

The FCRA and Unlawful Discrimination: A Possible Foreshadowing of FTC Enforcement Priorities

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This week brought news of a Federal Trade Commission (“FTC”) complaint and proposed \$4.25 million settlement with AppFolio, Inc. (“AppFolio”), a California-based company that provides “screening reports” to property management companies regarding potential tenants’ rental, credit, and criminal histories,. While the settlement bears a hefty price tag, it was Commissioner Rohit Chopra’s dissenting statement that caught CPW’s attention as it directly raised the question of whether aggregated violations of the Fair Credit Reporting Act (“FCRA”) may constitute unlawful discrimination. With anticipated changes to administrations and enforcement priorities, Commissioner Chopra’s dissenting opinion may foreshadow a future enforcement priority for the FTC: FCRA claims against tenant screening companies that report consumer financial and/or rental histories.

The [complaint](#) against AppFolio, a California-based company that provides “screening reports” to property management companies regarding potential tenants’ rental, credit, and criminal histories, alleges that AppFolio failed to follow reasonable procedures to ensure the accuracy of reported criminal record and eviction histories. AppFolio allegedly obtained records from a third-party vendor that it failed to independently verify, relying instead on the third-party’s procedures. This was allegedly done despite AppFolio’s “limited knowledge” of the third-party’s procedures and the third-party’s express disclaimer that it could not “guarantee the accuracy and/or completeness of the consumer information furnished.”

Targeting this practice, the complaint alleges that AppFolio provided inaccurate information for certain tenant applicants including: records for individuals with a different name or birthdate; records with a missing or inaccurate offense name, type, or date; records with a missing or inaccurate disposition; and multiple entries for the same criminal or eviction action. Due to these inaccuracies, some applicants allegedly may have been denied housing or other opportunities.

The [proposed settlement](#) includes a \$4.25 million monetary penalty, mandates compliance reporting and monitoring, and enjoins AppFolio from reporting information that is more than seven years old and failing to maintain “reasonable procedures” to ensure the “maximum possible accuracy” of the information that it reported. Notably, and as noted in the concurring statement of Commissioner

Rebecca Kelly Slaughter, while the settlement aims to achieve deterrence, the penalty payment “benefits the U.S. Treasury, not [AppFolio’s] victims.”

Although the FTC voted 4-1 to authorize the suit and its proposed settlement, the real story is the lone dissent and its timing as the country observes changing administrations. Commissioner Chopra’s [dissenting statement](#) raises numerous issues, including a question of whether AppFolio’s practices, as alleged, constitute unlawful housing discrimination in violation of the Fair Housing Act.

Commissioner Chopra pointed to guidance from the U.S. Department of Housing and Urban Development illustrating how the use of criminal history-based restrictions on accessing housing “have a disparate impact on protected classes.” He opined that, “The shoddy practices alleged . . . against AppFolio may have contributed to decision-making that HUD has determined is presumptively unjustified.” He listed three reasons:

- AppFolio allegedly provided screening reports that included criminal records more than seven years old. This practice may have excluded applicants who were never actually convicted of any offense.
- AppFolio also allegedly included multiple entries for the same convictions, which created reports that may have inaccurately portrayed the nature of tenants’ records.
- By allegedly providing reports that failed to include offenses’ “name, type, or date,” AppFolio could have contributed to decision-making that ignored the “nature, severity, and recency of criminal conduct,” which is a practice that HUD has indicated is likely unjustified.

The Commissioner also chastised the proposed settlement’s provisions to discourage recidivism. The proposed settlement only requires AppFolio to follow the FCRA, which it is already required to do, and provide “generalized reports,” which could lack qualitative data on specific metrics.

Finally, the Commissioner suggested increased accountability for individual executives and board directors. He pointed to a CFPB order that required a defendant to establish a compliance committee on its board and ensure that directors bore the “ultimate responsibility” for fulfilling the company’s legal commitments. Whether “ultimate responsibility” under these conditions could mean individual civil or criminal liabilities was not delineated. The Commissioner concluded his statement with these remarks: “I hope that the Commission will take steps to tighten its coordination with sister regulators, sharpen its approach to reducing the likelihood of recidivism, and its improve *[sic]* overall strategy to combat discriminatory practices in the market.”

As CPW has [previously reported](#), the incoming Biden Administration may have a significant impact on the FTC’s enforcement priorities. The AppFolio lawsuit and Commissioner Chopra’s dissenting statement may signal a changing tide in which companies find themselves facing increased FCRA enforcement. Stay tuned for additional coverage as it may arise.

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