushed into 2010.

Cohen/Gutierrez-Use of Credit Reports for Employment Purposes

On July 28, Rep. Steve Cohen (D-TN) was joined by Rep. Luis Gutierrez (D-IL) in a press conference boosting the introduction (on July 9) of their bill H.R. 3149, the Equal Employment for All Act. This legislation would amend the Fair Credit Reporting Act (“FCRA”) prohibiting use of credit reports for employment purposes, except for four conditions:

- “(A) When the consumer applies for, or currently holds, employment that requires national security or FDIC clearance.
- (B) When the consumer applies for, or currently holds, employment with a State or local government agency which otherwise requires use of a consumer report.
- (C) When the consumer applies for, or currently holds, a supervisory, managerial, professional, or executive position at a financial institution.
- (D) When otherwise required by law.”

The bill has picked up 34 co-sponsors, and Rep. Gutierrez is Chairman of the Financial Services Committee’s Subcommittee for Financial Institutions and Consumer Credit. The weak economy and continued high unemployment lend urgency to the basic premise of the bill. If the bill begins to move we will look for ways to leave unaffected the many legitimate circumstances in which employers need to obtain credit reports.

Kilroy-Medical Collections

On July 30, Rep. Mary Jo Kilroy (D-OH) introduced H.R. 3421, the Medical Debt Relief Act of 2009. This bill amends FCRA to prohibit the inclusion of paid medical debts in consumer reports. It currently has 18 co-sponsors, including Financial Institutions and Consumer Credit Subcommittee Chairman Gutierrez.

Our concern with this bill is more one of principal than practical effect. That is, some of the newer scoring models, including VantageScore, do not reference paid medical collections. Thus it is difficult to estimate the negative effect that this bill will have on the predictive value of credit reporting databases. There will be some effect, but it may be relatively minor.

However, the principal at stake is one of arbitrary intervention in the performance of the credit reporting system. For at least some models, a paid medical collection account continues to have some relevance. In some cases, a paid medical collection may even have a benign effect—if, for example, it is the only entry on the credit report and thus can support individual authentication inquiries; or if the purpose of the inquiry was to confirm that medical debts were indeed paid. So while most agree that the healthcare payments system in the United States has room for improvement, and that healthcare providers are apparently making greater use of collection agencies during the present recession, it is our view that the negatives in this bill outweigh whatever positive effect its well-meaning sponsors expect.

Rulemaking & Studies

Final Rule on Accuracy Guidelines & Direct Disputes

On July 1, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration and the FTC (“the Agencies”) published two Final Rules required by the 2003 FACT Act amendments to FCRA. FCRA Section 623(e)(1)(A) requires the Agencies to issue guidelines concerning the accuracy and integrity of information provided to consumer reporting agencies (“CRAs”) and regulations requiring furnishers of such information to adopt reasonable policies and procedures for implementing the guidelines. FCRA Section 623(a)(8) requires the Agencies to prescribe regulations identifying the circumstances under which furnishers is required to reinvestigate a dispute concerning the accuracy of information in a consumer report on a consumer, when that request is conveyed directly to the furnisher by the consumer. The effective date of both Final Rules is July 1, 2010. The FTC’s July 1 press release, with links to the *Federal Register* posting, is at <http://www.ftc.gov/opa/2009/07/facta.shtm>

FTC Extension to Nov 1, 2009 of Red Flag Compliance Date

In a July 29 announcement, the FTC stated it would redouble its efforts to educate small businesses, health care providers, and other entities falling within the FCRA’s definition of “creditor” and thus having a compliance obligation under the Red Flag identity theft rule. In connection with this renewed effort, and at the request of the House Appropriations Committee, the FTC issued its third extension of the compliance deadline for the Red Flag guidelines to entities under its jurisdiction to November 1, 2009. The original compliance deadline of November 1, 2008 remains in effect for banks and other financial institutions not under the FTC’s jurisdiction. The FTC’s announcement, with links to related materials, is at <http://www.ftc.gov/opa/2009/07/redflag.shtm>

FTC’s Request for Comment on Plans for Accuracy Study

On July 20, the FTC published in *the Federal Register* a request for public comment concerning its plans to conduct a national study of the accuracy of consumer reports. Section 319 of the FACT Act requires the FTC to provide Congress with a series of biennial reports over an eleven-year period. The first report, issued in December 2004, described the intended methodology, generally based on direct consumer interviews. The second and third reports, issued respectively in December 2006 and December 2008, described the results of pilot studies. This will therefore be the first full study, with the report expected in December 2010. Comments are due September 18. TransUnion is working with our trade association, CDIA, on an industry response to the FTC’s request.

States

With tremendous budget issues taking up much of state's agendas, credit reporting laws in general have taken a backseat to in the states this year to issues that are straining the states coffers, including health care, transportation, and taxes. However, states continue to address how the recession has impacted credit reports, especially relating to consumer's ability to get employment and essential insurance products when their credit report has been adversely impacted because of job loss or other extraordinary life circumstance.

