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On Capitol Hill

Since the last edition of *The Washington Report*, the government shutdown has come and gone. The shutdown—which closed the Federal Trade Commission (FTC) and the Equal Employment Opportunity Commission, but not the Consumer Financial Protection Bureau (CFPB)—dominated the conversation in the Congress and postponed congressional hearings addressing background check issues.

The primary driver for the congressional interest in background checks was the tragic shooting incident that left 12 people dead at the Washington Navy Yard in mid-September, just as our last edition of *The Washington Report* went to press.

In the aftermath of the Navy Yard shootings, considerable media attention was paid to the shooter's mental condition and prior encounters that the man, a contractor, had with law enforcement. Many questioned the background checks conducted on the man and, further, whether the man should have received the clearance which gave him access to the Navy Yard. The fact that both the Navy Yard shooter and Edward Snowden were both employed by government contractors, and that background checks on both men apparently were conducted by USIS for the Office of Personnel Management, led to additional questions about the background check processes used. The Secretary of the Navy announced a full review of Navy screening processes.

The Senate Homeland Security Committee had a hearing on the Navy Yard shootings scheduled for October 1, "The Navy Yard Tragedy: Examining Government Clearances and Background Checks," but the hearing was postponed due to the government shutdown. Senator Tom Carper (D-DE), the Committee Chairman, has promised that the Committee will take a close look at the background check process for individuals applying for security clearances for both contractors and federal employees. Other Senators including Kelly Ayotte (R-NH) and Claire McCaskill (D-MO) have urged additional inquiries by the Committee as well as the Navy.

The House Oversight and Government Reform Committee also is conducting an investigation, reportedly requesting unredacted copies of the background checks conducted among other information.

At the CFPB and the FTC

On October 4th, the CFPB filed an *amicus* brief on behalf of the agency and the FTC in, *Moran v. The Screening Pros LLC*, a case pending before the 9th Circuit Court of Appeals. The brief supports the Plaintiff's view that in the event a criminal charge is dismissed, the seven-year limitation on the reporting of "adverse information" in Fair Credit Reporting Act (FCRA) § 605(a) runs from the date of charge rather than from the date of dismissal because the dismissal is not itself an adverse pieces of information for FCRA § 605(a).

The case involves a consumer report issued for tenant screening purposes in 2010, which included information about a drug charge brought in 2000 and dismissed in 2004. The Plaintiff claims that the dismissal was not itself adverse information and, as a result, the FCRA-permissible reporting period for that charge ended 2007, seven years after the initial charge. The defendant consumer reporting agency, argues that it was permissible to use the date of the disposition of the charge to start the clock on the seven year reporting period, in which case the consumer report complied with the FCRA. The District Court ultimately ruled for the defendant and the Plaintiff appealed to the 9th Circuit.

The crux of the dispute is the interpretation of the 1998 FCRA amendments which permitted the reporting of convictions without limitation. The amendments removed language from the original FCRA which established the reporting period for arrests, indictments, and convictions as seven years "from the date of disposition, release or parole."

The position taken by the CFPB and the FTC in their brief is that the "FCRA restricts the reporting of "[a]ny other adverse item of information . . . which antedates the report by more than seven years." 15 U.S.C. § 1681c(a)(5). An adverse item, when it occurs, starts the seven-year period. Later related events that are not in themselves adverse do not reopen the period. Thus, in the case of a criminal charge that is eventually dismissed, the dismissal is not an adverse item that starts its own seven-year reporting period. It is simply the disposition of the truly adverse item, the underlying criminal charge."

Consumer reporting agencies that report criminal charges using the date of disposition as their baseline for calculating the reporting period for the item should continue to monitor developments in the case and consider reviewing their reporting practices with their counsel in light of the joint position taken by the CFPB and the FTC in their amicus brief.