

## FTC DELAYS ENFORCEMENT OF RED FLAGS RULE

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The Federal Trade Commission ("FTC") announced on October 22, 2008 that it would suspend enforcement of the Red Flags Rule (the "Rule") until May 1, 2009.<sup>1</sup> The FTC decided to do so in light of the enormous amount of confusion that has arisen over who is covered under the Rule. The FTC's delay in enforcement gives covered entities an additional six months to establish and implement identity theft prevention programs that comply with the Rule.

The Rule implements sections of the Fair and Accurate Credit Transactions Act of 2003. It specifically calls for financial institutions and creditors to develop and implement identity theft prevention programs that detect and respond to patterns, practices, or specific activities that could indicate identity theft. Until recently, the Rule had received little attention outside of the financial industry. However, the Rule's broad definition of "creditor" and the FTC's current interpretation indicate that it applies to industries and entities, including healthcare providers, that typically are not required to comply with FTC rules.

Under the Rule, a creditor is any entity that provides goods or services without demanding payment up front. During a teleconference sponsored by the American Health Lawyers Association, an attorney with the Privacy and Identity Protection Section of the FTC indicated that the agency views health care providers as falling within the definition of creditors, if the provider does not require payment for medical services at the time they are rendered. This would include a hospital that bills a patient's insurance company for the care it provided, but is not actually paid by the insurer until after the services are rendered.

A creditor has a duty to protect against identity theft in connection with "covered accounts." Under the Rule, covered accounts are those that are used primarily for personal, family, or household purposes and involve multiple payments or transactions.

The Rule and the FTC's guidance specifically identify certain types of interactions (such as with auto dealers, government, or non-profit entities) where an individual establishes a continuing relationship with the entity, including billing for previous services rendered, as covered accounts. Thus, any type of patient account or payment plan that involves multiple transactions or multiple payments likely falls within the Rule's definition of a covered account.

The focus of the Rule in the health care industry is medical identity theft – patients obtaining health care by using another person's insurance information. The FTC is concerned that this is a significant and growing problem. Providers who qualify as creditors holding covered accounts must develop a comprehensive identity theft prevention program that enables the provider to detect, prevent, and mitigate identity theft. The provider's governing board will need to approve and then periodically update the program to reflect changes in risks.

*Cozen O'Connor health law attorneys can assist your organization in establishing a written identity theft program that complies with the Rule. For more information, please contact Mark Gallant, John Washlick, Kate Layman, or Kim Hynes.*

1. 16 C.F.R. § 681.1 *et seq.*

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