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As the New Year begins, privacy and background screening issues continue to receive attention in Washington.

At the Justice Department

On January 22, the Justice Department filed a complaint against USIS in connection with security clearance screening work that USIS conducts for the Federal Government. DOJ alleges that USIS made false claims and false statements, as well as breached its contract with the Office of Personnel Management (OPM) in the course of its conduct of background checks conducted for the government resulting in millions of dollars in payments and performance bonuses to USIS that the company otherwise would not have received. More specifically, DOJ alleges that USIS failed to conduct required quality assurance reviews of at least 665,000 reports prepared between March 2008 and September 2012 with the knowledge of USIS management. USIS issued a statement to the *Washington Post* indicating that the allegations in the complaint are "contrary to our values and commitment to excellent service" and "relate to a small group of individuals over a specific period of time."

The scrutiny of USIS has intensified in recent months after it was revealed that USIS preformed background checks on both NSA leaker Edward Snowden and Washington Navy Yard shooter Aaron Alexis, although there does not appear to be any evidence that USIS cut any corners in the Snowden or Alexis investigations. DOJ had announced in October that it would file a complaint against USIS in connection with its screening practices. The January 22 complaint does not allege violations of the Fair Credit Reporting Act, only USIS's contractual quality assurance commitments to OPM. The suit, however, is already bringing renewed attention, including fresh media scrutiny, to the screening process for government employees and contractors.

At the Federal Trade Commission

EU/Swiss Safe Harbor. On January 21, the Federal Trade Commission (FTC) announced proposed settlements with 12 companies (including the Super Bowl-bound Denver Broncos and several other National Football League teams) to resolve FTC allegations that the companies had engaged in violations of Section 5 of the FTC Act in connection with their participation by in the European Union (and/or Swiss) Safe Harbor Program administered by the Department of Commerce for the transfer of personal information from participating European countries to the United States.

Specifically, the FTC alleged that the twelve companies failed to renew their certifications of participation with the Department of Commerce each year as required while continuing to hold themselves out as Safe Harbor participants through language in their privacy policies and/or display of the Department of Commerce's Safe Harbor Program seal on their websites. In none of the cases, did the FTC allege that the

companies had engaged in any violations of the substance embodied in the Safe Harbor Principles.

This type of claim is "low lying fruit" for the FTC. Safe Harbor certifications are or are not renewed with the Department of Commerce in a timely fashion. Company websites either do or do not continue to indicate Safe Harbor participation for a period of months or years after a certification has lapsed. There is not a lot of room for interpretation in these cases the way that there may be in a dispute whether a Safe Harbor participating company complied with one of the Safe Harbor's substantive principles, such as notice, choice or access. Employment and tenant screening companies that participate in Safe Harbor would be wise to ensure that they calendar their annual renewal dates and take steps to ensure that renewal does not "fall through the cracks" because of a change in personnel or an oversight. If a company intends to withdraw from Safe Harbor, its privacy policy should be changed accordingly and any Safe Harbor seals should be removed (of course, participating companies have an ongoing duty to handle information previously transferred pursuant to Safe Harbor in accordance with the Principles even after they withdraw from the program).

Apple. On January 15, the FTC announced that Apple had agreed to provide at least $32.5 million in refunds to consumers whose children had been able to make "in-application" purchases for up to 15 minutes after a parent authorized a particular charge. A majority of the FTC Commissioners alleged that Apple had engaged in an unfair practice under Section 5 of the FTC Act by allowing purchases for 15 minutes without informing the parents—some of whom were billed significant amounts for their children's subsequent online purchases using the applications. FTC Commissioner Wright dissented in the matter, arguing that Apple's conduct did not rise to the level of unfairness for Section 5 purposes. The scope of the FTC's unfairness authority is controversial and has been a point of contention in the FTC's information security cases that are ongoing against Wyndham and LabMD.

While the Apple case involves billing practices, it is interesting not only because of the questions it raises about the scope of the FTC unfairness authority, but also because of the weight the Commission appears to have given to consumer complaints to Apple. The Commission found that Apple had received a significant number of complaints from consumers about its billing practices in this area and that, as a result, Apple was on notice that there was a problem that it should have addressed through changes to its policies. Companies would be wise to consider whether they have mechanisms in place to monitor their complaint processes generally to look for trends or high volumes of complaints which could be a signal that changes in policies or procedures may be appropriate.

McSweeny Nomination. On January 13, the Senate Commerce Committee approved the President's nomination of Terrell McSweeny to fill the final vacancy on the FTC. The Committee approved her nomination last year, but the full Senate failed to act on the nomination before the recess and, pursuant to Senate Rules, her nomination was returned to the President, who renominated her again this year.

Ms. McSweeny, once confirmed, will give the Democrats a 3-2 majority on the Commission and fill the seat vacated by former FTC Chairman Jon Leibowitz who resigned from the Commission last year. Given the changes to the Senate's filibuster rules late last year, Ms. McSweeny is expected to be confirmed by the Senate in the near future.

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