



Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

*Regarding AppFolio
Commission File No. 1923016
December 8, 2020*

Summary

- When Americans are improperly blocked from an opportunity to live in the home of their choice due to sloppy data practices by tenant screeners, this is extremely harmful.
- While the FTC's proposed settlement includes a modest penalty, it offers no redress or help for victims – valuing the harm to tenants at \$0.
- Unlawful tenant screening practices also raise serious questions about a company's compliance with federal prohibitions on housing discrimination.
- To prevent recidivism, it is not enough to simply require a defendant to follow existing law and to submit generalized reports that may never become public.

Americans are facing a historic shortage of affordable and available rental units.¹ To make matters worse, many prospective renters face unlawful practices, including discrimination. When applicants are improperly denied housing, this is not only costly – in terms of money, time, and stress – but also forecloses opportunities. Unfortunately, there are too many outfits peddling inaccurate data and reports about prospective tenants, which can even imply that a person has been involved in a crime or is burdened with significant debt. When this is false, this is very harmful.

Before the Commission is a matter regarding the shoddy use of criminal records and eviction records, a problem that is believed to be widespread in the background screening industry.² The Commission is considering a proposed complaint and settlement to refer to the Department of Justice regarding tenant screening practices by AppFolio (NASDAQ: APPF).³ The complaint alleges several knowing violations of the Fair Credit Reporting Act (FCRA) and the FTC Act's prohibition on unfair or deceptive practices over a multiyear period. In my view, the violations bear resemblance – but were significantly worse – to the conduct involved in the Commission's 2018 action against RealPage (NASDAQ: RP). In this matter, I am particularly concerned that

¹ AMERICA'S RENTAL HOUSING 2020, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY (2020), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf.

² BROKEN RECORDS REDUX: HOW ERRORS BY CRIMINAL BACKGROUND CHECK COMPANIES CONTINUE TO HARM CONSUMERS SEEKING JOBS AND HOUSING, NATIONAL CONSUMER LAW CENTER (Dec. 2019), <https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf>.

³ AppFolio sells tenant screening reports, as well as many other services to property managers. In 2019, the company generated \$256 million in revenue and \$36 million in net income. AppFolio, Inc., Annual Report (Form 10-K), (Mar. 2, 2020), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1433195/000143319520000019/appf12311910-k.htm> (hereinafter *Annual Report*).

As charged in the complaint, AppFolio’s tenant screening service provided background reports on prospective tenants that included criminal records and eviction records that were more than seven years old, including those that did not even lead to a conviction. This practice, if proven as charged, is clearly unlawful under the Section 605(a) of the FCRA.

In addition, the complaint alleges that AppFolio included inaccurate information in background reports. Section 607(b) of the FCRA requires that the company have reasonable procedures in place to assure “maximum possible accuracy.” As detailed in the complaint, there are allegations that AppFolio background reports included information from individuals with completely different dates of birth and other identifiers from the tenant applicant. The complaint also alleges that background screening reports even included wrong information based on individuals with a completely different name, rather than a slight misspelling or nickname. According to the complaint, consumers filed disputes, yet AppFolio did little to fix problems with the data it purchased from its vendor, CoreLogic. This goes beyond sloppy – this is suspicious.⁴

The Commission is proposing that the Attorney General enter into a settlement, where AppFolio will pay \$4.25 million to the Treasury, promise to follow the Fair Credit Reporting Act going forward, and submit periodic paperwork to the FTC. This is not a bad outcome, and all settlements require tradeoffs.

However, I would have preferred a far different approach to the investigation and resolution. The Commission has referred a proposed complaint and settlement to the Department of Justice, pursuant to the procedures under Section 16 of the FTC Act for civil penalty actions. Rather than ending the investigation and negotiating a proposed settlement, I believe we should only refer the complaint. This would allow the Department of Justice to determine whether AppFolio’s practices violated discrimination laws in order to pursue a more comprehensive resolution.⁵

Even if the FTC and Department of Justice insisted on quickly resolving this matter with a settlement, our proposal is inadequate. Given the allegations of widespread, harmful conduct at hand and of specific individuals who have filed disputes and complaints, we should have only agreed to settlement with victim redress. I would also have sought more specific safeguards to prevent recidivism.

AppFolio’s Tenant Screening Practices May Constitute Unlawful Discrimination

When it comes to opportunities like housing and employment, background screeners can play a pivotal role in determining whether an applicant is accepted or denied, since they provide detailed dossiers of personal information. If their practices are discriminatory, they can and should be held accountable.

