

FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.1¹

The Federal Trade Commission (the “FTC” or “Commission”) is extending its deferral of enforcement of the Identity Theft Red Flags Rule to August 1, 2009.² This rule was promulgated pursuant to § 114 of the Fair and Accurate Credit Transactions Act (“FACTA”). Congress directed the Commission and other agencies to develop regulations requiring “creditors”³ and “financial institutions”⁴ to address the risk of identity theft. The resulting Identity Theft Red Flags Rule requires any of these 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. This rule applies to all entities that regularly permit deferred payments for goods or services, including entities such as health care providers, attorneys, and other professionals, as well as retailers and a wide range of businesses that invoice their customers.

¹ The Commission recently re-numbered the Identity Theft Red Flags Rule in the Code of Federal Regulations from § 681.2 to § 681.1. (At the same time, the Commission re-numbered the rule regarding address discrepancies applicable to users of consumer reports, from § 681.1 to § 641.1, and the rule regarding changes of address applicable to card issuers, from § 681.3 to § 681.2.) As of the date of this Statement, the notice implementing the re-numbering has not been published in the Federal Register.

² 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 Identity Theft Red Flags regulations and guidelines (the “rule”).

³ 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, such as lawyers or health care providers, who bill their clients after services are rendered. Similarly, a retailer or service provider that, on a regular basis, allows its customers to make purchases or obtain services and then bills them for payment at the end of each month would be a creditor under the ECOA.

⁴ 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.

The final rule became effective on January 1, 2008, with full compliance for all covered entities originally required by November 1, 2008. During the course of the Commission's education and outreach efforts following publication of the rule, a number of industries and entities within the FTC's jurisdiction expressed confusion and uncertainty about their coverage by and/or obligations under the rule. Owing to this confusion, the Commission issued an Enforcement Policy on October 22, 2008, delaying enforcement of the rule as to the entities under its jurisdiction by six months, until May 1, 2009.

The Commission staff already has conducted substantial outreach to help raise awareness about the rule and its requirements, and it will continue to do so. For example, staff has given speeches and participated in seminars, conferences and other training events to numerous groups; published general and industry-specific articles; and responded to inquiries by telephone and email through a dedicated email box (RedFlags@ftc.gov). The Commission also published a compliance guide for business, and established a dedicated website (www.ftc.gov/redflagsrule) that contains all of the FTC's published resources. To further assist 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.

The rule was drafted to be risk-based, i.e., the nature and complexity of an entity's program would be commensurate with the identity theft risk it encounters. With this approach, the burden for low-risk entities should be minimal, and a streamlined program typically would suffice. *See* 72 Fed. Reg. at 63,742. Nevertheless, although there is increased awareness about the coverage of the rule, some sectors – particularly those that are comprised of a large number of smaller entities that are likely subject to only a low risk of identity theft⁵ – continue to have questions and concerns about the specific obligations they must meet and the burden of complying with the rule.

To address these questions and concerns, the Commission determined that some entities, particularly those that are small, non-traditional creditors, would benefit from the availability of a template Red Flags program in developing their programs. The Commission staff intends to publish such a template for low-risk entities shortly. The extension, coupled with the release of the template, should be sufficient to enable low-risk entities to prepare their programs without undue burden.

The Commission believes, therefore, that immediate enforcement of the rule on May 1, 2009 would not further the exercise of good public policy, and that an additional three month extension is warranted. Accordingly, the Commission is extending its forbearance for bringing any enforcement action for violation of the Identity Theft Red Flags Rule, 16 CFR 681.1, against

⁵ The Commission estimated that, at a minimum, there would be more than 1.5 million low-risk entities that would need to implement a written program under the rule. 72 Fed. Reg. 63,742.

a financial institution or creditor that is subject to administrative enforcement of the Fair Credit Reporting Act by the FTC, for an additional three months, from May 1, 2009 until August 1, 2009.

This delay in enforcement, like the one issued by the Commission in October,⁶ is limited to the Identity Theft Red Flags Rule (16 CFR 681.1) 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, Bureau of Consumer Protection, 202-326-2252, or email RedFlags@ftc.gov.

⁶ Available at <http://www.ftc.gov/os/2008/10/081022idtheftredflagsrule.pdf>.