

TO: MEUW Members  
FROM: David J. Benforado, Executive Director  
DATE: January 14, 2011  
RE: Update on FTC's "Red Flag"/Identity Theft Protection Rule; Little Impact of "Red Flag Program Clarification Act of 2010" on MEUW Member Utilities.

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On January 1, 2011, enforcement of the federal Red Flags Rule began—a mere three years after its enactment. The Red Flags Rule comprises federal regulations aimed at preventing or mitigating identity theft associated with certain financial transactions. The Rule requires certain “creditors” that offer or maintain one or more covered accounts to develop and provide for the continued administration of a written program to detect, prevent, and mitigate identity theft in connection with the opening or maintenance of the accounts. See 16 C.F.R. Part 681 (2007).

For the last three years, MEUW has advised Member utilities to adopt a Red Flag identity theft protection policy and we provided a model written policy template to use. We advised Members that our analysis of the “Red Flag” rule was that municipal utilities were covered entities, and furthermore, that from a business perspective, it made sense to have an identity theft protection policy in place (for your customers’ sake) regardless of what the federal law was.

The Federal Trade Commission (FTC) delayed enforcement of the Red Flags Rule five times. The enforcement delay was due in large part to controversy over the scope of coverage of the Rule. In fact, when it issued its last extension notice in May 2010, the FTC indicated that it was doing so at the behest of several Members of Congress to afford Congress time to consider “legislation that would affect the scope of entities covered by the Rule.

Well, Congress did act. On December 18, 2010, President Obama signed the “Red Flag Program Clarification Act of 2010”, which amends the Fair Credit Reporting Act, with respect to identity theft. To review the background through which this act was passed, the Fair Trade Commission’s (FTC) Red Flag Rule implemented Section 114 of the Fair and Accurate Credit Transaction Act (FACTA) back in January of 2008. The rule applied to financial institutions and creditors with covered accounts and instructed them to implement programs to detect and respond to identity theft. However, the term “creditor” was defined broadly and created confusion with some entities. Now, the recently signed Clarification Act defines the definition of a “*creditor*” as someone who regularly engages in one or more of the following activities:

- 1) *Obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction;*
- 2) *Furnishes information to consumer reporting agencies...in connection with a credit transaction; or*
- 3) *Advances funds to or on behalf of a person based on an obligation to repay the funds.*

So, what are the implications of the recently enacted Red Flag Program Clarification Act for MEUW Members? Our analysis remains the same -- that municipal utilities are covered entities and therefore they must comply with the Red Flag Rule (i.e., implement and maintain an identity theft protection plan), and furthermore, that from a business perspective, it made sense to have an identity theft protection policy in place (for your customers’ sake), regardless of what the federal law was. If you need another copy of the MEUW model identity theft protection program template, here’s a link: [www.meuw.org/resources.htm](http://www.meuw.org/resources.htm).