

## THE WASHINGTON REPORT September 2014

Since the last edition of *The Washington Report*, the Congress reconvened and then left again shortly thereafter so that members could return home to campaign for the upcoming elections. In the brief time Congress was in session, however, there were several developments of interest to consumer reporting agencies, including employment and tenant screeners. At the agencies, the Federal Trade Commission held a workshop on “Big Data” and the Office of Personnel Management (OPM) made an important announcement regarding its background screening contracts.

### **On Capitol Hill**

On September 10<sup>th</sup>, the House Financial Services Committee’s Subcommittee on Financial Institutions and Consumer Credit held a hearing entitled, “*An Overview of the Credit Reporting System*,” to “provide...a better understanding of the roles and responsibilities of the consumer reporting agencies, as well as the users and furnishers of consumer credit data.” Witnesses included:

- Stuart Pratt, President and CEO of the Consumer Data Industry Association;
- Howard Beales, Professor of Strategic Management and Public Policy at George Washington University;
- John Ikard, President and CEO of FirstBank Holding Company, appearing on behalf of the American Bankers Association; and
- Chi Chi Wu, Staff Attorney at the National Consumer Law Center.

The hearing was well attended, with 12 Republicans, including full committee Chairman Jeb Hensarling (R-TX) and Subcommittee Chairwoman Shelley Moore Capito (R-WV), and 6 Democrats, including full committee Ranking Member Maxine Waters (D-CA) and Subcommittee Ranking Member Gregory Meeks (D-NY), though not all members that attended asked questions or made statements.

The bulk of the hearing focused on issues relating to credit scores, report accuracy and reinvestigations, and alternative data. There also was discussion of shortening the period for reporting adverse information and further restrictions on the reporting of medical debt and certain property related items, such as short sales.

Several Democratic members, including Congresswoman Waters, Congressman Meeks, and Congressman Al Green (TX) expressed concern about the use of credit reports for employment purposes, often appearing to use “credit report” and “credit score” interchangeably. Chi Chi Wu also expressed concern about the use of credit reports for employment purposes. The following excerpt from her written testimony summarizes the NCLC position:

The use of credit reports by nearly half of employers. Credit checks create a fundamental “Catch-22” for job applicants – a job loss prevents a worker from paying his/her bills, and the resulting damage to a credit report prevents him/her from

getting a job. Yet there is no evidence that credit history can predict job performance. Its use in hiring discriminates against African American and Latino job applicants. We urge Congress to ban the use of credit reports in employment, with very limited exceptions.

At the hearing, Congresswoman Waters announced a draft bill entitled the “*Fair Credit Reporting Improvement Act of 2014*,” which is intended to “enhance requirements on the consumer reporting agencies (CRAs), and furnishers that provide information to these CRAs, to guarantee consumers have the capacity to ensure that the information on their credit reports is accurate and complete.” Specifically, the bill would:

- Restrict the use of credit reports for employment purposes by requiring employers, in order to obtain consumer reports for employment purposes to certify its basis for requesting the report, such as a legal requirement, national security purposes, or certify that credit “is a valid predictor of employee performance in the specific position of employment and is a more reliable predictor of such employee performance” than certain “alternative scoring methods” to be determined by the CFPB;
- Prohibit employers from passing the cost of employment reports onto the applicant/employee;
- Require the employer to make additional disclosures to individuals in advance of seeking their authorization to obtain consumer reports for employment purposes, including contact information for the CRA to furnish the report;
- A number of other changes to the consumer reporting process.

On September 16<sup>th</sup>, Rep. Mike Kelly (R-PA) introduced H.R. 5482, the “*Enhanced Security Clearance Act*,” which would expand government background checks to include an applicant’s “publicly available electronic information,” including but not limited to that from social media accounts. The bill is similar to S. 1618, Sen. Susan Collins’ (R-ME) bill of the same name, introduced last October and reported out by the Senate Homeland Security and Governmental Affairs Committee on July 30<sup>th</sup>. In a press release, Kelly stated, “Especially in light of today’s anniversary of the Navy Yard shooting, it is critical that we remember the grave costs of security-related oversights and do not hesitate to take obvious and overdue action to save American lives.”

The EEOC also received additional attention on the Hill in September. On September 9<sup>th</sup>, Rep. Tim Walberg (R-MI) introduced H.R. 5422, the “*Litigation Oversight Act of 2014*,” which would amend the Civil Rights Act to require, “the [Equal Employment Opportunity Commission (EEOC) to] approve or disapprove by majority vote whether the Commission shall commence or intervene in litigation involving multiple plaintiffs, or an allegation of systemic discrimination or a pattern or practice of discrimination.” The bill would allow for a member of the Commission to require the whole Commission to approve or disapprove by majority vote whether to commence or intervene in any litigation, an authority neither the Commission nor a member of the Commission may delegate to any other person. The bill would further require that votes on commencing or intervening in litigation would be posted publicly not later than 30 days after such action. The bill has been referred to the House Education and the Workforce Committee.

## **At the FTC**

On September 15<sup>th</sup>, the FTC held its long-planned workshop entitled, “*Big Data: A Tool for Inclusion or Exclusion?*”, the latest in the FTC’s ongoing series of privacy workshops. FTC Chairwoman Edith Ramirez stated in her opening remarks that, “As part of the FTC’s ongoing work to shed light on the full scope of big data practices, our workshop will examine the potentially positive and negative effects of big data on low income and underserved populations.” Chairwoman Ramirez cited examples of the risks of big data, including that “web searches for distinctively black names were 25 percent more likely to produce an ad suggesting the person had an arrest record, regardless of whether that person had actually been arrested, than web searches for distinctively white names.” The Chairwoman identified three objectives for moving forward:

- The FTC should continue to rigorously enforce existing law in connection with uses of big data;
- Industry should understand its ethical obligations as “stewards” of consumer information; and
- “We should encourage businesses to guard against bias or disparate impact on low-income and vulnerable populations when designing their analytics systems, algorithms, and predictive products.”

The FCRA was frequently cited as a model that has tended to work well with respect to credit, insurance, employment, and other FCRA permissible purposes. Arnall Golden Gregory Partner Montserrat Miller spoke as part of a panel “Surveying the Legal Landscape,” which discussed, among other things, the protections afforded by the FCRA in the employment context and how the FCRA affects the reporting of non-traditional information, such as social media data.

## **At OPM**

The Office of Personnel Management (OPM) announced in early September that the agency will not renew any contracts with USIS, the background screening company that currently conducts the majority of background checks for federal security clearances, when the current contracts expire on September 30th. The company has garnered media attention following revelations that it conducted the background checks for former National Security Agency contractor Edward Snowden and Navy Yard shooter Aaron Alexis, as well as allegations in a whistleblower suit that USIS violated the False Claims Act by “dumping” 665,000 background checks back to OPM that USIS knew were incomplete. Most recently, USIS suffered a cybersecurity incident that potentially exposed the personal information of thousands of federal employees. OPM did not respond to media requests for comment. USIS responded in a public statement that it is “deeply disappointed” with the decision but intends “to fulfill our obligations to ensure an orderly transition” and to continue “to provide high quality service to its many other valued government customers.”

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