

# Client Alert

A report  
for clients  
and friends  
of the Firm August 2009

## Red Flags Rule Applies to Legal Profession

The Federal Trade Commission (“FTC”) intends to apply the Red Flags Rule to lawyers and law firms, and those in the legal profession should prepare themselves by putting into place written programs to detect and mitigate against identity theft involving client accounts.

Section 114 of the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”) directed the FTC and federal banking agencies to issue regulations requiring “financial institutions” and “creditors” to develop identity theft prevention programs designed to identify and detect “Red Flags” signaling possible identity theft. The FTC and the federal banking agencies finalized the regulations, commonly known as the “Red Flags Rule,” in late 2007.

More than one year after the Red Flags Rule was finalized, the FTC announced that it believed lawyers engaged in the practice of law may be “creditors” subject to the Red Flags Rule. The FTC made this announcement in a document entitled “FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.1 (the “Extended Enforcement Policy”). According to the FTC, the definition of “creditor” under the Red Flags Rule covers all entities that bill their clients after services are rendered, including lawyers. The Extended Enforcement Policy stated that the FTC would begin enforcing the Red Flags Rule on August 1, 2009.

Since this announcement, a number of bar associations have sought to convince the FTC that lawyers should not be deemed “creditors” under the Red Flags Rule since lawyers are not engaged in the type of commercial activity that Congress intended to regulate. On July 29, 2009, amidst the complaints from the legal community, the FTC announced that it will delay

enforcement of the Red Flags Rule until November 1, 2009 and will issue additional guidance to assist “low-risk entities” with compliance. See <http://www.ftc.gov/opa/2009/07/redflag.shtm>. The FTC’s website on Red Flags now has a Frequently Asked Questions section, with questions that specifically recognize the Red Flag Rule’s application to lawyers and law firms. See <http://ftc.gov/bcp/edu/microsites/redflagsrule/faqs.shtm>.

Despite the FTC’s enforcement delay, the American Bar Association (“ABA”) has called upon Proskauer Rose, through its Law Firm Advisory and Privacy and Data Security Practice Groups (Proskauer’s “Red Flags Team”), to represent the ABA pro bono in its efforts to challenge the FTC’s interpretation that the Red Flags Rule applies to the legal profession.

Proskauer’s Red Flags Team will continue to work on behalf of the ABA. In the interim, however, we are recommending that lawyers and law firms have in place a Red Flags program, and our Red Flags Team stands ready to advise our lawyer and law firm clients on how to develop and implement such a program.

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