

THE WASHINGTON REPORT

July 2014

It has been a slow month in Washington when it comes to background screening issues. As the month comes to a close, however, the Federal Trade Commission's (FTC) action against LabMD was the subject of renewed interest on Capitol Hill. The FTC alleges that LabMD violated Section 5 of the Federal Trade Commission Act as a result of lax security practices that resulted in the exposure of the patient information of more than 10,000 patients over a peer-to-peer network.

In last month's edition of the Washington Report, we noted that the administrative law judge handling the FTC's action against LabMD, suspended consideration of the case indefinitely following word that House Oversight and Government Reform Committee Chairman Darrell Issa (R-CA) was investigating Tiversa, the company that brought the LabMD case to the attention of the FTC. There have been allegations that Tiversa may have acted inappropriately such as by reporting data incidents to the FTC if the company that was allegedly the subject of a breach failed to pay Tiversa for its services.

On July 25, Chairman Issa, chaired a hearing by his committee titled, "The Federal Trade Commission and its Section 5 Authority: Prosecutor, Judge and Jury." Among the witnesses at the hearing was Michael Daugherty, LabMD's CEO, who recounted the events that led to the closure of LabMD due to the expense of fighting the FTC. Representatives of the FTC and Tiversa reportedly were not invited to attend the hearing. Chairman Issa was critical of the FTC, opining that the agency has not provided adequate notice of what steps a company must take to safeguard personal information, but will come in after a breach has occurred and demand a consent decree from companies that may have been victims themselves. The Committee's ranking member, Elijah Cummings (D-MD) argued in his opening statement that there is no legitimate debate over whether the FTC has the authority to bring data security cases.

On July 24th, the day before Chairman Issa's hearing on the matter, Senator Jay Rockefeller (D-WV), Chairman of the Senate Commerce Committee, sent a highly critical letter to Chairman Issa about what Chairman Rockefeller described as the "impropriety of [Chairman Issa's] ongoing interference with an administrative trial" and "using heavy-handed, bullying tactics to undermine due process and to inappropriately assist the Defendant, LabMD." Chairman Rockefeller defended the FTC and its authority to bring information security actions under Section 5 of the FTC Act.

Senator Rockefeller's letter also noted that Congress has repeatedly failed to pass information security legislation, making it necessary for the FTC to act using its authority under Section 5 of the FTC. The failure of Congress to act on a host of issues is an ongoing theme for the current Congress. As a result, while Chairman Issa was highly critical of the FTC's data security actions, it is unlikely that the full Congress would take any action to limit FTC authority if the Chairman were to make a proposal to do so.

Disclaimer: The *Washington Report* provides a general summary of recent legal and legislative developments and is for informational purposes only. It is not intended to be, and should not be relied upon as legal advice. For more information, please contact Kevin Coy at 202-677-4034.