

SPECIAL BULLETIN

October 23, 2008

A Six-Month Delay of Enforcement of the "Red Flags" Rule Requiring Identity Theft Prevention Programs Has Been Approved by the FTC.

On October 22, 2008 the Federal Trade Commission made public an enforcement policy that the FTC will now not enforce the new "Red Flags Rule" requirements until May 1, 2009. The original compliance date was November 1, 2008, but given the confusion and uncertainty of new entities that now qualify as "creditors," the FTC decided to begin enforcement six months later to allow ample time to develop and implement identity theft prevention programs.

In 2003, Congress enacted the Fair and Accurate Credit Transactions ("FACT") Act to curtail the effects of identity theft. Recently, the FACT Act has been amended to require that all creditors (including local government agencies that defer payments for goods or services) establish policies and procedures to help prevent identity theft. These policies and procedures will take the form of an identity theft prevention program that is tailored to your public agency.

The new provisions of the FACT Act apply to "creditors" with "covered accounts." A "creditor" includes government entities who defer payment for goods or services (for example, payment for utilities or payment plans for parking tickets). "Deferring payments" refers to postponing payments to a future date and/or installment payments on fines or costs. A "covered account" is an account used mostly for personal, family, or household purposes, and that involves multiple payments or transactions. Covered accounts include credit card accounts, mortgage loans, automobile loans, margin accounts, cell phone accounts, utility accounts, checking accounts, and savings accounts.

The FACT Act added new provisions to the Federal Credit Reporting Act called the "Red Flag Rules" to help prevent identity theft. "Red Flags" must be part of your identity theft prevention program and are designed to serve as triggers or alerts that a consumer who has a covered account with your agency may be a victim of identity theft. These Red Flags include, for example, unusual account activity, fraud alerts on a consumer report, or attempted use of suspicious account application documents. The identity theft prevention program must also describe appropriate responses that would prevent and mitigate the crime and detail a plan to update the program. The program must be managed by the governing body of the agency or by senior employees, include appropriate staff training, and provide for oversight of any service providers.

To ensure compliance with the new requirement that identity theft prevention programs including red flags designed to detect and prevent identity theft are in place, government regulators will be required to evaluate public agencies and their adherence to their new identity theft prevention programs, and impose fines where the disregard of red flags has resulted in losses to consumers. The FTC has stated that it will now not enforce the new Red Flags

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Rules until May 1, 2009. The original date had been set for November 1, 2008. This will give your agencies six additional months to develop and implement a properly tailored identity theft prevention program.

Your agencies should evaluate whether they are in fact required to comply with these new FACT Act requirements. If so, then you must develop and implement an identity theft prevention program. The FTC will begin enforcement May 1, 2009. Local government agencies should seek the assistance of legal counsel where there is a question as to the applicability of these new laws to their public agency, and to seek aid in the preparation of an identity theft prevention program that suits your agency's particular needs.

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If you have questions about this issue, please contact our Los Angeles, Fresno or San Francisco office.