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On Capitol Hill

When the Congress returns in September, there may be activity of interest on background screening issues—including a possible hearing on Fair Credit Reporting Act issues—but, in the meantime, Capitol Hill is quiet while Congress is on recess. Before heading out of town for the August recess/district work period, however, there were a two items of note:

On July 29th, House Financial Services Committee Chairman Jeb Hensarling (R-TX) and Senate Banking, Housing, and Urban Affairs Committee Ranking Member Mike Crapo (R-ID) sent a letter to Consumer Financial Protection Bureau (CFPB) Director Cordray about the Supreme Court's recent decision in *NLRB v. Canning*, which invalidated three National Labor Relations Board recess appointments President Obama made on the same day he also appointed CFPB Director Cordray by recess appointment (discussed in the June edition of the *Washington Report*). The letter questions "the outcome of decisions made by you during your 2012-2013 tenure at the CFPB" before the Director was confirmed by the Senate. The signatories also questioned the validity of Cordray's Federal Register notice of ratification of the actions Cordray took as CFPB Director during the time of his recess appointment. They requested by September 1st a full accounting of all CFPB actions during the recess appointment period that are not derived from Title X, Subtitle F of the Dodd-Frank Act, as well as all CFPB or outside counsel documents, communications, and analyses related to:

- The validity or standing of CFPB actions taken during the recess appointment that are not derived from Title X, Subtitle F;
- The CFPB's authority and Cordray's standing to ratify past actions; and
- The impact of *Canning* on the effective dates for all regulations that the CFPB issued during the recess appointment.

On July 31st, Rep. Spencer Bachus (R-AL) introduced a bill, H.R. 5320, which would amend the S.A.F.E. Mortgage Licensing Act of 2008 to expand state access to federal background checks for not only state-licensed loan originators, but also "other financial service providers, or related businesses."

At the CFPB

On August 20th, the CFPB announced that First Investors Financial Services Group, Inc. ("First Investors") had agreed to a Consent Order which imposes a $2.75 million civil monetary penalty on the Company and requires First Investors to fix computer system errors that transmitted inaccurate information to credit reporting agencies. First Investors makes and services auto loans primarily to subprime borrowers, and furnishes account information to credit reporting agencies under the Fair Credit Reporting Act.

The CFPB alleged that First Investors knew of the errors in its computer system, which it purchased from a vendor, and notified the vendor but, "did not make sufficient efforts to fix the errors." The CFPB alleged that First Investors violated the FCRA's Furnisher Rule because of the recurring erroneous reporting as well as the Consumer Financial Protection Act's prohibition on deceptive practices because of a statement on First Investors' website about its FCRA compliance.

In a statement, CFPB Director Richard Cordray warned that, "Companies cannot pass the buck by blaming a computer system or vendor for their mistakes." The CFPB alleged that, over a period of at least three years, First Investors provided inaccurate information on consumer payments, distorted dates of delinquency, inflated numbers of delinquencies, and mischaracterized voluntary vehicle surrenders and repossessions. In addition to the civil monetary penalty and improvements to its computer systems, the Consent Order requires First Investors to identify and correct errors on affected consumers' credit reports, help consumers obtain free copies of their credit reports, and establish appropriate safeguards. The CFPB stated that the errors affected potentially tens of thousands of consumers, but did not state any specific consumer injury.

The case is another example of increased regulatory attention to compliance with the FCRA Furnisher Rule, which could have an impact on furnishers to employment and tenant screening consumer reporting agencies, as well as the furnishers to the credit reporting agencies and other consumer reporting agencies. The case also underscores the increased scrutiny of service provider relationships, which could be applied to any service provider scenario, not just situations where furnishers use service providers for support services.

At the EEOC

It has been a slow month at the Equal Employment Opportunity Commission (EEOC) on background screening matters, but the EEOC's litigation against Dollar General over that company's screening practices—which the EEOC has alleged have a disparate impact on African-Americans—continues. On July 29th, a Federal District Court in Illinois ordered Dollar General to produce an additional four years of hiring records (covering the period 2004-2008) and explain to the EEOC the "purported business necessity" for performing criminal background checks on job applicants. Dollar General unsuccessfully sought to limit its production to post-2008 data. The Court also declined to shift the cost of the production from Dollar General to the EEOC. EEOC v. Dolgencorp, LLC d/b/a Dollar General, No. 2013-cv-04307 (N.D. Ill. July 29, 2014).

At the FTC

The FTC's data security litigation against Wyndham and LabMD continues to grind along.

In the Wyndham case, discovery continues while the parties wait for the Third Circuit Court of Appeals to hear Wyndham's interlocutory appeal challenging the FTC's authority to bring the case under Section 5 of the FTC Act. Wyndham has asked the trial court to require the FTC to identify the factual basis for the Commission's claim—as part of its unfairness allegations—that the Wyndham breach caused substantial and unavoidable consumer harm. Wyndham also is seeking additional information that the FTC apparently has refused to provide during discovery, such as the names of consumers allegedly injured as a result of the Wyndham breach.

Last month's edition of the *Washington Report* covered congressional attention to the LabMD case. On August 20th, there was a new development, with the 11th Circuit Court of Appeals announcing that it would schedule oral arguments in LabMD's suit against the FTC. LabMD is trying to stop the FTC's administrative action against the company for alleged data security violations, which is currently on hold because of the congressional inquiry into the matter. The 11th Circuit had declined to hear the appeal on an expedited basis in May—after the District Court declined to intervene in the ongoing administrative action---but LabMD and the FTC have since filed their briefs in the case. The date for oral arguments has not yet been set.