

Red Flag Regulations

After multiple delays to allow businesses time to come into compliance, the Federal Trade Commission's (FTC's) "Red Flag" Regulations finally became effective in January 2011. Under these regulations, "creditors," and all businesses that obtain information from a national credit-reporting agency, are now required to develop a written plan that identifies and detects the relevant warning signs – "red flags" – of identity theft.

For purposes of these regulations, "creditors" include any businesses or organizations that regularly provide goods or services first and allow customers to pay later. For example, use of a promise-to-pay agreement or use of RUBS for utility reimbursements may make a landlord a creditor under the definitions in the regulations.

The term also includes all businesses that make credit decisions about consumers affecting household related goods and services. While commercial landlords are excluded from this definition, residential landlords that use credit reports to make decisions about whether or not to rent to a particular individual, or how much of a deposit to require, are clearly covered. Because residential landlords also usually have "covered accounts," i.e. they allow the consumer to make multiple payments or transactions for the goods or services, they are required to develop and implement a written program to detect and respond to the red flags of identity theft. This program is generally referred to as a written Identity Theft Prevention Program ("Program").

An Identity Theft Prevention Program must include four basic elements, which combine to create a framework to address the threat of identity theft:

1. The Program must include reasonable policies and procedures to identify the "red flags" of identity theft that the business is likely to see in the course of its day-to-day operations. These "red flags" are suspicious patterns or practices, or specific activities that indicate the possibility of identity theft.

A Supplement to the Red Flags Rule lists five specific categories of warning signs to consider in developing a program. These categories are (a) alerts, notifications and warnings from a Credit Reporting Company, such as a warning that there is a fraud or active duty alert on a credit report, or a notice of address discrepancy by a credit reporting agency; (b) suspicious documents, such as identification that appears to be altered or forged or the fact that the person presenting the documents does not resemble the photo or match the physical description in the document; (c) suspicious personal identifying information, such as inconsistencies in the information the person has provided; (d) suspicious account activity; and (e) notice from other sources that an account has been opened or used fraudulently.

2. The Program should have procedures to demonstrate that the property is taking reasonable steps to ensure that the person opening the account or seeking the credit is actually the person identified in the documents presented. For example, the property should compare the information contained in the credit report with the information provided on the application to ensure they are consistent. Discrepancies that may give rise to suspicion include variations in prior addresses or dates of employment, or variations on Social Security numbers or driver's licenses numbers. Any of these inconsistencies should set up a "red flag" suggesting the possibility that identity theft must be considered.
3. The Program needs a system to prevent and mitigate identity theft. The scope of this system is limited by the size of the business and the risk that exists for identity theft under the particular circumstances. In most situations involving residential properties this will mean reporting the discrepancy to the credit reporting agency and/or asking for additional information to ensure that the person seeking the credit is actually the person that he/she purports to be.
4. Finally the Program must establish a system to update the Program as technology changes – or changes in business practices – require.

For most businesses, including property management companies and owners of residential rental properties, the Identity Theft Prevention Program required by the Red Flag Regulations does not have to be complicated; it does, however, have to be in writing. Audited properties that fail to create a written Program that complies with the Red Flag requirements can face penalties up to \$3500.00 per violation. The FTC has indicated that a sample program from a creditor without significant risk might look something like the following:

1. Red Flags We Have Identified:
 - a. Inconsistency between application and credit report, such as incorrect prior addresses or employers.
 - b. Inconsistency between applicant's appearance and information contained on the photo identification.
 - c. Documents that appear to be forged.

2. How We Will Address Red Flags We Have Identified:
 - a. Train employees to carefully scrutinize applications and compare them to credit reports.
 - b. Train employees to look for inconsistencies between the description on the photo identification and the appearance of the applicant.
 - c. Train employees on what a valid identification looks like.

3. How We Will Respond to Red Flags
 - a. Report inconsistencies, including address inconsistencies between the credit report and the application to the credit reporting agency.
 - b. Ask for additional identification if the applicant's appearance does not substantially match the photo identification.
 - c. Refer questionable documents to supervisors

4. How We Will Administer the Program
 - a. Get Program approval from _____, a program manager or decision maker.
 - b. Designate _____, a senior person to administer the program.
 - c. Train all _____ (categories of staff) to detect red flags and provide training by _____.
 - d. We do/do not have service providers with accounts covered by the Red Flags Rule. If we do have such service providers, we are identifying them as follows and will contact them about complying with the Red Flag Rules.

5. We Will Periodically Update the Program as Follows:

Properties or companies that have questions about the applicability of these Red Flag Regulations to their business, or who need help drafting a Program, are encouraged to contact our office for assistance at any time.