

September 30, 2008

The Honorable William E. Kovacic
Chairman
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington DC 20580



RE: Federal Trade Commission final rule on Identity Theft Red Flags; 16 CFR Part 681

Dear Chairman Kovacic:

The Federal Trade Commission (FTC) issued regulations (i.e., the "Red Flag Rules" or the "final rules" referenced herein) on November 9, 2007, which require financial institutions and "creditors" to develop and implement written identity theft prevention programs, as part of the Fair and Accurate Credit Transactions (FACT) Act of 2003. The identity theft prevention programs must be in place by November 1, 2008, and must provide for the identification, detection, and response to patterns, practices, or specific activities - known as "red flags" - that could indicate identity theft.

The American Medical Association (AMA) along with the undersigned organizations understand some staff attorneys in the Privacy and Identity Protection Section of the FTC have taken the position that physicians are "creditors," and therefore subject to the Red Flag or final rules, if they do not require full payment up front at the time they see patients, but rather bill patients after the physician's services are rendered. We also understand that these staff attorneys are advising that physicians who accept insurance are considered "creditors" if the patient is ultimately responsible for the medical fees (as is routinely the case with respect to co-pays or deductibles or services not covered by insurance). We strongly disagree with the FTC's interpretation that physicians are "creditors," and are therefore subject to the Red Flag Rules.

According to the final rule, a "creditor" is "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew or continue credit." We do not believe that most practicing physicians are "creditors" under the statutory and regulatory scheme, as most do not "regularly extend, renew or continue credit." We note the final rule's definition of a "creditor" (16 CFR § 681.2(b)(5)) specifically mentions "lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies." The final rule does not include physicians (or other health care providers or other types of professionals such as lawyers, accountants, or consultants) among the trades or businesses identified as creditors.

We also question if it is a correct interpretation of the final rule to advise that physicians are creditors if they bill patients after their services are rendered. That would lead to the result that anyone issuing a bill or invoice for services rendered would, by definition, be a creditor, which we do not believe is the intent of the statutory and regulatory scheme. In that regard, we call your attention to Shaumyan v. Sidetex Co., 900 F.2d 16 (2d Cir. 1990), involving application of the Equal Credit Opportunity Act (ECOA), which defines "creditor" for purposes of the Red Flag Rules, wherein the court pointed out [in the context of a home improvement contract calling for progress payments] that imposing a requirement of simultaneous performance would transform into credit transactions "countless transactions in which compensation for services is not

simultaneous ... Such indiscriminate application of the ECOA is not appropriate.” 900 F.2d at 19.

Furthermore, if a physician's billing to a patient is due when invoiced, the physician should not thereafter become a creditor for purposes of the final rule simply because the physician agrees, after the fact, to let the patient pay in installments as opposed to turning the matter over to a collection agency or suing the patient. Likewise, physicians should not be considered creditors simply because they accept insurance and hold the patient responsible for the amount(s) unpaid by insurance, as the patient's indebtedness to the physician is not fixed or certain, and there is no extension of credit, while the claim is being processed by the insurance company.

Finally, we call to your attention Riethman, et al. v. Berry, et al., (287 F.3d 274 (3d Cir. 2002)), wherein, in the context of an attorney's fee arrangement where payment was made in progress payments and interest was charged on the unpaid balance due, the court stated “Hagel's interpretation of the ECOA would embrace doctors' fees, dentists' fees, accountants' fees, psychologists' fees and virtually all other professional fees. In view of the statutory purpose underlying the ECOA, it seems implausible that Congress intended to cover not only banks and other such financial institutions but also all professions.” 287 F.2d at 278.

In light of the foregoing and in view of the extensive HIPAA privacy and security requirements applicable to physicians with respect to patient information, we respectfully request that the FTC immediately provide a cogent legal analysis and judicial precedence which support the views expressed by some staff attorneys that the final rules are applicable to physicians. Given that final rules go into effect November 1, 2008, we also request that the FTC withhold any plans to apply the Red Flag Rules to physicians until this matter is resolved.

We look forward to hearing from you. Please contact Margaret Garikes, AMA's Director of Federal Affairs, at margaret.garikes@ama-assn.org or 202-789-7409 at your earliest opportunity.

Sincerely,

American Academy of Dermatology Association
American Academy of Facial Plastic and Reconstructive Surgery
American Academy of Family Physicians
American Academy of Neurology Professional Association
American Academy of Ophthalmology
American Academy of Otolaryngology-Head and Neck Surgery
American Academy of Pediatrics
American Association of Neurological Surgeons
American College of Emergency Physicians
American College of Gastroenterology
American College of Obstetricians and Gynecologists
American College of Osteopathic Surgeons
American College of Physicians
American College of Radiation Oncology
American College of Surgeons
American Gastroenterological Association
American Medical Association
American Osteopathic Academy of Orthopedics
American Psychiatric Association
American Society for Gastrointestinal Endoscopy

American Society for Reproductive Medicine
American Society of Cataract and Refractive Surgery
American Society of Plastic Surgeons
Congress of Neurological Surgeons
Joint Council of Allergy, Asthma and Immunology
Medical Group Management Association
Society of Interventional Radiology