Another active week for CFPB watchers. This past week included the growing fallout from the Noel Canning v. NLRB (D.C. Cir. Jan. 25, 2013), which continues to snowball, the filing of a bill by Senator Merkley targeted at the payday industry, an FTC report and commentary on the debt buying industry, Raj Date’s last day on the job and the appointment of his temporary successor.

January 29, 2013

Payday Online Industry Be On Alert

Four U.S. Senators, Jeff Merkley (D-OR), Tom Udall (D-NM), Dick Durbin (D-IL) and Richard Blumenthal (D-CT), introduced the Stopping Abuse and Fraud in Electronic (SAFE) Lending Act. This bill is basically identical to the bill offered last year by Senators Merkly, Udall and Blumenthal. So while its filing was not a surprise, the industry was given little notice of its timing. The stated purpose of this bill according to the Senators’ press release is to “crack down on the worst practices of the online lending industry and give states more power to protect consumers from predatory loans.” However, the press release includes some significantly more telling and harsh words for the industry, including this quote from Senator Blumenthal: “Too often these lenders saddle vulnerable families with debt - creating a vicious cycle that makes them more vulnerable. This bill will protect consumers from this predatory industry.”

The Senators’ summary of the bill identifies four main provisions, which follow:

- Ensures That Consumers have Control of their own Bank Accounts
  - Ensures that a third party doesn’t gain control of a consumer’s account through remotely created checks (RCCs), which are checks from a consumer’s bank account created by third parties. To prevent unauthorized RCCs, consumers will be able to preauthorize exactly who can create an RCC on his/her behalf (such as when traveling).
  - Allows consumers to cancel a debit (just like they can cancel a check) in connection with a small-dollar (payday) loan. This would prevent an Internet payday lender from stripping a checking account without a consumer being able to stop it.

- Closes Loopholes and Creates a Level Playing Field In State Usury Law Enforcement
  - Requires all lenders, including banks, to abide by state rules for the small-dollar, payday-like loans they may offer customers in a state. Only states, not the federal government, have laws to prevent 400% APR loans.

- Bans Lead Generators and Anonymous Payday Lending
  - Some websites describe themselves as payday lenders but are actually “lead generators” that collect applications and auction them to payday lenders and others. This practice is rife with abuse and has even led to fraudulent debt collection.
  - The SAFE Lending Act bans lead generators and anonymously registered websites in payday lending.

- Stops Offshore and Other Illegal Online Payday Lending in Violation of State Law
  - Gives the Consumer Financial Protection Bureau authority on its own behalf and upon petition by state Attorneys General or their local regulators to shut down payment processing for lenders that are violating State and other consumer lending laws through the Internet.
  - Carefully constructed not to negatively impact the Internet.

It is understood that much like last year’s bill, the current bill does not have any Republican sponsors at this time. It is anticipated the bill will be moved through the Senate Banking Committee, which may prove difficult.

Quote of the Week
“Today’s letter reaffirms a commitment by 43 Senators to fix the poorly thought structure of this agency [the CFPB] that has unprecedented reach and control over individual consumer decisions - but an unprecedented lack of oversight and accountability.”

-- Senator McConnell, “Senate Republicans renew blockade of Obama’s Consumer Bureau pick,”


**Has there been a Lack of Punishment?**

The National Mortgage News posted an article dated January 29, 2013 titled, “What We’re Hearing: Crime and Lack of Punishment,” which reported that “makers of a PBS documentary believe that regulatory officials should have done more to find executives involved in the massive mortgage-related securities losses taken during the downturn that they could successfully levy criminal charges against.”² It was noted that one of the more disturbing points in the documentary is the “systemic” nature of the “problem.” As it was reported, one of the regulatory officials grilled for the documentary, noted that “the ramifications of taking a sweeping enforcement action that could jeopardize a large financial system are enough to keep you awake at night.” The reporter commented that regulators should put a focus on preventing future financial crimes and reform the system through consultation with the industry.³

**January 30, 2013**

**“FTC Study Shines Light on the Debt Buying Industry”**

The FTC released on this day an empirical study started in 2009 - before the creation of the CFPB - focused on the debt buying industry, in particular those in the business of buying consumer debts and then collecting on them.⁴ And while this is a FTC study, those falling under the CFPB’s supervisory and/or enforcement jurisdiction, such as banks involved in selling the debt and those involved in buying and collecting on the debts, should be on heightened notice. Thomas Pahl, the assistant director for the FTC’s Bureau of Consumer Protection was quoted as saying, “[T]he CFPB is very interested and [sic] debt collection and debt buying issues, and it is really well designed to tackle this kind of problem... A couple of folks over there are former members of the industry, and really the idea is that we intend to keep pursuing this.”⁵

The report itself, which analyzed more than 5,000 portfolios of consumer debt of nearly 90 million consumer accounts with a face value of $143 billion, with debts ranging from medical to utility, but the majority being credit card debt, was critical of the creditors and the documentation they provided to the debt buyers.⁶ In addition, the FTC’s press release noted other “significant consumer protection concerns” raised by debt buying. One such concern was debt verification. To this point the FTC stated, “Debt buyers verified only about half of the disputed debts, which means that buyers either could not verify or did not attempt to verify about 500,000 debts each year.”

