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Business and Finance Update: FTC Identity Theft Rules Apply Broadly and May Require Businesses to Develop a Written Identity Theft Prevention Program

By Susan M. Wissink and Mark R. Bolton

The Federal Trade Commission ("FTC") recently enacted rules that will require many businesses and other organization to implement a written identity theft prevention program designed to identify and detect warning signs of identity theft. All businesses and organizations subject to the "Red Flag Rules" must have their Identity Theft Prevention Program drafted and in place by August 1, 2009. The FTC can obtain penalties of \$3,500 per knowing violation of the Red Flag Rules.

All businesses and organizations that meet the rules' definition of "creditors" or "financial institutions" and maintain "covered accounts" are required to implement an identity theft prevention program. The term "creditor" is defined broadly and includes businesses or organizations that defer payment for goods or services or provide goods or services and bill customers later. This definition could apply to non-profit groups, government agencies, telecommunications companies, utilities, homebuilders, and healthcare providers. The term "creditor" is further defined to include organizations that regularly grant loans, arrange for loans or the extension of credit, or make credit decisions, including automobile dealers, mortgage brokers, mortgage bankers, real estate agents, finance companies, and retailers that offer financing or help consumers obtain financing from another organization.

Additionally, all "financial institutions" may be subject to the Red Flag Rules. The rules define "financial institution" as any bank, savings and loan association, mutual savings bank, credit union, or institution that maintain deposits or accounts from which the account holder is permitted to make withdrawals by negotiable or transferable instrument. The extremely broad application of the Red Flag Rules will catch many businesses and organizations off guard. Simply deferring payment for goods or services provided may require a business to implement a written Identity Theft Prevention Program.

Not all "creditors" and "financial institutions" are subject to the Red Flag Rules. The rules only apply to "creditors" and "financial institutions" that maintain "covered accounts." There are two categories of "covered accounts." The first is a consumer account offered primarily for personal or household purposes that is designed to allow multiple payments or transactions. The second is "any other account that a financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft..." To determine whether an organization maintains one of the second types of "covered accounts," the organization must examine the types of accounts it offers, how the accounts are opened, and how the accounts are accessed.

If an organization does not maintain "covered accounts," it does not need to implement an identity theft prevention program. However, organizations that fit within the definition of "creditors" or "financial institutions" and that maintain "covered

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accounts" must create and implement an identity theft prevention program.

Fennemore Craig's attorneys are prepared to assist organizations with all levels of Red Flag Rules compliance, and can do so in an efficient manner. Our attorneys can help determine if the Red Flag Rules apply to your organization, draft written identity theft prevention programs, and help administer the identity theft prevention programs. For more information on the Red Flag Rules, please contact Susan Wissink at 602-916-5319 or Mark Bolton at 602-916-5495.

Susan M. Wissink chairs the firm's business and finance practice and practices in the areas of mergers and acquisitions, securities, general corporate law and commercial real estate. She has represented both buyers and sellers in numerous complex transactions, including asset and stock based acquisitions and sales, mergers and other business reorganizations. She has also assisted her clients in private placements, venture capital transactions, general corporate matters and commercial real estate transactions. She earned her B.A. (1991) from Northwestern University and her J.D. (1995) from Arizona State University.

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