

November 6, 2009

FTC POSTPONES ENFORCEMENT OF RED FLAGS RULE U.S. DISTRICT COURT HOLDS RULE NOT APPLICABLE TO LAWYERS

There have been two important developments recently regarding the Federal Trade Commission's Red Flags Rule.

The Red Flags Rule requires financial institutions and creditors to develop and implement written identity theft prevention programs. These programs must provide for the identification, detection, and response to patterns, practices, or specific activities – known as “red flags” – that could indicate identity theft. Generally speaking, the Rule applies to all persons who regularly permit consumers to defer payment for goods and services purchased. An obvious example of a “creditor” that is subject to the Rule is an automobile dealer; a less obvious example is a lawn mowing service that provides the service and subsequently sends a bill.

Two new developments of note:

Although the Rule is already in effect, the FTC has deferred enforcement until June 1, 2010. This action was taken at the request of members of Congress following unanimous approval of HR 3763 on October 20, 2009, which would exempt certain creditors from the Rule (including health care, accounting, and legal practices with 20 or fewer employees). The FTC elected not to begin enforcing a regulation from which some creditors could soon be exempt as a result of Congressional action.

Please note that the Red Flags Rule is one of several rules issued under the Fair and Accurate Credit Transactions Act (“FACTA”) and the FTC's deferral decision does not affect other rules. Other rules currently subject to enforcement include the rule regarding address discrepancies identified by users of consumer reports and the rule relating to change of address notices received by debit or credit card issuers.



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On October 30, 2009, the U.S. District Court for the District of Columbia ruled that the Red Flags Rule does not apply to attorneys. The ruling was issued in a proceeding initiated by the American Bar Association after the FTC publicly announced its view that lawyers are subject to the Rule because they bill their clients after services are rendered. The case is American Bar Association v. Federal Trade Commission, No. 09-1636 (D.D.C. Oct. 30, 2009). As of this writing, the FTC has not yet indicated whether it will appeal the District Court ruling.

Watch this space for updates or contact our Data Security Team leaders:

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