FTC Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.2

On November 9, 2007, the Federal Trade Commission ("FTC"), the federal bank regulatory agencies,[1] and the National Credit Union Administration, published a joint notice of final rulemaking in the Federal Register (72 FR 63718) finalizing the Identity Theft Red Flags regulations and guidelines. This rule, promulgated pursuant to the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), requires financial institutions and creditors to develop and implement written "identity theft prevention programs." The programs must provide for the identification, detection, and response to patterns, practices, or specific activities – known as "red flags" – that could indicate identity theft. Although the final rule became effective on January 1, 2008, full compliance with the rule is not required until November 1, 2008.

During the course of the Commission's education and outreach efforts following publication of the rule, the Commission has learned that some industries and entities within the FTC's jurisdiction have expressed confusion and uncertainty about their coverage under the rule. These entities indicated that they were not aware that they were undertaking activities that would cause them to fall within FACTA's definitions of "creditor" or "financial institution."[2] Many entities also noted that because they generally are not required to comply with FTC rules in other contexts, they had not followed or even been aware of the rulemaking, and therefore learned of the requirements of the rule too late to be able to come into compliance by November 1, 2008.

Given the confusion and uncertainty within major industries under the FTC's jurisdiction about the applicability of the rule, and the fact that there is no longer sufficient time for members of those industries to develop their programs and meet the November 1 compliance date, the Commission believes that immediate enforcement of the rule on November 1 would be neither equitable for the covered entities nor beneficial to the public. Delaying Commission enforcement of the rule as to the entities under its jurisdiction by six months, until May 1, 2009, will allow these entities to take the appropriate care and consideration in developing and implementing their programs. It also will give the Commission time to conduct additional education and outreach regarding the rule. Therefore, the Commission has determined that it will forbear from bringing any enforcement action for violation of the Identity Theft Red Flags

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[1] The Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Office of Thrift Supervision.

[2] Under FACTA, "creditor" is defined the same way as in the Equal Credit Opportunity Act ("ECOA"), as any entity that regularly extends, renews, or continues credit; any entity that regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who is involved in the decision to extend, renew, or continue credit. The ECOA definition of "credit" includes a right granted to defer payment for any purchase. Thus, any person that provides a product or service for which the consumer pays after delivery is a creditor. A "financial institution" is defined by FACTA to include all banks, savings and loan associations, credit unions, and any other person that holds a consumer transaction account as defined by section 19(b) of the Federal Reserve Act.

Rule, 16 CFR 681.2, against a financial institution or creditor that is subject to administrative enforcement of the Fair Credit Reporting Act by the FTC, for a period of six months following the mandatory compliance date of November 1, 2008.

This delay in enforcement is limited to the Identity Theft Red Flags Rule (16 CFR 681.2), and does not extend to the rule regarding address discrepancies applicable to users of consumer reports (16 CFR 681.1), or to the rule regarding changes of address applicable to card issuers (16 CFR 681.3).

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