

## THE WASHINGTON REPORT March 2015

### On the Hill

On March 9<sup>th</sup>, Senator Rand Paul (R-KY) introduced S. 675, the “*Record Expungement Designed to Enhance Employment Act of 2015*” which would permit “eligible individuals” to petition in federal District Court to have certain federal nonviolent criminal offenses sealed.

On March 9<sup>th</sup>, eight members of Congress sent identical letters to Uber, Lyft, and Sidecar urging the ride-sharing companies to “adopt fingerprint-based background checks” for drivers. In the letter, the lawmakers expressed concern over recent reports regarding sexual assaults and potential gaps in the screening process for drivers. The signatories cite reports of assault, kidnapping, and groping of passengers in cities including San Francisco, Los Angeles, Boston, and Washington, D.C. As a result, the lawmakers urge the ride-sharing companies to “implement fingerprint-based background checks right now.”

On February 27<sup>th</sup>, Rep. Kevin Cramer (R-ND) introduced H.R. 1168, the “*Native American Children’s Safety Act*,” which would amend the *Indian Child Protection and Family Violence Prevention Act* to require background checks before foster care placements are ordered in tribal court proceedings. Specifically, the bill states that “no foster care placement shall be...approved and no foster care license shall be issued until the tribal social services agency – (i) completes a criminal records check on each covered individual who resides in the household or is employed at the institution in which the foster care placement will be made.” Under the bill, conducting a background check includes:

- Fingerprint-based checks of national crime information databases;
- Any abuse registries maintained by the Indian tribe; and
- Any child abuse and neglect registry maintained by the State in which the covered individual resides.

On February 10<sup>th</sup>, Senator Jon Tester (D-MT) introduced S. 434, the “*Security Clearance Accountability, Reform, and Enhancement Act of 2015*.” The bill would seek to strengthen the accountability of individuals involved in misconduct affecting background investigations and update guidelines for security clearances in the aftermath of the 2013 Navy Yard shootings. Specifically, the bill would permit a federal agency to declare an employee “unfit for federal employment” if the agency determines that an employee has engaged in “misconduct affecting the integrity of a background investigation conducted by or for an agency with investigative authority to conduct background investigations.” Examples of misconduct identified in the bill include the falsification of information relating to a background investigation and other serious misconduct that compromises the integrity of a background investigation. According to the bill, once an employee is determined unfit for federal employment, “the individual shall not be appointed to or continue to occupy a position, as an employee with any agency, that requires its occupant to perform background check investigations.”

### At the White House

On February 27<sup>th</sup>, the White House released a discussion draft of its proposed “Consumer Privacy Bill of Rights Act of 2015”, the intent of which would be to provide baseline cross-sectoral privacy protections for consumers. The discussion draft was quickly criticized both on the grounds that it is too strict, as well as on the grounds that it is not sufficiently privacy protective. The President’s discussion draft includes a pair of savings clauses, the intent of which appears to be to exclude the operation of the FCRA and certain other existing privacy statutes from the new framework and exempt to consumer reports from the bill’s accuracy and correction requirements specifically. Consumer reporting agencies nevertheless should monitor the bill’s progress carefully, given that similar language in the Gramm-Leach-Bliley Act ultimately was held insufficiently broad to preserve traditional uses of the credit header from regulation under GLB. If any FCRA-protective language is not sufficiently broad, it is possible that the bill—if ultimately enacted—could still impact screeners and other consumer reporting agencies.

### At the Supreme Court

On March 13<sup>th</sup>, the Solicitor General and the Consumer Financial Protection Bureau filed an *amicus* (i.e. friend of the court) brief with the Supreme Court, at the Court’s request, recommending that the Court decline to hear the Fair Credit Reporting Act (FCRA) case, *Spokeo Inc. v. Robins*. Spokeo has requested that the Court review an opinion of the 9<sup>th</sup> Circuit which held that a consumer had standing to sue Spokeo for FCRA violations even if the consumer could not demonstrate having been harmed as a result of the alleged violation. The case has generated significant interest, including *amicus* briefs by the U.S. Chamber of Commerce, the Consumer Data Industry Association, and the National Association of Professional Background Screeners, among others supporting Supreme Court review of the case. The case is important because it could significantly impact the threshold for plaintiffs to bring class action suits under the FCRA. It is up to the Supreme Court as to whether the Court will hear Spokeo’s appeal, but the Solicitor General’s recommendation traditionally carries considerable weight in cases where the Court has asked the Solicitor General to opine on whether a case should be heard.

### At the GAO

On March 16<sup>th</sup>, the Government Accountability Office (GAO) released a report to Congress “Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks.” The GAO report addresses how:

- States conduct Federal Bureau of Investigation (FBI) background checks for specific employment positions;
- States have improved the completeness of criminal history records, and remaining challenges that background check agencies face; and
- Private companies conduct criminal background checks.

According to the report, states have improved in the completeness of criminal history records, finding that twenty states reported that more than 75% of their arrest records contained dispositions in 2012, up from 16 states in 2006. Regarding private companies, the report found, on the basis of anecdotal evidence, that an increase in employer demand for criminal background checks has produced an increase in the number of private companies conducting criminal record background checks. The report also addressed the enforcement practices of the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB). According to the report, from FY 2009-2014 the “FTC settled 16 complaints against private background screening companies and employers for alleged Fair Credit Reporting Act violations.” Alternatively, CFPB officials stated that they “have not received many consumer complaints regarding the use of criminal history records in employment background checks.”

The GAO Report found that “private companies face challenges in obtaining complete and accurate criminal records” including:

- “Private companies do not always have access to complete commercial databases, which can result in companies providing employers with incomplete information”; and
- “Private companies generally conduct name-based checks (versus fingerprint-based checks) which can decrease the accuracy of the information that the check produces.”

The Report also references FCRA § 613 notice to consumers indicating that “senior officials from two private screening companies [GAO] interviewed raised concerns” about the 613 notice “and its potentially negative effects on employees and applicants.”

GAO recommended that the Office of Personnel Management, the FBI, and the Compact Council take steps to further improve disposition reporting and the overall quality of criminal history records.

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