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FTC Announces Fourth Delay of Red Flags Rule Enforcement

In a [press release](#) issued on October 30, the Federal Trade Commission (FTC) announced its fourth delay in the enforcement of the much-anticipated "Red Flags" Rule until June 1, 2010, in response to a request from several members of Congress. The request came just two days prior to the expiration of the FTC's latest enforcement postponement, and nine days following the House of Representatives' unanimous approval of a bill enacting significant Rule exemptions. The further delay was requested to allow Congress to finalize legislation.

The Rule, which became law on January 1, 2008, was developed pursuant to the Fair and Accurate Credit Transactions Act (FACTA), in which Congress directed the FTC and other agencies to develop regulations requiring "creditors" and "financial institutions" to address the risk of identity theft. The Red Flags Rule is applicable to companies that extend, renew or continue credit to customers and maintain accounts used for personal, family or household purposes that involve multiple payments or transactions over time. These companies must have a written Identity Theft Prevention Program in place which must identify, detect and respond to the relevant warning signs (red flags) of identify theft.

The bill that triggered the request for delay was [H.R. 3763](#), which addresses controversy over the broad reach of the Red Flags Rule by exempting from coverage health care, accounting and legal practices with 20 or fewer employees. The bill passed the House by a unanimous 400-0 vote, and currently is pending before the Senate Committee on Banking, Housing, and Urban Affairs. H.R. 3763 would also introduce a procedure by which certain small businesses can file an application with the FTC for an exemption from the Rule. When a business 1) knows all of its customers or clients individually; 2) only performs services in or around the residences of its customers; or 3) has not experienced incidents of identity theft and identity theft is rare for businesses of that type, it would be eligible to apply for the exemption.

One of the key sponsors of the bill, Rep. Mike Simpson (R-Idaho) – who also is a dentist – said in a press release issued by the American Dental Association that the bill appropriately carves out an exception for certain businesses that are not true "creditors."

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"It is obvious that physicians and dentists are not creditors, and they should not be forced to spend hundreds of dollars to comply with this needless regulation," said Congressman Simpson. "They don't require full payment at the time of service because they first bill the insurance company, then they bill the patient the remainder of the bill. This system should not be treated the same as a loan with a financial institution."

On the same day that the FTC announced the Red Flags Rule enforcement delay, the U.S. District Court for the District of Columbia granted a motion for summary judgment by the American Bar Association (ABA), finding that the FTC cannot apply the Rule to attorneys. While the court will issue a Memorandum Opinion later this month explaining its decision, the Court's Order is another strong indication that the FTC likely will have to narrow the applicability of the Rule prior to its enforcement. The FTC press release, announcing the further delay in enforcement, made clear that the delay does not affect the separate timeline of the ABA's court case and any possible appeals.

It should be emphasized that despite the delay in the enforcement of the Rule, the Rule remains in effect, and most businesses already have their written Identity Theft Prevention Programs in place. The text of the Rule can be found [here](#). The FTC's site contains links to assist businesses in formulating their programs, including a compliance guide and numerous articles and forms answering common questions.

FTC Announces Plans to Host a Series of Privacy Roundtables

According to the FTC's Web site, the FTC will host a series of public roundtables to explore the privacy challenges posed by social networking; cloud computing; online behavioral advertising; mobile marketing; and the collection and use of information by retailers, data brokers, third-party applications, and other diverse businesses. Participants, including academics, privacy experts, consumer advocates, industry participants and others, will discuss the risks and benefits of information collection and use in online and offline

contexts, consumer expectations surrounding various information management practices, and the adequacy of existing regimes to address privacy interests. The first of three roundtables will be held on December 7, 2009 at the FTC Conference Center in Washington, D.C. Live Webcasts of the roundtables will be available on the FTC Web site. For information about participating as a panelist, submitting an agenda topic, and a list of discussion questions, visit the [FTC's Web site](#).

If you have questions about compliance with the Red Flags Rule, or the FTC's upcoming Privacy Roundtables, please contact the attorney from whom you received this e-mail or any member of Sullivan & Worcester LLP's Privacy & Data Security Group.

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