

REGULATING MEDICAL IDENTITY THEFT – UNCERTAINTY FOR THE RED FLAGS RULE

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The implementation date of the Federal Trade Commission's ("FTC") Red Flags Rule (the "Rule"), promulgated under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"),¹ has been delayed for the fourth time to June 1, 2010.² FACTA requires **creditors** and **financial institutions** to implement procedures to help prevent identity theft. The latest delay follows a decision by a Federal District Court holding that FACTA cannot be applied to attorneys. This has forced the FTC to reevaluate how broadly it will apply the Rule and presents the question whether the Rule can be applied to medical providers, as previously asserted by the FTC.³

The Rule's problems stem from the FTC's effort to broadly define "credit."⁴ FACTA borrows the definition from the Equal Credit Opportunity Act which defines credit as "the right granted by a creditor to a debtor to defer payment of debt ...".⁵ The FTC's interpretation defines creditor to include medical providers, lawyers, and merchants who extend "incidental credit," or those who defer payments for services, despite no associated finance charge or installment payment option.⁶

The American Bar Association ("ABA") recently won summary judgment preventing the FTC from applying the Rule to lawyers. The court held that the FTC erroneously and inconsistently applied the Rule,⁷ and exceeded its authority in attempting to regulate all businesses that use monthly invoice billing, and that no evidence suggested identity theft was prevalent in law practice, or that Congress intended to regulate the practice of law through FACTA.⁸

The decision in the ABA case raises the question of whether medical providers can be regulated under the Rule. Much of the legal analysis of the ABA decision could apply to a legal challenge by medical providers. However, the FTC takes the position that there is **some** evidence that medical identity theft occurs. A 2007 FTC report shows 3% of identity theft victims reported that medical services/supplies had been obtained using their information.⁹ This figure is small in comparison to other misuses reported by identity theft victims: credit cards (61%), checking/savings (33%), and telephone services (11%).¹⁰ It is uncertain whether this evidence could support a finding that FACTA was intended apply to medical providers because, much like lawyers, medical providers do not usually require credit checks, and invoicing patients "is more likely an outgrowth of practicality...rather than...credit"¹¹ (especially because of third party payors, such as insurers).

The uncertainty in the application of the Rule requires health care attorneys to prepare their clients to comply.¹² However, it is possible that the Rule will need to be revised in order to overcome a potential legal challenge from the medical field. As the June 1, 2010, deadline approaches it is important to remain aware of developments to ensure your clients' compliance with the Rule.

¹15 U.S.C. §§1681-1681x

² www.ftc.gov/opa/2009/10/redflags.shtm

³<http://www.ftc.gov/os/closings/staff/090204amareponse.pdf>

⁴15 U.S.C. §1681a(r)(5)

⁵15 U.S.C. §1691a(d)

⁶<http://www.fdic.gov/regulations/laws/rules/6500-3000.html>

⁷http://www.abanet.org/poladv/priorities/redflagrule/2009dec01_memoropinion.pdf

⁸*Id.* at 19,40

⁹<http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf>, 17,19,21

¹⁰*Id.*

¹¹http://www.abanet.org/poladv/priorities/redflagrule/2009dec01_memoropinion.pdf at 29.

¹²<http://www.ama-assn.org/ama1/pub/upload/mm/368/red-flags-rule-edu.pdf>