⁴ AppFolio should not have been surprised about these alleged deficiencies and the resulting harms. For example, the company settled an FCRA class action suit in 2019 that involved related conduct. I am particularly concerned that background screeners have a market incentive to maximize “false positives.” Annual Report, *supra* note 3.

⁵ The Department of Justice’s Civil Rights Division is certainly aware of potentially discriminatory practices in the consumer reporting industry. In fact, AppFolio has even publicly disclosed the existence of an investigation by this division. *Id.*

For example, the Fair Housing Act forbids housing discrimination on the basis of race, color, religion, sex, disability, familial status or national origin. According to a recent landmark decision, consumer reporting agencies, including third-party tenant screening companies like AppFolio, must comply with the Fair Housing Act when they place decisive roles in housing decisions.⁶

While many are familiar with the fact that background screening reports include information about our financial accounts, they also include information drawn from legal filings, including criminal records. There is significant concern about discriminatory effects when it comes to the use of criminal records, even when those records are accurate.

Guidance from the U.S. Department of Housing and Urban Development (HUD) outlines how use of criminal history-based restrictions on access to housing have a disparate impact on protected classes.⁷ The shoddy practices alleged in the FTC’s complaint against AppFolio may have contributed to decision-making that HUD has determined is presumptively unjustified. First, AppFolio is alleged to have provided screening reports that include criminal records that are more than seven years old – a practice that may have excluded applicants who were never convicted of any offense.⁸ Second, according to the complaint, AppFolio included multiple entries for the same convictions, resulting in reports that may have inaccurately portrayed the nature of tenants’ records.⁹ Finally and relatedly, by allegedly providing reports that failed to include offenses’ “name, type, or date,” AppFolio may have contributed to decision-making that ignores the “nature, severity, and recency of criminal conduct” – a practice that HUD has indicated is likely unjustified.¹⁰

In addition, when an applicant is falsely matched with another individual with a similar name who has a criminal record, this also raises concerns about discriminatory effects, since many Americans have names that are strongly associated with a certain race or ethnic background. AppFolio’s alleged practices likely led to landlords and property managers excluding not only individuals with criminal records, but also individuals with similar names to someone with a criminal record.

⁶ See *Connecticut Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC*, 369 F. Supp. 3d 362 (D. Conn. 2019) (sustaining a Fair Housing Act claim against a tenant screening company).

⁷ *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, DEP’T OF HOUSING AND URB. DEV., https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF (last visited on Oct. 15, 2020).

⁸ Compl., U.S. Dep. of Justice v. AppFolio, Inc., ¶ 26. According to HUD, “a policy or practice that does not consider the amount of time that has passed since the criminal conduct occurred is unlikely to satisfy this standard, especially in light of criminological research showing that, over time, the likelihood that a person with a prior criminal record will engage in additional criminal conduct decreases until it approximates the likelihood that a person with no criminal history will commit an offense.” *Supra* note 7.

⁹ Compl., *supra* note 8, ¶ 23. HUD’s guidance advises that “[a] policy or practice that fails to take into account the nature and severity of an individual’s conviction” is unlikely to constitute “necessary to achieve a substantial, legitimate, nondiscriminatory interest.” *Supra* note 7.

¹⁰ *Id.*

Given these allegations and other information I have reviewed, I believe the investigation should continue to be pursued by the Department of Justice, which should determine whether AppFolio also violated the Fair Housing Act.¹¹

Proposed Settlement Includes No Redress, Notice, or Help for Victims

Congress recognized that inaccurate consumer reporting is harmful. The Fair Credit Reporting Act specifically allows individuals to seek damages for negligent and willful violations. If the FTC and Department of Justice insist on reaching a quick settlement, we should, at a minimum, seek redress for the people filing disputes and submitting complaints about the incorrect information that may have illegally knocked them out of the running for their home of choice.

The complaint does not reveal the exact number of people who lost out on a home to rent because of incorrect information. This is nearly impossible for any agency to achieve. But for any case in front of the Commission, this shouldn't stop us from seeking redress altogether.

Of course, individuals who are incorrectly told that they aren't suitable to rent waste time and money on application fees. On top of this, some would have experienced humiliation from getting turned away, and frightened that it would happen again at the next place they tried to rent. Others might be forced to live farther away from their desired neighborhood, leading to higher costs for transportation and child care.

In any case, while we may not be able to quantify with 100% accuracy the economic value of the harm caused by practices like these, we have a 100% chance of being inaccurate when we ask for zero. For example, in a recent action by the Consumer Financial Protection Bureau that also involved inaccurate reporting of criminal records, the agency sought – and obtained – millions of dollars in redress, as well as civil penalties.¹² The CFPB's order required the defendant to develop a detailed plan to identify and notify the potential population of affected individuals, including through an analysis of their own dispute records. The order required the defendant to make redress payments to affected individuals and forfeit any unclaimed funds. Given explicit authority to seek civil penalties and other relief under the Fair Credit Reporting Act, any settlement strategy on such a case should seek to redress potential victims, just as the CFPB did.

