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On Capitol Hill

On August 19th, House Oversight and Government Reform Committee Chairman Jason Chaffetz (R-UT) sent a letter to the Office of Personnel Management (OPM) requesting the agency to turn over documents related to its recently reported data breaches affecting up to 22 million current and former federal employees' personal information. In the letter, Chaffetz expressed his concern over the "numerous questions about OPM's response to the breaches and the agency's overall information system security and incident response measures." As a result, Chaffetz requested that OPM produce security documents describing the agency's information technology systems, the agency's cybersecurity policies and practices, and all communications relating to the data breaches. Chaffetz requested production of the documents by September 2nd.

On August 5th, Senator Elizabeth Warren (D-MA) introduced S. 1981, the Equal Employment for All Act of 2015. The bill would amend the Fair Credit Reporting Act (FCRA) to restrict the use of information bearing on creditworthiness, credit standing, or credit capacity for employment purposes or employment adverse actions. Under the bill, "a person, including a prospective employer or current employer, may not use a consumer report or investigative consumer report, or cause a consumer report or investigative consumer report to be procured, with respect to any consumer where any information contained in the report bears on creditworthiness, credit standing, or credit capacity of the consumer" for employment purposes or for making an employment adverse action. The only exceptions to the prohibition would be when the consumer applies for, or currently holds, employment that requires national security clearance; or when otherwise required by law. The bill has been referred to the Senate Committee on Health, Education, Labor, and Pensions.

On July 30th, the Senate Appropriations Committee reported out a bill (S. 1910), the Financial Services and General Government Appropriations Act of 2016, which includes a provision (Section 999F(p)) which would make a series of technical amendments to the FCRA. The bill awaits action by the full Senate.

At the EEOC

On August 24th, the Equal Employment Opportunity Commission (EEOC) announced that Target agreed to pay $2.8 million dollars to settle EEOC allegations that three employment assessments formerly used by Target "disproportionately screened out applicants for exempt-level professional positions based on race and sex." According to the EEOC the tests were not sufficiently "job-related and consistent with business necessity" and, therefore violated Title VII of the Civil Rights Act of 1964. In addition, the EEOC alleged that one of the assessments, which was performed by psychologists on behalf of Target, was a pre-employment medical examination that was given prior to the offer of a conditional offer of employment, in violation of the Americans with Disabilities Act. Target reportedly had discontinued use of the tests prior to the settlement. The EEOC plans to divide the settlement amount "thousands" of individuals the EEOC believes were adversely affected by the tests. The EEOC did not release additional details regarding the tests the agency found objectionable, but screeners would be well advised to assess any pre-employment testing offerings for compliance.

On July 28th, President Obama nominated Victoria Lipnic, a former Seyfarth Shaw LLP attorney and former assistant secretary of labor, to serve another term as a commissioner at the EEOC. Lipnic has served as commissioner at the EEOC since December 2010, when she was confirmed by the Senate after receiving a recess appointment from President Obama in March 2010. In a statement following the president's nomination, Lipnic said, "I am humbled and honored that the president has elected to nominate me for a second term as an EEOC Commissioner. I hope that my nomination is confirmed by the Senate, so that I may continue to do the important work of protecting the civil rights of America's workers."

At the Office of Personnel Management

On August 19th, the Justice Department announced that U.S. Investigations Services (USIS) and its parent company, Altegrity, had agreed to settle allegations that USIS had violated the False Claims Act (FCA) in connection with conduct involving USIS's former background screening contract with the Office of Personnel Management (OPM). According to the Justice Department, the companies agreed to forego the right to collect at least $30 million in payments that USIS claimed it was owed by OPM in exchange for a release from FCA liability. The government had alleged that from at least March 2008 until at least September 2012, USIS "deliberately circumvented contractually required quality reviews of completed background investigations in order to increase the company's revenues and profits", by releasing cases to OPM and representing them as having been completed when, in fact, all of the quality reviews had not been completed. In the settlement announcement, the head of the Justice Department's Civil Division is quoted as saying "Shortcuts taken by any company that we have entrusted to conduct background investigations of future and current federal employees are unacceptable."

