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Enforcement of "Red Flags" Identity Theft Rule Delayed

The Federal Trade Commission has delayed until November 1, 2009 enforcement of a rule that requires "financial institutions" and "creditors" to implement written identity theft prevention programs. The FTC also posted frequently asked questions on its website that clarify how the rule applies to certain employee benefit plans. Significantly, they indicate that 401(k) plans and health flexible spending accounts are not covered by the new rule.

Background

On November 9, 2007, the Federal Trade Commission (FTC) and other federal agencies issued final regulations requiring "financial institutions" and "creditors" to implement programs to identify, detect, and respond to the warning signs or "red flags" that could indicate identity theft. These regulations have become known as the "red flags rule." Covered entities were originally required to be in full compliance with the rule by November 1, 2008, but the FTC first delayed enforcement until May 1, 2009 and then until August 1, 2009. The FTC has now further delayed enforcement until November 1, 2009.

The regulations define creditor as "any entity that regularly extends, renews, or continues credit; any entity that regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who is involved in the decision to extend, renew, or continue credit." They define financial institution as "a bank, savings and loan, credit union, or some other institution that offers accounts enabling customers to write checks or make payments to third parties." These definitions are broad enough to potentially include certain employee benefit programs (e.g., a 401(k) plan that provides participant loans, health flexible spending accounts). The FTC had earlier released a guide to help businesses comply with the new rules, including a section on which entities are subject to the rules as creditors, but it did not directly address the status of employee benefit plans. The FTC has now posted frequently asked questions which provide some clarification of the rule's applicability in certain benefit contexts.

Enforcement Delay

As indicated above, the FTC has announced that it is further delaying enforcement of its red flags rule until November 1, 2009.

Frequently Asked Questions

The FTC has posted frequently asked questions to its website that help clarify which employee benefit plans may or may not be subject to the red flags rule. Specifically, the FTC says –

- A Section 401(k) plan that provides loans to participants and the employer that sponsors it are not creditors subject to the rule because participants are borrowing "from their own funds."
- A company that otherwise is a financial institution or creditor and provides individual retirement accounts is subject to the rule, but not with respect to 401(k) accounts of employees (because the accounts are with the 401(k) plan, which is a separate legal entity).
- An employer sponsoring a health flexible spending account or a third party administrator is not considered a creditor and is not subject to the rule.
- An entity that makes debit cards available for flexible spending accounts is considered a financial institution subject to the rule.

BUCK COMMENT. *In this latter case, it is the entity actually providing the debit card (e.g., third-party administrator) and not the employer that is subject to the rule.*

Conclusion

The FTC delay is useful to those affected by the red flags rule, but the FTC guidance clarifying that certain employee benefit programs are not subject to the rule is even more welcome.

Buck's consultants would be pleased to discuss any questions you have on this guidance.