

## THE WASHINGTON REPORT

### August 2013

August is traditionally a slow month in Washington, as the Congress is in recess, the President spends time away from Washington and Federal agencies also often slow their pace a bit. This August is no exception, so this month's edition of *The Washington Report* will be relatively brief.

#### **On Capitol Hill**

Congress will not return to Washington until early next month. The Congressional Privacy Caucus announced, however, that Congresswoman Diana DeGette (D-CO) will be joining Congressman Joe Barton (R-TX) as co-chair of the bipartisan congressional privacy group. Rep. DeGette replaces longtime Privacy Caucus co-chair Ed Markey (D-MA), who recently was elected to the Senate to fill the seat vacated by John Kerry when he became Secretary of State.

#### **At the EEOC**

*The Washington Report* has focused considerable attention in recent months on Equal Employment Opportunity Commission (EEOC) complaints and conciliation agreements regarding the use of criminal history and credit information for employment purposes. This month, we report on a setback experienced by the EEOC in one such case, *EEOC v. Freeman*. On August 9<sup>th</sup>, a Federal District Court in Maryland threw out a disparate impact case that the EEOC brought against Freeman, a convention and events service provider. The EEOC had alleged in a 2009 complaint that Freeman's employment practices had a disparate impact on African Americans.

The Court found the EEOC's expert testimony in the case to be flawed and unreliable. The Court also faulted the EEOC for failing to identify a specific employment practice or practices of Freeman's that had a disparate impact and instead seeking to make a generalized allegation that Freeman's screening program had a disparate impact.

The Court was dismissive of the EEOC's approach to the case, opining: "The story of the present action has been that of a theory in support of facts to support it." The Court went on to opine that "By bringing actions of this nature, the EEOC has placed many employers in the 'Hobson's choice' of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers. Something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks." As *The Washington Report* goes to press, the EEOC has not yet indicated whether it will appeal the ruling.

## **At the FTC**

On August 15<sup>th</sup>, the Federal Trade Commission (FTC) announced a \$3.5 million settlement with Certegy Check Services, Inc. to resolve a variety of alleged Fair Credit Reporting Act (FCRA) violations by the check services company. The size of the settlement is a reminder that while the Consumer Financial Protection Bureau (CFPB) may be the flashy new kid on the block, the FTC continues to be a force to be reckoned with on FCRA compliance matters. More specifically, the FTC alleged that Certegy:

- Failed to comply with FCRA § 607(b)'s requirement to maintain reasonable procedures to ensure maximum possible accuracy by failing to adequately track and handle the resolution of consumer complaints resulting in the retention and continued reporting of inaccurate information;
- Failed to comply with various specific timing obligations when conducting reinvestigations required by FCRA § 611 and also impermissibly sought to shift burdens of conducting a reinvestigation to the consumer, such as requiring the consumer to contact a merchant-furnisher to resolve the dispute directly rather than conducting its own independent reinvestigation;
- Failed to comply with its obligations as a nationwide specialty consumer reporting agency under the Free Annual File Disclosure Rule, both by failing to provide file disclosures on a timely basis and failing to collect only as much personal information as is necessary to properly identify the consumer;
- Failed to establish and maintain reasonable written policies and procedures regarding accuracy and integrity of information under the Furnisher Rule for cases where Certegy was furnishing information to a consumer reporting agency.

The FTC's focus on the alleged violations of § 611 reinvestigation requirements is a reminder to all consumer reporting agencies that § 611 includes a host of discrete timing and other requirements, all of which must be complied with. Interestingly, however, the FTC used Certegy's alleged failure to handle reinvestigations correctly, not only as the basis for alleged § 611 violations, but also as the basis for alleged violations of § 607(b) because inaccurate information that should have been corrected during the reinvestigation process was not corrected and was then subsequently reported in future consumer reports.

The FTC has indicated that the Certegy case is the first time that it brought an action for an alleged violation of the Furnisher Rule. Unfortunately, the FTC's complaint provides little insight into the basis of this alleged violation. Similarly, the complaint provides little guidance about what information Certegy requested as part of its streamlined process that exceeded the requirement to collect only as much personal information as necessary to properly identify the consumer. Nevertheless, consumer reporting agencies that have a streamlined process for free annual file disclosures or furnish information to consumer reporting agencies should examine their practices in these areas, as well as other areas the FTC brought claims against Certegy.

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