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NEWS RELEASE

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Federal Trade Commission Delays Enforcement of "Red Flag" Identity Theft Rule

As many of you may know, the Federal Trade Commission (FTC) "Red Flag Rule" requiring a large number of businesses to adopt identity theft protection and mitigation policies and procedures was scheduled to come into effect on November 1st. However, at the 11th hour, the FTC delayed enforcement until June 1, 2010.

This delay was in part a result of an October 29th federal court order. The order explicitly addressed law firms; however the order raised more general questions as to whether the scope of the FTC's claimed jurisdiction exceeded its statutory FTC's mandate. A full opinion is anticipated to be released in the next month and will likely clarify the extent of the difference between the scope of authority claimed by FTC and the courts views as to the legitimate extent of the FTC's mandate. The FTC is also considering whether to appeal the order. There are also efforts in Congress to exempt small businesses (one proposal characterizes these as having twenty employees or less).

The Rule would require "financial institutions" and "creditors" to create policies and procedures based upon an internal evaluation of the risk of identity theft posed to actual or potential account holders who are offered goods or services on credit. It appears that the mandate is fairly clear as to businesses falling within the definition of "financial institutions." It is the very broad definition of "creditors"—in effect businesses that offer any kind of deferred payment terms will likely qualify—that may change.

In the interim, businesses will still benefit from following the letter of the Rule. Due to the last minute nature of the delay in implementation, many clients have already put policies and procedures in place. For these, voluntary compliance with the Rule remains a useful means to demonstrate good faith efforts to protect confidential client information. For some "creditors" compliance may in fact be relatively straight forward and inexpensive, although others face a significant task to achieve and maintain compliance. The burden that the Rule places upon any particular business depends upon considerations such as size, client turnover, whether they sell to individuals, past information issues, etc. As a reminder, The FTC offers useful guidance for businesses still seeking to define their implications <http://ftc.gov/redflagrule>.

One important aspect of the Rule is that the requirements for compliance, and the responsibility for ensuring it, are defined by a contractor's business characteristics, not those of the actual service provider. As a commercial law firm, KMKSC is a service provider to our clients under the Rule. We continue to work with individual clients that have notified us of additional requirements stemming from the nature of their particular businesses. **We believe that this approach supports our clients who have already implemented the Rule as best practice, as well as providing general reassurance in the run up to June 1st 2010.**

About Kohner, Mann & Kailas, S.C.

Founded in 1937, KMKSC is a business and commercial law firm listed in Martindale-Hubbell's Bar Register of Preeminent Lawyers. KMKSC provides quality legal expertise across the areas of law encountered by businesses in the course of their operations and growth. Our services range from high-profile appellate representation and international business issues to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and expertly. Our purpose is to deliver excellent results for our clients, whether the issue is advice on the avoidance of legal disputes, closing a deal, protecting assets or winning in court. KMKSC is continually advancing the interests of its clients in negotiations, transactions, litigation and alternative dispute forums across North American and beyond. We help U.S. companies address the legal issues raised by trading across international borders and provide legal support and advice to foreign companies operating in American markets.

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