North Carolina Omnibus Identity Theft Bill Enacted

Governor Bev Perdue on July 27 signed into law Senate Bill 1017, amending the security freeze and breach notice laws originally enacted in 2004 and adding a new provision that affects credit monitoring. Sponsored by Senator Josh Stein, a freshman who previously worked at the North Carolina Attorney General's Office, and promoted by the current Attorney General's Office, it is effective October 1, 2009. This law sets a few precedents, first in Section One, when a consumer reporting agency freezes the consumer's credit file, it must provide a notice to the consumer who made the request for the freeze, informing them that the freeze only pertains to that CRA's credit file, and provide to the consumer the information the website, phone number, and postal address of the other nationwide CRAs, in which to place a freeze. The law also requires that in the notice we provide contact information for the North Carolina Attorney General. Secondly, it sets up a regime in which a parent or guardian of a minor residing in North Carolina may upon appropriate proof of identity and proof of their relationship to the minor, inquire of a nationwide CRA, as to the existence of a credit report for the minor of the parent or guardian. If a credit report for the minor exists, the nationwide consumer reporting agency shall make reasonable efforts to prevent providing a credit report on the minor until the minor reaches the age of majority. However, if a credit report for the minor does not exist, the nationwide CRA has no obligation to create one. Third, the law allows consumers who place their freeze electronically, as well ID theft victims and their spouses, and those sixty-two years of age and older, to do so for no charge.

Section Two adds that security breach notices to consumers must now include the toll-free numbers and addresses for the major CRAs, and the toll-free numbers, addresses, and Web site addresses for the FTC and the North Carolina Attorney General's Office, along with a statement that the individual can obtain information from these sources about preventing identity theft. It also adds that in the event a business provides notice to an affected person pursuant to this section, the business shall notify without unreasonable delay the Consumer Protection Division of the Attorney General's Office of the nature of the breach, the number of consumers affected by the breach, steps taken to investigate the breach, steps taken to prevent a similar breach in the future, and information regarding the timing, distribution, and content of the notice.

Section Seven, for the first time in state law, defines a credit monitoring service and requires that anyone providing a credit monitoring service, before collecting a fee or compensation for the service, shall provide a clear and conspicuous written description of a consumer's right to one free credit report per year pursuant to section 612(a) [15 U.S.C. § 1681j(a)] of the federal Fair Credit Reporting Act, and how to obtain those credit reports from each of the nationwide consumer reporting agencies.

Employment Screening

Hawaii House Bill 31 Enacted

Although Governor Linda Lingle wisely vetoed this bill, the heavily Democrat-controlled legislature overrode the veto in a largely partisan split. House Bill 31 creates a new restriction on Hawaii employers; preventing them from hiring, employing, “or changing the terms, conditions, or privileges of employment of any individual because of [that] individual's credit history or credit report, unless the information in the individual's credit history or credit report directly relates to a bona fide occupational requirement. This new law has the potential to jeopardize public health, safety, and financial security of Hawaii businesses. Checking the credit history of an employee or potential employee is critical for many employers, many of whom own and manage their own small businesses. This credit review may be a necessary safety check for employers and small business owners to want to keep themselves, their businesses, their other employees, and their customers safe and secure. Unfortunately, the law's few exemptions for managerial or supervisory employees are very limited and are insufficient to protect many public safety situations.

California Assembly Bill 943 Advances

Current California law allows for the procurement and use of credit reports for employment purposes if, prior to requesting a consumer credit report, an employer provides a written notice stating the source of the information and how it will be used, provides a copy of the credit report to the consumer, if desired, and if an adverse employment action is taken against a person due to the information contained in a credit report, the user must provide the name and contact information for the CRA to the consumer. However AB 943 would prohibit employers from using credit reports for employment purposes unless the information is “substantially job related,” as defined, including positions that handle cash, other assets, or personal information, and at least one of the following conditions: managerial, municipal, sworn peace officer or other law enforcement, or as otherwise required by law. Although we expect the bill to pass this year, we also expect Governor Schwarzenegger to veto it as he has done previously.

Connecticut Background Check Bills Stopped

After a tough fight in the legislature we were able to stop Senate Bill 733 and House Bill 5521 from passing before the legislature adjourned on June 3rd. HB 5521 would have banned the use of credit reports in employment decisions and SB 733 imposed civil liability on consumer reporting agencies for “improper” reporting of criminal records. We expect the issues to be back next year in Connecticut.

Massachusetts Vets Numerous Background Check Bills

With the belief that the existence of a criminal record should not be an automatic and permanent disqualification for employment, that more than 750,000 criminal records are eligible for immediate sealing under the current laws of the Commonwealth, that many employers and landlords are currently paying private vendors to obtain criminal records, rather than obtaining such records from the official state repository, and are therefore not subject to existing state regulations giving the subject of the record check the right to challenge the accuracy and relevancy of the record, and that gainful employment for rehabilitated offenders reduces recidivism and 16 increases the likelihood of successful re-integration into society, Massachusetts legislators have introduced a package of bills limiting use of background checks. It is too early in the session to know how SB 1068, HB 1440, 3517, 3534 or 4107 will fare, but we are engaged nonetheless.

Insurance Scoring

The National Conference of Insurance Legislators (NCOIL) Model Act was amended last month and adopted by a vote of 14-1 and referred to the full membership in New Orleans. It is likely to be approved by the full association later this year. As background, the model act was adopted in 2002 and a drafting note was added in 2005 to account for extraordinary life events. The new amendment would take the drafting note and move it, with expansion, to the body of the model act. Notwithstanding any other law or regulation, this model law provides that an insurer that uses credit information shall, on written request from an applicant for insurance coverage or an insured, provide reasonable exceptions to the insurer's rates, rating classifications, company or tier placement, or underwriting rules or guidelines for a consumer who has experienced and whose credit information has been directly influenced by catastrophic event, as declared by the federal or state government, serious illness or injury, or serious illness or injury to an immediate family member, death of a spouse, child, or parent, divorce or involuntary interruption of legally-owed alimony or support payments, identity theft, temporary loss of employment for a period of 3 months or more, if it results from involuntary termination, military deployment overseas, and other events, as determined by the insurer.

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