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Presidential Privacy Initiatives

During President Obama's State of the Union address on January 20th, the President pledged to reform the federal government's surveillance programs recognizing the importance of ensuring that the "privacy of ordinary people is not being violated." The President also pledged to combat cyber attacks.

While these State of the Union references were brief, they represented only a small part of the President's privacy agenda, part of which he outlined in a speech at the Federal Trade Commission on January 12th. In that speech, President Obama:

- Announced plans to introduce national data breach legislation which would require companies to provide notice of breaches within 30 days in most cases and to "close loopholes" to permit increased criminal actions against identity thieves;
- Urged financial institutions to provide consumers with free credit scores;
- Announced plans to introduce legislation to create a "Consumer Privacy Bill of Rights" which would create baseline privacy legislation applicable across industries; and
- Announced initiatives to increased protections for the personal information and privacy of children.

Parts of the President's proposal, such as breach legislation and a Consumer Privacy Bill of Rights have been promoted by the Administration previously, but the President's speech at the FTC—reportedly the first President to visit the agency since President Roosevelt in the 1930s—was a high profile endorsement of these privacy initiatives by the President himself. It remains to be seen how the legislation to enact a Consumer Privacy Bill of Rights, once introduced, will account for the Fair Credit Reporting Act and other existing privacy laws. Of course, it also remains to be seen whether and to what extent the Congress, with both the House and the Senate now controlled by the Republicans, will be inclined to act on the President's proposals.

On the Hill

The 114th Congress began this month and congressional committees are beginning to hold hearings and outline their agendas for the new Congress.

The House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade has scheduled a hearing on data breach legislation for January 27th titled "What are the Elements of Sound Data Breach Legislation?" The witness list for the hearing had not been released when *The Washington Report* went to press, but the hearing is expected to lay the ground work for the House Energy and Commerce's data breach legislation efforts in the new Congress.

The House Financial Services Committee has released its oversight plan. Among the issues that the Committee intends to examine as part of its oversight work in the 114th Congress

are issues related to credit scores and credit reporting as well as enforcement of the Fair Housing Act. The later may be important for screeners, particularly in light of the Supreme Court's decision, previously reported, to hear a case which could clarify the extent to which disparate impact theory is a proper basis for discrimination claims. Such an opinion could have an impact on Equal Employment Opportunity Commission (EEOC) efforts to bring disparate impact claims in connection with criminal background checks.

With the President's call for a Consumer Privacy Bill of Rights it also is likely that there will be a number of privacy bills introduced in addition to the Administration's proposal. If prior congresses are any indication, some of those legislative proposals will include "data broker" legislation. If consumer reporting agencies are not excluded, data broker legislation could add to the obligations of screening companies.

At the FTC

On January 21st, the FTC issued its sixth and final report on credit report accuracy required by the Fair and Accurate Credit Transactions Act of 2003 (FACTA). The final report focuses on 121 consumers who had at least one unresolved dispute from the FTC's prior study in 2012 and participated in a follow-up survey. According to the FTC, the study "finds that 37 of the consumers (31 percent) stated that they now accepted the original disputed information on their reports as correct. However, 84 of these consumers (nearly 70 percent) continue to believe that at least some of the disputed information is inaccurate. Of those 84 consumers, 38 of them (45 percent) said they plan to continue their dispute, and 42 (50 percent) plan to abandon their dispute, while four consumers are undecided."

Given the small sample size, it is unclear how much can be gleaned from these numbers. In fact, as a result of the small sample size the FTC declined to make any legislative recommendations on the basis of survey findings. The FTC did, however, recommend that consumer reporting agencies "review and improve the dispute results notification process to ensure the notices and explanation of investigation results are provided to consumers" and that consumer reporting agencies continue efforts to educate consumers regarding their rights to review their credit reports and dispute inaccurate information. The FTC also recommended that consumers continue to check their reports at least annually.

Commissioner Julie Brill issued a separate statement with two additional recommendations:

- Consumer reporting agencies should improve how they inform consumers about the effects of credit errors and corrections of erroneous information as well as providing interactive disclosure mechanisms that would allow consumers to see how correcting a disputed piece of information would change their credit score. Commissioner Brill also noted that regulators (e.g. the CFPB) could "consider" whether to require credit reporting agencies to provide such interactive disclosure mechanisms.
- Regulators should consider whether consumer reporting agencies are adequately complying with existing FCRA requirements regarding the results of reinvestigations and whether more "robust" rules may be required.

The three national credit reporting systems were the focus of the study and the primary target of the FTC's recommendations and Commissioner Brill's additional regulations. Nevertheless, given that accuracy and the conduct of reinvestigations are obligations of all consumer reporting agencies, employment and tenant screeners should consider whether any enhancements to their reinvestigation programs may be appropriate.

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