



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Privacy and Identity Protection
Bureau of Consumer Protection
Joel Winston
Associate Director

March 11, 2009

Ms. Margaret Garikes
Director of Federal Affairs, American Medical Association
25 Massachusetts Avenue, N.W.
Suite 600
Washington, D.C. 20001

Dear Ms. Garikes:

We have received your recent letter to the Chairman of the Commission, continuing the dialog about application of the Red Flags Rule to physicians and related health care providers. We have reviewed carefully the legal and policy arguments the AMA has raised. However, we continue to disagree with your position that the Red Flags Rule does not apply to medical providers who regularly defer payment for goods or services.

As previously noted, the scope of the Red Flags Rule is broad, and is clearly intended to address all forms of identity theft, including the growing problem of medical identity fraud. Moreover, Commission staff believe the plain language of the Rule, buttressed by the Federal Reserve Board's interpretations of the terms "creditor" and "credit," dictate that health care providers are covered by the Rule when they regularly defer payment for goods or services. Of course, each provider must assess its own business operations to determine the risk of identity theft and any appropriate response. As previously explained, we believe that this obligation need not be a substantial burden, but can substantially help to reduce the real threat of identity theft to patients.

I further note your contention that application of the Rule to physicians should trigger notice and comment under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, because it constitutes an expansion of the Rule. We believe the agency's interpretation of the statutory term "creditor" to include health care providers is entirely consistent with both the language of and policies underlying the Red Flags Rule. Indeed, the rulemaking record establishes that the Commission intended the Red Flags Rule to apply broadly to all entities that extend credit within the full scope of the FTC's jurisdiction. For example, the Red Flags Notice of Proposed Rulemaking ("NPRM") made clear that the FTC and other agencies intended the rule to "apply to a wide variety of financial institutions and creditors" that offer "many different products and services." 71 Fed Reg. at 40,791 (July 18, 2006).¹

¹ The rulemaking record also reveals that several commenters responding to the NPRM understood the potentially broad scope of the "creditor" definition. For example, ACA International, a trade association of credit and collection companies, argued that third party debt

Further, the Paperwork Reduction Act section of the NPRM specifically noted the following types of persons that would be potentially covered by the Rule: “State-chartered credit unions, non-bank lenders, mortgage brokers, motor vehicle dealers, utility companies, telecommunications companies, *and any other person that regularly participates in a credit decision, including setting the terms of credit.*” *Id.* at 40,798 (emphasis added). The Commission specifically noted that in light of the “broad scope of entities covered, it is difficult to determine precisely the number of financial institutions and creditors that are subject to the FTC’s jurisdiction,” which also include “numerous small businesses.” Similarly, the Regulatory Flexibility section of the NPRM noted the difficulty in determining with precision the number of financial institutions and creditors subject to the FTC’s jurisdiction: “The entities under the FTC’s jurisdiction are so varied that there are no general sources that provide a record of their existence.” *Id.* at 40,806. It was neither feasible nor mandatory that the FTC enumerate every entity that might be covered by the Rule.

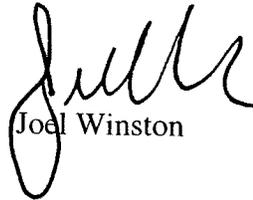
Agency interpretations of their own rules do not constitute rulemaking under the APA, unless they seek to repudiate or amend a prior rule. *See, Funeral Consumer Alliance, Inc., v. FTC*, 481 F.3d 860 (D.C. Cir. 2007). In that case, the Funeral Consumer Alliance sued the Commission on the grounds that a Commission interpretation of the Funeral Rule, in its view, narrowed the scope of the rule and, therefore, constituted a rulemaking under the APA. The Court rejected that view, distinguishing between an agency rule interpretation and a rule amendment: “[A]n agency action is an amendment of a rule if it ‘repudiates or is irreconcilable with [a prior legislative rule].’” The Court further noted that an “agency action does not become an amendment ‘merely because it supplies crisper and more detailed lines than the authority being interpreted.’” *Id.* at 863.

In light of the above, it is clear that the Commission intended the Red Flags Rule to apply to all businesses that extend credit within the full scope of the FTC’s jurisdiction. Staff’s finding – that providers who regularly defer payment are “creditors – does nothing more than supply additional crispness to the admittedly broad ECOA definition of the term “creditor” already incorporated into the Rule. And, as explained in our letter to you of February 4, this view is wholly consistent with the Federal Reserve Bank’s interpretation of “credit” and “creditor” under the ECOA.

collectors are not “creditors,” as defined in the NPRM, and specifically asked for further clarification. *See* ACA International (Sept. 18, 2006), *available at* <http://ftc.gov/os/comments/redflags/523455-00037.pdf>. The National Association of Realtors (NAR) voiced concern about the scope of the ECOA definition of “creditor” as well: “NAR strongly opposes applying the [Federal Reserve Boards]’ regulatory definition in the context of red flag guidelines because it would extend inappropriate and burdensome requirements to the large majority of our members who have only a peripheral role in helping their clients obtain mortgage loans.” *See* Nat’l Assoc. Of Realtors (Sept. 15, 2006), *available at* <http://www.ftc.gov/os/comments/redflags/523455-00003.pdf>.

Again, we welcome further dialogue on these and other issues to ensure that the Rule does not place undue or unnecessary burdens on health care professionals, while still meeting the desired goal of reducing the overall incidence and impact of identity theft, including medical identity theft. If you have further questions about this issue, you may contact attorney Naomi Lefkowitz at nlefkovitz@ftc.gov.

Sincerely,



Joel Winston