At the FTC

On August 17th, FTC Commissioner Joshua Wright announced his resignation as FTC Commissioner, effective August 24th. He intends to return to his prior position at George Mason University School of Law as a Professor and as Director of the Global Antitrust Institute at the Law and Economics Center. Commissioner Wright, a Republican, had served as a Commissioner since January 2013. President Obama has not yet announced a nominee to serve the remainder of Commissioner Wright's term, which does not expire until September 2019.

On August 24th, the Third Circuit upheld a federal district court's decision allowing the FTC to pursue its case against Wyndham Worldwide Corp. (Wyndham) over the company's data security practices, ruling that the FTC has authority to regulate cybersecurity. The FTC's lawsuit against Wyndham was filed after three data breaches the company suffered in 2008 and 2009, resulting in hundreds of thousands of consumers' personal and financial information being compromised, according to the opinion. According to the FTC, Wyndham failed to safeguard consumers' personal information with proper data security policies and practices. Wyndham argued that the FTC has no authority to regulate a business' data security practices. However, the Third Circuit rejected Wyndham's argument, stating that Wyndham's cybersecurity practices are covered under Section 5's unfairness prong of the FTC Act. Specifically, the Third Circuit wrote that, in drafting the FTC Act, "[t]he takeaway is that Congress designed the term as a 'flexible concept with evolving content,' and 'intentionally left [its] development…to the [FTC].'" FTC Chairwoman Edith Ramirez reportedly said in a statement that the "decision reaffirms the FTC's authority to hold companies accountable for failing to safeguard

consumer data," adding that, "[i]t is not only appropriate, but critical, that the FTC has the ability to take action on behalf of consumers when companies fail to take reasonable steps to secure sensitive consumer information."

On August 17th, the FTC announced that thirteen companies agreed to settle FTC charges alleging that they falsely claimed to comply with the U.S.-EU or U.S.-Swiss Safe Harbor Frameworks. According to the FTC, the companies "misled consumers by claiming they were certified members of the U.S.-EU or U.S.-Swiss Safe Harbor Frameworks when their certifications had lapsed or the companies had never applied for membership in the program at all." The Safe Harbor Frameworks permit companies to transfer consumer data between the specified countries while in compliance with each country's laws. Under the proposed settlement agreements, the companies are prohibited from misrepresenting the extent to which they participate in any privacy or data security Safe Harbor Framework program or any other self-regulatory or standard-setting organization. Screeners that choose to participate in Safe Harbor should take steps to ensure their certification remains current and that their program complies with all Safe Harbor obligations.

On August 14th, the FTC denied LabMD, Inc.'s (LabMD) second attempt to disqualify FTC Chairwoman Edith Ramirez from handling the agency's data security action against LabMD. According to the FTC, LabMD's second motion to disqualify Ramirez used the same rejected arguments outlined in its first attempt. In both motions, LabMD claimed that Ramirez improperly communicated with the House Committee on Oversight and Government Reform regarding its investigation of Tiversa, Inc. and refused to disclose the communications, a violation of the Administrative Procedure Act according to LabMD. Specifically, LabMD argued that Ramirez's communications with the committee "tainted" her objectivity regarding its data security case. The FTC rejected this argument, stating that Ramirez's communications with the committee did not address her decision-making regarding the merits of the LabMD case.

On August 3rd, the Federal Trade Commission (FTC) published a blog post entitled, "How to Dispute Credit Report Information That Can't Be Confirmed." In the post, the FTC focuses on what consumers can do when a debt collector reported a debt to a credit reporting agency and then went out of business. The post cites an FTC enforcement action against Crown Funding Company (Crown), a debt collection company the FTC sued for deceptive practices, which resulted in the company shutting down its business. According to the FTC, "[f]ederal law says that, when consumers dispute information on a credit report, the credit reporting agencies must investigate it. If the credit reporting agency can't confirm the information with the company that reported the debt — and in the case of Crown, it can't — it must delete the information from the consumer's credit report, usually within 30 days of receiving the consumer's dispute." The blog includes a list of steps consumers can take in contacting a credit reporting agency to correct their credit report, as well as a sample letter to assist consumers disputing items in their credit report. While the blog post focuses on a credit-related example involving a debt collector, the underlying FCRA Section 611 obligation of a consumer reporting agency to delete disputed information if it cannot be verified during the reinvestigation applies to all consumer reporting agencies, including employment and tenant screeners.