

PARK WATCH ® A LEGAL DEVELOPMENTS NEWSLETTER

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UPDATE! RED FLAG PROGRAM CLARIFICATION ACT of 2010 – NEW BILL SIGNED INTO LAW DEC. 18TH

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CLARIFICATION ACT of 2010 REDUCES STATUTORY DUTIES TO “ADDRESS DISCREPANCY” PROCEDURE FOR MANY OWNERS –Full Compliance Required Where Extending Credit/Loans

By: Terry R. Dowdall, Esq.

● **SYNOPSIS:** *The Red Flag Program Clarification Act of 2010 was passed in response to the Federal Trade Commission’s (“FTC’s”) delays and various requests to Congress that it address the over-inclusive nature of the Red Flag Rule. After the House of Representatives passed the bill on December 7th, the legislation was passed on to the President who signed the legislation December 18th. Basically, the Clarification Act specifies that:*

*(1) for Park owners obtaining credit/consumer reports in connection with a tenancy application, an “address discrepancy” procedure be in place; **this procedure does not have to be reduced to writing, but a written policy is advised as a safeguard (to prove the existence of an in-place procedure in the event of an enforcement action);***

*(2) for Park owners who make loans to their residents, **compliance with the Red Flags program (and SAFE Act) is required.***

----TRD

The “Red Flags Rule,” arising from the “Fair and Accurate Credit Transactions Act of 2003” (“FACTA”),

generally requires “creditors” with “covered accounts” to establish and maintain an Identity Theft Prevention Program to prevent, detect, and mitigate identity theft.

The *Red Flag Rule* was designed to require creditors such as banks, credit card companies and other lenders, to implement various safeguards to protect their clients from identity theft. The original *Red Flag Rule* defined “creditor” very broadly, and the FTC initially interpreted it to apply even to physicians, attorneys, dentists and other professionals who bill their clients for services. Landlords were also believed to be included from FTC positions expressed in the tumefaction of “Red Flag Rule” literature.

The purpose of the new Clarification Act of 2010 is to identify and limit the type of “creditor” to be covered. Congress finally recognized that the “. . . rule could require small businesses to undertake costly, burdensome measures to prevent identity theft in industries where it poses little threat. Identity theft is a serious problem, but the definition of ‘creditor’ for purposes of the FTC’s Red Flag rule is too broad and would cover small businesses that pose little risk to consumers.”

Aligning the Rule more closely with FACTA intention, the Clarification Act defines a creditor as one that regularly and ordinarily:

(1) obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction;

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(2) furnishes information to a consumer reporting agency in connection with credit transactions; or

(3) advances funds directly to or on behalf of a person based on an obligation to repay the funds or repayable from specific property pledged by or on behalf of the person.

This is welcome news, but still, a cautious approach for park owners is to have a written procedure in place for dealing with “address discrepancies” and, where the park owner is providing credit and/or making loans, the Red Flag procedure (discussed below) is still apparently required.

Adding to concerns for caution is the recognition that further rule-making may occur. *“Any other type of creditor may only be covered through a rule-making based upon an agency’s determination that these types of creditors offer or maintain accounts that pose a reasonably foreseeable risk of identity theft. Such creditors would receive notice that they could be covered by a rule, and there would be a public airing of the issues when the proposed rule is published for notice and comment.”*

Park Owners who Obtain Credit Reports in the Application for Tenancy Process - “Address Discrepancy”

Park owners who obtain consumer credit reports in the screening of tenancy applications must still comply with relevant sections of FACTA. *It requires users such as park owners to develop reasonable policies and procedures that must be applied when they receive a notice of “address discrepancy” from a consumer reporting agency.*

There is no requirement that the policies and procedures on address discrepancies be in writing. However, a written policy could assist in ensuring policies are being followed by all employees and we continue to recommend it: the procedure is simple to prepare, intuitive and consistent with existing practices, and effective in the park owner’s self-interest of avoiding frauds, “drop-off’s”¹ and other deception.

Moreover, this relaxation of the rule does not mean that the remaining concerns for falsified information may be overlooked. For example, falsified or non-existent social security numbers, altered personal identification, and other

¹ “Drop-off’s” refers to the practice of an applicant for tenancy seeking to deceive management. The applicant qualifies for tenancy with other family members, but never moves in; essentially, “dropping off” the family members to reside alone after qualifying for tenancy. Experience shows the “drop-off” to be, often, a troublesome tenant and nuisance to others.

efforts to deceive park owners should be rooted out.

The rule provides various examples of reasonable policies and procedures when a notice of address discrepancy is received from the credit reporting agency. The park owner can verify the information in the consumer report with the applicant; or compare the information in the consumer report with information obtained and used to verify the applicant’s identity or information in the application.

After receiving notification from a consumer reporting agency of an address discrepancy, and upon reasonably confirming the accurate address for the consumer, the community must furnish this information to the consumer reporting agency if: 1) the relationship with the consumer is a new one; and 2) the community regularly furnishes information to the consumer reporting agency.

According to the Manufactured Housing Institute (“MHI”), one reason community owners may be at low risk for identity theft is because of the “duplicative efforts of their lender partners to check the identity of the individuals the industry is assisting with financing. MHI discussed this issue with FTC staff who in turn recommended this be included in the ‘Here are the reasons we are at low risk for identity theft’ section of the FTC do-it-yourself form.”

