

# FTC Expands FCRA Coverage to Mobile Industry – Employers Beware

**January 22, 2013**

The Federal Trade Commission ("FTC") recently extended the reach of the Fair Credit Reporting Act ("FCRA") to the mobile industry by means of a consent order, settling its complaint that alleged Respondents Filiquarian Publishing LLC and Choice Level LLC (as well as the sole owner and corporate officer of the Respondents in his individual capacity) furnished employment screening data in violation of the FCRA. This alert discusses the ramifications of the consent order on the breadth and enforcement of the FCRA.

## **Facts**

By way of background, Filiquarian operated a series of mobile applications ("apps") which it distributed and sold through two online stores, iTunes and Google Android store, now GooglePlay. Filiquarian represented that consumers could use the apps to conduct a "quick criminal background check for convictions," providing access to hundreds of thousands of criminal records (including those of prospective employees) made available by Choice Level LLC. In fact, after downloading the app, users could conduct an unlimited number of searches for criminal record reports within a specific geographic location (such as a state or county). The FTC determined that Respondents violated the FCRA by the manner in which they made these apps available to consumers (such as employers).

## **Complaint and Consent**

The FCRA covers credit reporting agencies that perform background checks on behalf of consumers. The FTC charged that, given the nature of the Respondents' operations, they qualified for coverage under the FCRA but had not complied with several of its provisions. Specifically, they had (i) "furnished consumer reports to third parties without procedures to inquire into the purpose for which the user is buying the report"; (ii) "failed to require that prospective users of their reports identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose"; (iii) "maintained no procedures to assure maximum possible accuracy of information in the reports it provided"; and (iv) "failed to provide such notices" that the FCRA requires for all users of consumer reports.

Filiquarian and Choice Level had included a disclaimer in their "terms and conditions" stating that their respective products should not be considered screening devices for purposes of insurance, employment, loans, and credit applications, *inter alia*. The disclaimer also stated that Respondents did not comply with the FCRA and, in turn, any person using screening information made available by the app "assumes sole responsibility for compliance with the Fair Credit Reporting Act and all/any other applicable laws." According to the FTC's press release announcing the settlement, however, the disclaimers were "not enough to avoid liability under the FCRA," as the company promoted the apps to employers and expected that employers would use them.

As a result, the consent order required that Respondents: (i) maintain reasonable procedures to verify the users of the mobile apps and the purposes behind the apps' use; (ii) ensure the accuracy of the information contained in the consumer reports; and (iii) provide notice to users of their obligations under the FCRA.

### **Consequences for FCRA Enforcement**

The FTC's decision to extend the reach of the FCRA is consistent with its prior pronouncements. In a March 2012 report entitled "Protecting Consumer Privacy in an Era of Rapid Change," the FTC specified that "[e]ven if a company is not compiling or sharing data for the specific purpose of making employment . . . decisions, if the company has reason to believe the data will be used for such purposes, it would be covered by the FCRA." A month prior, the FTC also warned marketers of mobile apps that if they had reason to believe that the background reports available through their apps were being used for employment purposes, the FCRA would apply.

The consent order also comes on the heels of several other settlements brokered by the FTC. For example, in October 2012, the FTC settled charges against Equifax Information Services LLC and its customer, Direct Lending Source, for a total \$1.6 million dollars for the allegedly improper sale and resale of customer lists. In August 2012, HireRight Solutions, an employment background screening company, settled charges to the tune of \$2.6 million for allegedly failing to use reasonable procedures to assure the accuracy of the information provided to employers—the second largest civil penalty the FTC ever obtained under the FCRA. And, in June 2012, Spokeo, Inc., a data broker which compiles and sells consumer profile information, settled charges for \$800,000 for marketing profiles to companies engaged in human resources, background screening, and recruiting without allegedly protecting consumer information under the FCRA.

Despite this flurry of activity, it should be noted that the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 has shifted the responsibility of interpreting and enforcing the FCRA from the FTC to the Consumer Financial Protection Bureau ("CFPB"). Nevertheless, in January 2012, the FTC and the CFPB entered into a Memorandum of Understanding agreeing to cooperatively "share certain responsibilities and authorities to protect the nation's consumers" and to "seek to exercise their law enforcement authority" without "duplication of efforts" for up to three years. Given the Memorandum of Understanding and the FTC's recent actions, the FTC may yet play a role in the future of FCRA enforcement.

### **Takeaway for Employers**

The FTC's consent order bodes consequences for employers who use mobile apps to conduct background checks. The FCRA only covers employers who solicit third-party credit reporting agencies to perform background checks. However, given the FTC's efforts to broaden the definition of the term "credit reporting agency" through litigation like the ones against Filiquarian, employers must remember that, by retrieving background information on their applicants and employees through any number of software applications, they may qualify as a "user" of a third-party credit reporting agency and, thus, could be subject to the FCRA.

If covered by the FCRA, employers must remember to follow certain protocol. This protocol includes furnishing forms that: (i) disclose to the applicant the employer's intention to obtain a consumer report and/or investigative consumer report; (ii) obtain the applicant's advance authorization to conduct a background check; (iii) notify the applicant in advance of the employer's intent to take adverse action based on the information contained in the report(s) and provide a copy of the report and a notice of rights; and (iv) notify the applicant of the adverse action. Additionally, employers must comply with applicable state and local laws that also regulate the conduct of background checks.

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The consent decree presently is subject to a thirty-day comment period. If you have any questions or concerns regarding the settlement or FCRA-related developments, please contact your Proskauer lawyer or any co-chair of the Employment Law Counseling & Training Group.

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