Federal Trade Commission delays enforcement of Red Flags Rule until June 1, 2010

By Linn Foster Freedman

For the fourth time, the Federal Trade Commission (FTC) has agreed to delay enforcement of the new Red Flags Rule (the Rule) from November 1, 2009, to June 1, 2010, citing the request of members of Congress. The FTC issued the announcement on October 30, 2009, just one day following the granting of the American Bar Association’s (ABA) Motion for Partial Summary Judgment challenging the application of the Red Flags Rule to lawyers. The ABA has opposed the inclusion of attorneys under the regulation since April and has been working with the FTC to obtain an exemption for lawyers. When the FTC refused to grant the exemption, the ABA filed suit in the United States District Court for the District of Columbia. The ABA argued that the FTC failed to show a relationship between the practice of law and identity theft or how lawyers’ billings to clients can be considered an extension of credit pursuant to the FACT Act. The Judge agreed that the FTC went too far in applying the Rule to attorneys. A written decision will be issued.

On October 29, 2009, Health Financial Services Chairman Barney Frank (D-Mass.) and other members of Congress urged FTC Chairman John Leibowitz to delay the Rule for at least 180 days. This request was following the overwhelming approval of House legislation (H.R. 3763) to exclude certain small businesses from the Rule and to require the FTC to issue new Regulations allowing companies to apply for an exemption. The lawmakers cited the new legislation as a reason to delay implementation of the Rule. The legislation, working its way through the Senate, would exclude small health care providers, accounting firms, and legal practices from the Rule, and would allow a business to be exempted from the Rule if the FTC determines that the organization knows its customers individually, only performs services at the residences of customers, or has not experienced incidents of identity theft or is part of an industry that rarely experiences the issue of identity theft. The legislation would require the FTC to issue regulations setting forth the process by which a business may apply for an exemption.

For background relating to the Red Flags Rule, please see Nixon Peabody’s Health Law Alert dated May, 2009, and Health Law Alert of July 29, 2009. For further information, contact Linn Freedman at 401-454-1108 or lfreedman@nixonpeabody.com.