

At the FTC.

It has been a busy month for the Federal Trade Commission (FTC).

First, on a personnel note, Terrell McSweeney's nomination as the fifth FTC Commissioner was approved by the Senate on April 9, by a 95-1 vote. Senator David Vitter (R-LA) was the sole vote against her confirmation. The Senate Commerce Committee had approved the nomination in November 2013. Ms. McSweeney was chief counsel for competition policy at the Justice Department's antitrust division prior to her confirmation. The FTC once again has a full slate of five sitting Commissioners, three Democrats and two Republicans.

Also on April 9th, FTC announced another pair of Fair Credit Reporting Act (FCRA) settlements with two screening companies, Instant Checkmate and InfoTrack, which allegedly provided reports for employment and tenant screening purposes without complying with FCRA requirements.

In the case of Instant Checkmate, the FTC alleged that the company offered online background screening services for any purpose, including advertising the checks for employment and tenant screening purposes. The FTC alleged that the Company failed to maintain "any" credentialing procedures required by FCRA § 607(a) or "any" reasonable procedures to ensure maximum possible accuracy as required by FCRA § 607(b). The FTC also alleged violations of the permissible purpose requirements of FCRA § 604 because the Company "regularly" furnished reports without knowing or employing procedures to know the purposes for which reports were being requested. The FTC further alleged that the Company failed to provide the CFPB-prepared summary of user obligations as required by FCRA § 607(d).

In the case of InfoTrack Information Systems, the FTC alleged that the Company provided consumer reports including criminal history information, without employing reasonable procedures to ensure the maximum possible accuracy in violation of FCRA § 607(b) or complying with the notice or strict procedures requirements of FCRA § 613. More specifically, the FTC alleged that the Company provided information from the national sex offender registry based on "possible matches" where there was a match solely between the first and last name of the applicant and an individual on the registry. For each "possible match" the Company allegedly would send the prospective employer a report with the name and photo of the individuals from the registry. The FTC also alleged that the Company failed to provide the CFPB-prepared summary of furnisher obligations and the summary of user obligations when required by FCRA §§ 607(d).

The court orders settling the cases imposed a fine of \$525,000 against Instant Checkmate and \$1 million against InfoTrack and its owner (with all but \$60,000 being suspended based on an inability to pay).

In addition, on April 11th, the FTC announced that it would hold a workshop on September 15th, “to further explore the use of ‘big data’ and its impact on American consumers, including low income and underserved consumers.” While employment and tenant screening are not referenced in the FTC’s announcement, there may be discussions of the reach of the FCRA given that some of the examples used in the FTC’s press release appear to tie into credit determinations, such as mortgage rates. The workshop, according to the FTC’s announcement, is expected to focus on the following issues:

- How are organizations using big data to categorize consumers?
- What benefits do consumers gain from these practices? Do these practices raise consumer protection concerns?
- What benefits do organizations gain from these practices? What are the social and economic impacts, both positive and negative, from the use of big data to categorize consumers?
- How do existing laws apply to such practices? Are there gaps in the legal framework?
- Are companies appropriately assessing the impact of big data practices on low income and underserved populations? Should additional measures be considered?

While *The Washington Report* does not usually focus on court decisions, we must also note that on April 7, the FTC scored an initial win in its data security litigation against Wyndham hotels. A federal judge in New Jersey held, without deciding the merits of the FTC’s underlying claims, that the FTC’s suit against Wyndham could proceed. The court rejected Wyndham’s arguments that the FTC lacked authority under Section 5 of the FTC Act to bring the suit. Wyndham was back in court on April 17th, seeking to immediately appeal the judge’s ruling to the Third Circuit Court of Appeals.

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