FTC Extended Enforcement Policy: Identity Theft Red Flags Rule

At the request of several members of Congress, the Federal Trade Commission (the "FTC" or "Commission") is further extending its deferral of enforcement of the Identity Theft Red Flags Rule ("Red Flags Rule" or "the Rule")[1] through December 31, 2010, while Congress continues to consider legislation that would impact the scope of entities covered by the Rule.

The Rule was promulgated pursuant to the Fair and Accurate Credit Transactions Act ("FACTA"), in which Congress directed the Commission and other agencies to develop regulations requiring "creditors" and "financial institutions"[2] to address the risk of identity theft. The resulting Red Flags Rule requires all such entities that have "covered accounts" to develop and implement written identity theft prevention programs. The identity theft prevention programs must be designed to help identify, detect, and respond to patterns, practices, or specific activities – known as "red flags" – that could indicate identity theft.

In FACTA, Congress imported the definition of "creditor" from the Equal Credit Opportunity Act ("ECOA") for purposes of the Fair Credit Reporting Act. This definition covers all entities that regularly permit deferred payments for goods or services. The definition thus has a broad scope and may include entities that have not in the past considered themselves to be creditors. For example, creditors under the ECOA include professionals, merchants, or service providers that regularly provide a product or service for which the consumer pays after delivery.

The final Red Flags Rule became effective on January 1, 2008, with full compliance for all covered entities originally required by November 1, 2008. The Commission has issued several Enforcement Policies delaying the enforcement of the Rule. Most recently, the Commission announced in October 2009 that at the request of certain members of Congress, it was delaying enforcement of the Rule until June 1, 2010, for the specific purpose of allowing Congress sufficient time to finalize legislation that would limit the scope of businesses covered by the Rule.

At the time of the October 2009 announcement, the House of Representatives had already unanimously approved HR 3763, a bill that would exempt from the coverage of the Red Flags Rule any health care, accounting, or legal practice with twenty or fewer employees, as well as certain other businesses. The Senate has not yet passed similar legislation, but the Commission remains committed to working with Congress to resolve this issue.

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[1] 16 C.F.R. 681.1. On November 9, 2007, the Federal Trade Commission, the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration published a joint notice of final rulemaking in the Federal Register (72 Fed. Reg. 63,718) finalizing the Red Flags Rule regulations and guidelines.

[2] Congress defined a "financial institution" under § 111 of FACTA to include any person that holds a consumer transaction account as defined by § 19(b) of the Federal Reserve Act. The types of financial institutions that fall under the FTC's jurisdiction include state-chartered credit unions, mutual funds that offer accounts with check-writing privileges, or other entities that offer accounts where the consumer can make payments or transfers to third parties.

Several members of Congress have once again asked the Commission to delay the Rule's enforcement, through the end of the year, to give Congress time to reach a consensus on the types of businesses that should be covered under the Rule. The Commission believes that a limited further postponement is warranted so that it does not begin to enforce a regulation that Congress plans to supersede. Accordingly, the Commission is extending its forbearance for bringing any enforcement action for violation of the Red Flags Rule against a financial institution or creditor that is subject to administrative enforcement by the FTC, through December 31, 2010.

The Commission urges Congress to act quickly to pass legislation that will resolve any questions as to which entities are covered by the Rule and obviate the need for further enforcement delays. If Congress passes legislation limiting the scope of the Red Flags Rule with an effective date earlier than December 31, 2010, the Commission will begin enforcement as of that effective date.

In the interim, Commission staff has continued to provide guidance, both through materials posted on the dedicated Red Flags Rule website (www.ftc.gov/redflagsrule), and in speeches and participation in seminars, conferences and other training events to numerous groups. Further, the Commission published a compliance guide for business, and created a template that enables low risk entities to create an identity theft program with an easy-to-use online form (www.ftc.gov/bcp/edu/microsites/redflagsrule/get-started.shtm). Staff also has published numerous general and industry-specific articles, released a video explaining the Rule, and continues to respond to inquiries from the public. To assist further with compliance, FTC staff has worked with a number of trade associations that have chosen to develop model policies or specialized guidance for their members.

As was the case previously, this delay in enforcement is limited to the Red Flags Rule and does not extend to the rule regarding address discrepancies applicable to users of consumer reports (16 CFR 641), or to the rule regarding changes of address applicable to card issuers (16 CFR 681.2).

For questions regarding this Enforcement Policy, please contact Naomi Lefkovitz or Pavneet Singh, Bureau of Consumer Protection, 202-326-2252.