

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

April 8, 2009

The Honorable Jon Leibowitz
Chairman
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Final Rule on Identity Theft Red Flags, 72 Fed. Reg. 63718 (November 9, 2007)

Dear Chairman Leibowitz:

On November 9, 2007, the Federal Trade Commission (FTC or the Commission), along with five other agencies, issued a final rule (Final Rule) which implements sections 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act).¹ Among other things, the Final Rule requires each financial institution or creditor to develop and implement a written identity theft prevention program (Red Flag Program).

I am writing to you regarding the position maintained by the Commission's Bureau of Consumer Protection that certain professionals are "creditors" that are required to develop a Red Flag Program. In particular, the Bureau has determined that professionals such as medical doctors, dentists, optometrists and veterinarians (health professionals) are subject to the creditor requirements under the FACT Act. This position taken by the Bureau of Consumer Protection is inconsistent with the language of the Final Rule as it adds classes of businesses not specified in the regulation.

The Final Rule makes no mention that health professionals are considered "creditors." However, in letters to the American Medical Association and American Dental Association dated February 4, 2009, and March, 19, 2009, respectively, the Bureau of Consumer Protection stated that health professionals are indeed "creditors" for purposes of the Final Rule, and thus required to implement a Red Flag program. As Chair of the House Small Business Committee, I am concerned about the adverse impact such an interpretation could have on thousands of small health care practices.

¹ Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63718 (Nov. 9, 2007).

Among other areas, the House Small Business Committee has jurisdiction over the Regulatory Flexibility Act (RegFlex).² RegFlex was enacted to respond to concerns that the uniform application of federal regulations imposed disproportionate burdens on small businesses. In order to minimize the burden of rules on entrepreneurs, RegFlex mandates that federal agencies consider the potential economic impact of regulations on small entities and assess less burdensome alternatives.

If the FTC has decided that health professionals are indeed “creditors” subject to the Final Rule, then the Commission is obligated to fully analyze the burdens they face in implementing a Red Flag Program. It is readily apparent that health professionals will face very significant economic impacts from the Final Rule. The American Dental Association (ADA) has estimated that the cost to implement and manage the Final Rule will be at least \$600 per dental office. This cost includes time spent to review and understand rules, prepare written identity theft procedures and train staff. The \$600 figure estimated by the ADA may in fact be too low. For example, one firm is advertising a program designed to assist businesses in compliance with the Final Rule for \$795 with recurring annual fees of \$395.³ Other firms are offering programs with similar pricing.

If the FTC fails to perform a proper RegFlex analysis, the Final Rule could be successfully challenged by affected parties. Courts have prevented rules from being enforced when agencies overlook small business impacts. In *North Carolina Fisheries Ass'n v. Daly* the court remanded a rule to an agency for improperly certifying that a regulation would not have a significant economic impact on a substantial number of small entities.⁴ “Surely, Congress has not intended for administrative agencies to circumvent the fundamental purposes of the RFA by invocation of the certification provision.”⁵ In 2007, the Department of Homeland Security was enjoined from enforcing a rule for the same reason.⁶

One of the key requirements of RegFlex is the solicitation of ideas and comments of small businesses, so regulating agencies can properly examine the impact of rules on such entities. Although the Final Rule references “creditors in the health care field,” it makes no specific mention or analysis of the rule applying to health professionals. As such, this reference is too broad to provide notice to health professionals that they are subject to the Final Rule. RegFlex requires agencies to assure that small entities are given an opportunity to participate in rulemakings that have a significant economic impact on them.⁷

² 5 U.S.C. § 601 et. seq.

³ CoNetrix, <http://www.conetrix.com/Identity-Theft-Prevention-Program.aspx?gclid=CPGPjo6GzpkCFYZM5Qodaw3Muw> (last visited April 1, 2009).

⁴ *North Carolina Fisheries Ass'n v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1998).

⁵ *Id.* at 661.

⁶ *AFL-CIO v. Chertoff*, Order Granting Mot. For Preliminary Injunction (N.D. Cal. Oct. 12, 2007).

⁷ “When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule . . . shall assure that small entities have been given an opportunity to participate in the rulemaking.” 5 U.S.C. § 609.

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It is troubling that FTC staff did not notify health professionals that the rule applied to them until September 2008—nearly one year after the issuance of the Final Rule—and only one month before the date of compliance. The FTC subsequently delayed the compliance date until May 1, 2009 in response to the concerns of health professionals; however, this step alone does not satisfy the Commission's obligations under RegFlex.

Considering the views of small firms provides agencies with a better-informed rulemaking process and ultimately results in more effective regulations. The rulemaking process that the Commission has pursued in implementing the FACT Act has failed to meet the requirements of RegFlex. If health professionals are indeed subject to the Final Rule, then the FTC needs to properly consider the impact of the regulation on them and solicit their views for proposals that would minimize the burdens of compliance.

I urge the Commission to delay the compliance date of the Final Rule for small businesses until November 1, 2009. During this period, the FTC should issue a revised proposed rule with a new initial regulatory flexibility analysis which clarifies whether health professionals face any obligations to implement a Red Flag Program. If the health professionals do have such obligations, then the Commission must solicit their comments so it may fully comply with RegFlex and examine the economic burdens they face.

Sincerely,



Nydia M. Velázquez
Chairwoman