An easy approach to this issue is to fill out and keep this form of procedures, available here:

<http://www.ftc.gov/redflagrule>

Park Owners who Make Loans

The Red Flag Rule applies to entities that are financial institutions, creditors, or have transaction accounts or covered accounts under the Act. While many businesses will now be exempt from complying with the Red Flag Rule, those making true loans of money or otherwise using credit reports or credit-scoring will still be covered. Certainly, if you have an account with, or otherwise send information to, one of the credit-reporting agencies (e.g. Experian, Equifax, or TransUnion), an “address discrepancy” procedure is required. Even as now limited, credit transactions are still broadly defined under the Rule, and businesses that defer payment for goods or services can be covered if one of the prongs mentioned above apply.

The rule requires financial institutions and creditors to establish written Red Flag Identity Theft Prevention Programs to detect, prevent and mitigate identity theft in connection with the opening of certain accounts or existing accounts. *“Land-lease communities and retailers are considered to be financial institutions, creditors, or to have covered accounts if they offer financing or help consumers get financing from others by processing credit applications.”*

This according to the MHI.²

If a park owner is involved in the lending process, and thereby required to have a written Red Flag Identity Theft Prevention Program, they may be able to utilize the FTC-developed "Do-It-Yourself Template for Businesses at Low Risk for Identity Theft," available here:

<http://www.ftc.gov/redflagsrule>

Simply, fill in the plan on line, or write a plan in four steps which includes these factors:

1. Identify the red flags relevant to your business:

(E.g., applications for tenancy, r.v. storage, persons paying on behalf of tenants in carefully controlled and documented situations, such as family members for incompetent residents, hospitalized residents, recovery houses, dealers)

2. Explain your process for detecting them:

(E.g., a description of your review process, including tenancy applications, credit reports, comparisons made to the data provided, cross-referencing, telephoning employers, etc., checking credit references, comparing picture identification to the applicant)

3. Describe how you'll respond to red flags:

(E.g., asking for confirmation, clarification, any correction needed, contacting local law enforcement to prevent and mitigate identity theft)

4. Articulate the procedure to remain current:

(E.g., continuing education, trade journals such as the WMA reporter, attending MHET functions, obtaining updates from counsel). Periodic updates to your program are required to ensure that it keeps current with identity theft risks. As management obtains more experience, more steps and protections may come to light. Changes in technology can be accounted for, together with changes in the law.

As we generally stated in our Nov., 2010 **ParkWatch**[®]: Management is governed by *Civil Code* §§798.74, 798.75. Read these sections of the law very carefully. Management has 15 business days to give an answer to the application. When verifying the identity of the person who is applying for tenancy, reasonable procedures will include a good, comprehensive tenancy application.

Obtaining such information as name and address is clearly not enough. The application should also include in-person verification [management is entitled to require an in park interview], checking a current government-issued identification card like a driver's license, passport, federal

taxpayer identification number. For park owners not extending credit, it is the address discrepancy on which to focus for Red Flag Rule purposes. Again, you may verify the information in the report with the applicant; compare the information in the report with information obtained and used to verify the applicant's information in the application, etc.

And again, you may NOT ask questions as to nationality. *Civil Code* §1940.3(b): "No landlord or any agent of the landlord shall do any of the following: ¶ (1) Make any inquiry regarding or based on the immigration or citizenship status of a tenant, prospective tenant, occupant, or prospective occupant of residential rental property. ¶ (2) Require that any tenant, prospective tenant, occupant, or prospective occupant of the rental property make any statement, representation, or certification concerning his or her immigration or citizenship status."

If you know that the applicant is in the country illegally, you may not approve the applicant for tenancy. In this circumstance, the penalty for accepting a known illegal immigrant is severe, calling for a fine " . . . under title 18, imprisoned not more than 10 years, or both;..." According to the United States Code, 8 U.S.C. Section 1324, a park owner violates federal law when *you know . . . that an alien . . . remains in the United States in violation of law, [and you] conceal[], harbor[], or shield[] from detection, or attempt[] to conceal, harbor, or shield from detection, such alien in any place, including any building . . . [or] . . . encourage[] or induce[] an alien to . . . reside in the United States, knowing . . . that such . . . residence is or will be in violation of law.*

If there are discrepancies, an inquiry may clarify the application or correct mistakes. If the mistakes cannot be clarified, the reasons need to be evaluated. Are you the intended victim of a fraud? Identity Theft? Is the real identity of the applicant hidden from you? You are not required to do business with someone seeking to defraud you. Due to the time limitations of the code, a decision needs to be made; and you should obtain legal advice to ensure you comply with the Mobilehome Residency Law. **Remember:** Do not let the 15 day period expire without a decision, as it may be disingenuously argued that you waived your right to deny the application.

Disclaimer: Determining the level of compliance with the Red Flag Rule and the tenancy application process must be discussed with your attorney. This article is for general information only, and not intended for any owner or property. This article is not legal advice. The recommendations, requirements and exclusions discussed may or may not apply in any individual case.

PLEASE CALL TERRY R. DOWDALL, ESQ. WITH FURTHER QUESTIONS AND COMMENTS

² By contrast, the following activities would not require a written Red Flag Identity Theft Program: 1) The use of consumer credit reports solely for the purpose of qualifying applicants for residency; 2) Simply referring customers to lenders, without handling credit applications.