



Client Alert

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New Law Exempts Healthcare Professionals as Creditors Under the Red Flags Rule

On December 18, 2010, President Obama signed into law the Red Flag Program Clarification Act of 2010, Senate Bill 3987, to amend the Fair Credit Reporting Act by limiting the type of "creditor" that must comply with the Federal Trade Commission's (FTC) Red Flags Rule. Specifically, the new law provides for an exemption to the definition of creditor for entities that "advance[] funds on behalf of a person for expenses incidental to a service provided by the creditor to that person," effectively excluding healthcare professionals, among other entities, from the Rule's requirement to implement a written identity theft prevention program by January 1, 2011.

By way of background, the FTC issued the Red Flags Rule in November 2007 to require financial institutions and creditors to identify, detect and respond to warning signs, or "red flags," that could indicate identity theft. The Rule, effective on January 1, 2008, originally required creditors to develop and implement written identity theft programs by November 1, 2008. However, because the final regulation identified "creditor" to refer to any entity that regularly extends, renews or continues credit, the FTC interpreted the scope of the Rule to apply to any business or organization that defers payment for goods or services, including healthcare professionals, law firms and other small businesses. See Federal Trade Commission, *Fighting Fraud With The Red Flags Rule: A How-To-Guide For Business*.¹ Because physicians and other healthcare professionals lacked information on the Rule, the FTC extended the deadline for compliance until May 1, 2009. The FTC then postponed enforcement of the Rule until August 1, 2009, in response to a request from the American Bar Association, to allow the organization to assess the impact of the Rule on lawyers and law firms. The FTC subsequently decided to provide additional education and assistance to small businesses regarding the Rule and delayed implementation until November 1, 2009.

Although the FTC continues to characterize these extensions of the enforcement deadline as efforts to ensure that regulated entities understand the Rule's requirements, several professional organizations, as well as the District Court for the District of Columbia, have addressed and disputed the application of the Rule to various professions.² Due to Congressional requests for

¹ <http://www.ftc.gov/bcp/edu/microsites/redflagsrule/resources.shtm>

² On October 30, 2009, the U.S. District Court for the District of Columbia ruled that the FTC may not apply the Red Flags Rule to attorneys. Access the opinion at http://www.abanet.org/media/docs/ABA_v._FTC_Amended_Order.pdf.



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time to consider legislation to clarify the scope of the Rule, the FTC delayed enforcement of the Red Flags Rule twice in 2010, with the final deadline currently on December 31, 2010. As noted above, the Red Flag Program Clarification Act of 2010 provides the clarification desired by healthcare professionals and several other small businesses to exempt them from the application of the Rule.

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