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## FTC's Delay of Red Flag Enforcement Does Not Apply to Many Dealers

WASHINGTON, D.C. — Last month, the Federal Trade Commission announced a delay in its enforcement of the Red Flags Rules until May of next year. So, does this mean dealers have more time to prepare? In many cases, it does not.

Even with a six-month enforcement delay, dealers can't afford to rest on their laurels, according Strati Papageorge, director of management solutions at DealerTrack.

The delay does not impact financial institutions whose compliance falls under other federal agencies, such as those regulated by federal bank regulatory agencies or National Credit Union Administration, just those who fall under the FTC. So this means, many dealers need to be already prepared because their lender partners are requiring them to comply.

"As a result, the lenders are requiring dealers to be compliant, as well," Papageorge noted. "From that perspective, there's still a de-facto deadline enforced. It's just going to be from lenders instead of the government."

The Red Flags Rule was developed following the Fair and Accurate Credit Transactions Act of 2003 as a means to curb identity theft. Basically, the Red Flags Rule stipulated that financial institutions and creditors with covered accounts must have identity theft prevention programs in place.

The enforcement the FTC's Address Discrepancy Rule will not be delayed. This part of the rule requires consumer report users to respond to notices from consumer-reporting agencies if there are discrepancies in a customer's address.

However, for those who may not yet be impacted, such as some independent and buy-here, pay-here dealers, Papageorge cautioned that the government may not show as much leniency when it actually starts enforcing the rule.

"If I'm the FTC, I'm going to be much more diligent than if I had started (enforcement) six months before," Papageorge said. "When the enforcement deadline does come, because you've had so much time, you really have to have your ducks in a row."

So, what should dealers be doing with this extra time?

That might depend on where exactly they are in the process of identifying red flags, getting their program approved and training employees.

Regardless, Papageorge recommends dealers go through their procedures with a fine-toothed comb.



"We would recommend to those dealers, now that you have the extra time, go through and make sure you have procedures locked down and have it compliant as possible," Papageorge stressed. "This may be an opportunity to re-visit what you've done and make sure you feel comfortable."

So for dealers waiting until the last minute to get on the bandwagon, what should they be doing?

"It requires dealerships to act as if they have the layers of bureaucracy that finance institutions have. It will touch every single franchise and independent dealership. It will force dealership personnel to take on law enforcement duties (discovery and assistance with prosecution) heretofore never required," Jim Lawrence, a Compli spokesperson, told SubPrime Auto Finance News shortly after the rules were first announced.

"Compliance will require that dealerships automate as much of their compliance activity as possible. It will test the skills of every dealership's leadership and management personnel. It will require nearly constant sales and F&I training for the Red Flags, especially with the processes associated with CRA notifications because of turnover," he continued.

So, what exactly should dealers be looking for?

The FTC gave 26 examples of common red flags often seen in the business world. While all of these are important to both dealers and financial institutions to be aware of, some apply more to dealers (who open accounts) while others are more pertinent to lenders (who maintain accounts).

Lawrence noted that dealers would likely have to pick between eight and 15 of these red flags.

"The standard auto checks are functionally easy to implement and are relevant to most stores. This will encompass five red flags," he indicated. "Additionally, manual red flag checks such as credit alert on bureau, altered identification, physical appearance and picture all constitute individual flags that are also relevant to the scope of franchise dealers (or dealers already should be checking)."

Detecting additional red flags could be more challenging, Lawrence said.

"Additional red flags selected will depend on data gathered in the audit process that could be dealer-specific based on geography, trends, experiences, demographics and the like," he explained.

When it comes to implementation, though, how can dealers make sure they are in compliance? Lawrence agreed that the best way is to seek outside assistance from associations, find counsel from an outside attorney and hire a compliance company to oversee the dealership's plan.

"They can go to a compliance services provider with the correct content and audit forms and necessary distribution and training platform," Lawrence said.

He added: "They can choose to build their own set of required content and a methodology for implementation and maintenance with assistance of their legal counsel."



Regardless of how they prepare for the enforcement deadline, though, dealerships must be ready to show the FTC that they have made every effort to comply, according to Mike Goodman, an attorney with the Washington, D.C., office of Hudson, Cook

"I would expect the FTC to enforce this new rule as they have the Safeguards Rule," he explained. "When there is evidence of identity theft, the first thing the FTC will say is, 'Let me see your Identity Theft Prevention Program.'"

"In my view, the FTC does not have a track record of 'gotcha' enforcement. Compliance does not require perfection, and not every mistake is a law violation. However, companies must be able to show that they have made a reasonable effort to comply," Goodman stressed.

Moreover, another thing that dealers should keep in mind with regards to implementation of their programs is employee turnover.

"(This) will become a critical factor as the knowledge of that new methodology walks out the door every month," Lawrence noted. "Capturing and reporting their experience as well as implementing new findings will require a new level of management effort not seen in your average dealership before, unless monitored and tracked closely by an interested third party like OEM, or certified pre-owned programs."

Moving on, the FTC provided a bit more background as to why it decided to push back enforcement of the rule.

According to an Enforcement Policy Statement from the FTC, many of the industries and entities under the commission's jurisdiction expressed "confusion and uncertainty" about what the rule entailed.

"These entities indicated that they were not aware that they were undertaking activities that would cause them to fall within FACTA's definitions of 'creditor' or 'financial institution,'" officials explained in the statement.

The FTC also explained that many institutions were either unaware of the rule or hadn't followed its progress, simply because they typically aren't mandated to comply with FTC regulations in other contexts.

As such, many learned of the rule too late to develop and implement a program by Nov. 1, officials explained.

"Given the confusion and uncertainty within major industries under the FTC's jurisdiction about the applicability of the rule, and the fact that there is no longer sufficient time for members of those industries to develop their programs and meet the Nov. 1 compliance date, the commission believes that immediate enforcement of the rule on Nov. 1 would be neither equitable for the covered entities nor beneficial to the public," the FTC stated.

"Delaying commission enforcement of the rule as to the entities under its jurisdiction by six months, until May 1, 2009, will allow these entities to take the appropriate care and consideration in developing and implementing their programs," the commission added. "It also will give the commission time to conduct additional education and outreach regarding the rule."



That said, Papageorge has found that many dealers have been adamant about making sure they are ready.

"They're breathing a sigh of relief, but we're not seeing a slowdown at all," Papageorge noted.

"Between all the industry players, dealers were as ready, arguably, as some banks," he added.

And in the long run, Papageorge said, these rules could be a good thing for dealers in terms of building more trust with consumers.

"I think it could be a positive thing for the auto industry, especially retailers," Papageorge said. "If consumers know that you, the dealer, are taking steps to identify (red flags) ... that can really foster a positive relationship and it is a good loyalty opportunity for dealers."

