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Red Flags Rule: FTC Delays Enforcement Deadline Again and House of Representatives Passes Legislation That Would Limit the Rule

FTC Enforcement Extension

On Friday, October 30, 2009, the Federal Trade Commission ("FTC") again extended its enforcement deadline for the Identity Theft Red Flags Rule ("Red Flags Rule"). The deadline for the FTC's enforcement was set for November 1, 2009. The new deadline is June 1, 2010.

The Red Flags Rule is a regulation that the FTC and other federal agencies promulgated, pursuant to the Fair and Accurate Credit Transactions Act ("FACTA"), to address the risk of identity theft. The Rule requires "creditors" and "financial institutions" that have "covered accounts" to develop and implement a written identity theft prevention program with respect to such accounts. Covered entities must establish and maintain written programs that contain policies and procedures for identifying, detecting and responding appropriately to "red flags" that may indicate possible identity theft.

The Red Flags Rule became effective on January 1, 2008, with an original compliance date of November 1, 2008. While the original compliance date was effective for some entities (i.e., banks, federal credit unions, savings and loan associations), the compliance date for entities under the FTC's jurisdiction has been extended several times,¹ now until June 1, 2010. Our prior client memo (dated October 1, 2009) discussed that the FTC has issued guidance clarifying that employers (or third party administrators) are responsible for complying with the Red Flags Rule with regard to health flexible spending accounts that offer a debit card.

H.R. Bill 3763

On October 20, 2009, the House of Representative unanimously passed House Bill 3763, which provides an exemption to the Red Flags Rule for certain businesses. The bill would exempt health care, accounting, and legal practices with twenty (20) or fewer employees from compliance with the Rule. Following the vote on the bill, several members of Congress wrote asking the FTC to extend its enforcement deadline, which the FTC did, as noted above. The Senate has not introduced similar legislation.

These developments do not affect the application of the Red Flags Rule with respect to entities that are beyond the FTC's jurisdiction (i.e., banks, federal credit unions, savings and loans associations).

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¹ The FTC previously extended enforcement to May 1, 2009, August 1, 2009, and November 1, 2009, before this latest extension.