

Red Flags Rule

ABA Requests FTC to Extend Deadline for Enforcement of Rule

The Federal Trade Commission (FTC) has established a Red Flags Rule (with enforcement currently going into effect May 1, 2009) under the Fair and Accurate Credit Transactions Act of 2003 (72 FR 63771). The Rule requires certain creditors to develop and implement written programs to identify, detect, and respond to the warning signs (i.e. “red flags”) of identity theft. The ABA has only recently learned that the FTC plans to apply the Rule to lawyers and law firms. Additional time is needed to determine the impact and implications of the Rule on lawyers and law firms before the FTC begins enforcement.

The FTC should postpone enforcement of the Red Flags Rule for an additional three-to-six months because:

- **The FTC gave the ABA notice of the enforcement date to apply the Rule to lawyers and law firms one week before the Rule is to become effective.** The FTC alerted the American Medical Association over nine months ago on how the Rule might apply to health care providers. However, the ABA was notified by FTC staff of the Commission’s intention to apply the Rule to lawyers and law firms only one week before the effective date of May 1, 2009.
- **The FTC’s conclusion that lawyers should be considered “creditors” under the Rule has not yet been assessed by the ABA.** At least one U.S. Circuit Court of Appeals has ruled that lawyers are not creditors under the Equal Credit Opportunity Act. More time is needed to determine whether the Rule and the definition of creditor should apply to lawyers; the FTC has no examples of identity theft arising from an attorney-client relationship.
- **The FTC template providing guidance to entities on how to comply with the Rule is not yet complete.** The FTC is in the process of creating a template to explain the compliance requirements for entities under the Rule and illustrating that there are lower compliance expectations for low-risk creditors. The FTC should issue the template and provide ample time for lawyers and law firms to determine their requirements *before* enforcing the Rule.