**January 31, 2013**

**Republicans Draw the Battle Line on the Director’s Nomination**

Three U.S. Senators, Johanns (R-NE), Alexander (R-TN) and Cornyn (R-TX), introduced a bill that in essence does two things. First, if passed, it will block funding to the National Labor Relations Board (NLRB), to the extent the funds would be used by the NLRB to undertake or enforce any decisions that required a quorum of its board members. Second, the bill would block any further funding to the CFPB from the Federal Reserve Board to the extent those funds would be used to carry out any actions that require approval of a director, until the time that there is a confirmation of a Director of the CFPB. Further, the bill contains a self-termination clause, e.g., it will terminate upon the confirmation of sufficient members to constitute a quorum at the NLRB and upon confirmation of a Director of the CFPB consistent with the advise and consent provisions of the Constitution.

**Date’s Departure and Antonakes’ Ascendency**

After two years, Raj Date, a key leader in the CFPB’s early days, is stepping down as Deputy Director of the CFPB. January 31, 2013 was his last day. Date came to the Bureau with a Wall Street background, having worked as a Managing Director at Deutsche Bank Securities, where he led the firm’s investment banking coverage of U.S. based banks and thrifts, and having worked at Capital One Financial. In his most recent private sector position, before being appointed as Special Advisor to the Treasury Secretary, a role which preceded his spot as Deputy Director of the CFPB, he ran a private non-profit research and policy organization that supported financial reform.⁷ He has not announced his post-CFPB plans.

In stark contrast to Date’s background, the new Acting Deputy Director, Steve Antonakes’ background includes two decades as a regulator in the financial services arena. His experience includes entry level bank examiner in Massachusetts, and Commissioner of Banks from 2003 to 2010. He also served as the first state voting member of the Federal Financial Institutions Examination Counsel. Per the CFPB’s January 31, 2013 press release, Antonakes will continue to hold his position as Associate Director for Supervision, Enforcement and Fair Lending.⁸
How the Bureau will be impacted by this change in days ahead remains to be seen.

**Spotlight on Students Expands**

The CFPB announced that it is “launching an inquiry into the impact of financial products marketed to students through colleges and universities.” In a blog piece by Rohit Chopra and Patrick Campbell of the CFPB, they wrote, “[W]e want to see if students are getting a good deal and what schools can do to help them through the process.” The CFPB published a Notice and Request for Information Regarding Financial Products Marketed to Students Enrolled in Institutions of Higher Education and is seeking comments by March 18, 2013.

**Debt Collector Shut Down**

A week ago we reported on the CFPB’s recent litigation focus on the debt relief industry in our Alert, *Debt Relief Industry Under the Spotlight as the CFPB Continues to Target What it Alleges are Loan Modification Scams.* Since that time, the FTC has also utilized its litigation authority to shut down a Houston based debt collection operation that it alleged was illegally using “insults, lies, and false threats to collect on payday loans.” A receiver has been appointed and the operation’s assets have been froze. The complaint alleges violations of the FTC Act and the Fair Debt Collection Practices Act. While this is a FTC action, the similarities to the CFPB’s recent actions and the focus on industries also supervised by the CFPB should raise some flags.

The CFPB has focused on oversight of third party service providers and holding companies responsible for the activities of third party service providers. Accordingly, a reminder that companies should oversee activities and compliance with law by their third party service providers. In particular, in view of this development, companies doing business with debt collectors should be especially vigilant and expect the CFPB to be looking at these service providers.

**February 1, 2013**

**The NLRB fallout continues**

The fallout from the *NLRB* decision continued with a letter to the President, signed by 43 Republican U.S. Senators advising, that regardless of party affiliation of a nominee, they will oppose any confirmation of a director to the CFPB until three key changes are made. These three demands, which mirror those laid out in an earlier letter to the President by the Republican U.S. Senators on May 2, 2011 include the following:

- Replace the single Director with a board to oversee the Bureau,
- Subject the Bureau to the Congressional appropriations process, and
- Establish a safety-and-soundness check for the prudential financial regulators who oversee the safety and soundness of financial institutions.

Simultaneous to the above, Senator Jerry Moran (R-KS), reintroduced legislation (S.205) that was first introduced in 2011, seeking to enact the three reforms outlined in the letter by the 43 Republican Senators to the President. Concerning the legislation, the commentary coming from The Hill is that the Democrats have dismissed these demands as an attempt to weaken the Bureau, and will refuse to consider the changes.

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3 Id.


6 See FNs 4 & 5.


12 Id.


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