More Robust Provisions to Prevent Recidivism

It can be very difficult for individuals to detect when they have been harmed by improper screening and consumer reporting practices. To ensure that background screeners fulfill their legal requirements, it is important for regulators to have a clear window into their practices, ideally relying on specific metrics.

¹¹ As noted, under the disparate impact standard, a defendant can offer a legitimate business justification as a defense to a charge of discrimination. However, a plaintiff can rebut this defense by demonstrating that there was a less discriminatory alternative. Here, this analysis may be fairly straightforward, since HUD has already indicated that certain of the alleged practices are generally unjustified. Furthermore, even if they were justified, the defendant could have – and should have – adhered to the “maximum possible accuracy” standard in the Fair Credit Reporting Act, which could have constituted a less discriminatory alternative to the practices employed.

¹² Press Release, CFPB, Consumer Financial Protection Bureau Settles with Employment Background Screening Company (Nov. 22, 2019), <https://www.consumerfinance.gov/about-us/newsroom/bureau-settles-employment-background-screening-company/>.

The FTC’s proposed settlement includes order provisions that require AppFolio to follow the Fair Credit Reporting Act – which they are already required to do. In addition, AppFolio is required to file generalized reports with the Commission about their compliance. Having viewed many of these required paperwork submissions in other matters, they typically lack specificity and analysis that gives a high level of confidence about compliance.

In my view, there are better alternatives to ensure compliance. I have previously advocated for reporting of specific metrics and qualitative data. When these data are included in a publicly available report, this may increase the likelihood of compliance even further.¹³ Compliance can also be boosted by increasing accountability for individual executives and board directors. For example, the CFPB order mentioned above required the defendant to establish a compliance committee on its board, and ensured directors have the “ultimate responsibility” for fulfilling the company’s legal commitments.

While these measures are not bulletproof, in cases with facts like these, I believe any settlement strategy should include meaningful safeguards to prevent recidivism with low monitoring costs for the public, rather than simply requiring a defendant to follow existing law and to submit generalized reports that may never become public.

Conclusion

It has now been fifty years since the passage of the Fair Credit Reporting Act and ten years since Congress stripped the FTC of its role as the agency with primary responsibility for administering the law.¹⁴ Sloppy, inaccurate credit reporting practices are not mild inconveniences for American families. They can be deeply harmful, reinforcing discrimination and foreclosing opportunities for individuals to seek a better home, job, and life. The proposed settlement values these harms to families at \$0 – this is deeply misguided, and this mindset must change.

I hope that the Commission will take steps to tighten its coordination with sister regulators,¹⁵ sharpen its approach to reducing the likelihood of recidivism,¹⁶ and improve its overall strategy to combat discriminatory practices in the market.¹⁷

¹³ Here, we could have sought provisions that outlined a required set of metrics, such as dispute rates related to criminal records, in a report made available to the Commission or the public. Statement of Commissioner Rohit Chopra In the Matter of Uber Technologies Inc., Comm’n File No. 152304 (Oct. 26, 2018), <https://www.ftc.gov/public-statements/2018/10/statement-commissioner-chopra-matter-uber-technologies-inc>.

¹⁴ In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act stripped the FTC of many of its authorities, including in the mortgage, debt collection, and credit reporting markets. The FTC retains enforcement jurisdiction for a subset of entities covered by the Fair Credit Reporting Act.

¹⁵ Statement of Commissioner Rohit Chopra Regarding the Report to Congress on the FTC’s Use of Its Authorities to Protect Consumer Privacy and Security, Comm’n File No. P065404 (Jun. 17, 2020), <https://www.ftc.gov/public-statements/2020/06/statement-commissioner-rohit-chopra-regarding-report-congress-ftcs-use-its>.

¹⁶ Memorandum 2018-01 from Comm’r Rohit Chopra Regarding Repeat Offenders (May 14, 2018), https://www.ftc.gov/system/files/documents/public_statements/1378225/chopra_-_repeat_offenders_memo_5-14-18.pdf.

¹⁷ Introductory Remarks of Commissioner Rohit Chopra at the National Fair Housing Alliance 2020 National Conference (Oct. 6, 2020), <https://www.ftc.gov/public-statements/2020/10/remarks-commissioner-rohit-chopra-national-fair-housing-alliance-2020>.