

February 23, 2009

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; Application of the Red Flags Rule to Physicians

Dear Chairman Kovacic:

The Federal Trade Commission (FTC) issued a final rule (the Red Flags Rule) on November 9, 2007, which requires 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. Although the final rule indicated that the identity theft prevention programs must be in place by November 1, 2008, the FTC announced on October 22, 2008, that it was moving the compliance deadline of the Red Flags Rule to May 1, 2009.

The American Medical Association (AMA) along with the undersigned organizations agree that the growth of identity theft in the context of health care represents a growing concern that has potentially serious consequences for patients, physicians, and the health care industry as a whole. **However, we strongly object to the FTC staff's interpretation that physicians are "creditors," and are therefore subject to the Red Flags Rule. Not only do we disagree with the FTC staff's interpretation of the final rule, we also believe that the FTC failed to comply with the Administrative Procedure Act (APA), which requires the FTC to explain its regulatory proposals and provide the public with notice and opportunity to comment.** Finally, given our nation's current economic crisis, imposing this unjustified, unfunded mandate on physicians, especially small physician practices that account for 80 percent of outpatient visits, could have serious adverse consequences on patients' access to our health care delivery system and services.

Definition of Creditor

According to the Equal Credit Opportunity Act (ECOA) and 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.**

In the FTC's February 4, 2009, correspondence, the FTC cites to ECOA staff commentary to Regulation B; a regulation issued by the Federal Reserve Board to serve as guidance for compliance with the ECOA. The ECOA's staff commentary, not the Act itself, mentions that service providers that allow a client or customer to *defer* the payment of a bill can be viewed as a creditor. Unlike the two cases cited by the FTC, *Brothers v. First Leasing*, 724 F.2d 789, 793-94 (9th Cir. 1984) and *Williams v. AT&T Wireless Servs.*, 5 F. Supp. 2d 1142, 1147 (W.D. Wash. 1998), which involve clear cases of payment deferral, and as we have previously discussed with the FTC, **the claims payment process is not a deferral process; the process is governed by contractual obligations between patients and health insurance carriers, physicians, and health insurance carriers, as well as federal and state prompt pay laws.** More often than not, at the time a physician is treating a patient, the physician has no idea about the amount an insurance carrier will cover for a particular patient. We also addressed access to care concerns given that physicians have an ethical and at times legal obligation (e.g., Emergency Medical Treatment and Active Labor Act or "EMTALA") to medically treat patients and typically do not condition treatment upon full payment in advance of the rendering of service. We do not believe that the ECOA's staff commentary was intended to apply to the claims payment process as described above.

Moreover, the FTC admits that there is no language in the Red Flags Rule that references physicians as creditors; in fact there is only one instance in the preamble of the final rule that even mentions the health care field. The preamble indicates that "creditors" (not physicians) in the health care field may be at risk of medical identity theft and, therefore, must identify Red Flags that reflect this risk. Again, we question the FTC staff's interpretation of the final rule 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 our September 30, 2008, correspondence to the FTC, we called attention to two relevant cases *Shaumyan v. Sidetex Co.*, 900 F.2d 16 (2d Cir. 1990) and *Riethman, et al. v. Berry, et al.*, (287 F.3d 274 (3d Cir. 2002) that clearly support narrowly defining the term creditor so as to not apply the term to all professions, including physicians, and all payment processes.

Compliance with the Administrative Procedure Act (APA)

We strongly believe that the FTC staff's stance to apply the Red Flags Rule to physicians conflicts with the requirements of the Administrative Procedure Act (APA). The broad application of the Red Flags Rule must be accomplished through a formal notice and comment rule-making process; not through statements by FTC staff attorneys after the issuance of the final rule. It appears that there was no consideration of the applicability of the final rule to physicians during the rule-making process that lead up to the issuance of the final rule. In fact, a June 2008 FTC business alert following the publication of the

final rule, which highlighted who must comply with the Red Flags Rule, did not even mention health care providers. The extension of the final rule to physicians is a substantive rule. The Administrative Procedure Act, 5 U.S.C. § 551 et seq., requires that before a rule of this nature can be adopted, the public must be given notice and the opportunity for comment. *Id.* at § 553. The FTC did not follow this required protocol. **In order to comply with the APA, the FTC must publish a new rule that proposes to subject physicians to the Red Flags Rule for public comment. If the FTC does not withdraw this new interpretation regarding the application of the Red Flags Rule, then we urge the Commission to suspend the rule pending the outcome of a rulemaking procedure that complies with the requirements of the APA.**

Health Care Reform

The Obama Administration and Congress are committed to enacting comprehensive health care reform this year. If physicians are forced to collect monies up front from their patients to avoid being called creditors and being subjected to an unfunded, costly, burdensome mandate that duplicates existing requirements under the Health Insurance Portability and Accountability Act (HIPAA), the Red Flags Rule will undoubtedly undermine health care reform and our nation's access to health care services.

Although we believe that the Red Flags Rule does not apply to physicians, we are willing to pursue an awareness campaign that highlights the growth of identity theft in the health care industry. We would like to work with the FTC in furtherance of such a campaign. **Given that the Red Flags Rule goes into effect May 1, 2009, we urge the FTC to withhold any plans to apply the Red Flags Rule to physicians until the FTC complies with the APA and publishes a new Red Flags Rule that affords the physician community with an opportunity to comment.**

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 Home Care Physicians
American Academy of Hospice and Palliative Medicine
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 Clinical Endocrinologists
American Association of Clinical Urologists
American Association of Neurological Surgeons
American College of Cardiology

American College of Emergency Physicians
American College of Gastroenterology
American College of Obstetricians and Gynecologists
American College of Osteopathic Internists
American College of Osteopathic Surgeons
American College of Physicians
American College of Radiation Oncology
American College of Radiology
American College of Rheumatology
American College of Surgeons
American Gastroenterological Association
American Geriatrics Society
American Medical Association
American Medical Group Association
American Osteopathic Association
American Psychiatric Association
American Society for Gastrointestinal Endoscopy
American Society for Radiation Oncology
American Society of Addiction Medicine
American Society of Anesthesiologists
American Society of Cataract and Refractive Surgery
American Society of Clinical Oncology
American Society of Plastic Surgeons
American Thoracic Society
American Urological Association
Association of American Medical Colleges
College of American Pathologists
Congress of Neurological Surgeons
Heart Rhythm Society
Joint Council of Allergy, Asthma and Immunology
Medical Group Management Association
Society for Cardiovascular Angiography and Interventions
Society for Maternal-Fetal Medicine
Society of Hospital Medicine
Society of Interventional Radiology
The Endocrine Society

Medical Association of the State of Alabama
Alaska State Medical Association
Arizona Medical Association
Arkansas Medical Society
California Medical Association
Colorado Medical Society
Connecticut State Medical Society
Medical Society of Delaware
Medical Society of the District of Columbia

Florida Medical Association Inc
Medical Association of Georgia
Hawaii Medical Association
Idaho Medical Association
Illinois State Medical Society
Indiana State Medical Association
Iowa Medical Society
Kansas Medical Society
Kentucky Medical Association
Louisiana State Medical Society
Maine Medical Association
MedChi, The Maryland State Medical Society
Massachusetts Medical Society
Michigan State Medical Society
Minnesota Medical Association
Mississippi State Medical Association
Missouri State Medical Association
Montana Medical Association
Nebraska Medical Association
Nevada State Medical Association
New Hampshire Medical Society
Medical Society of New Jersey
New Mexico Medical Society
Medical Society of the State of New York
North Carolina Medical Society
North Dakota Medical Association
Ohio State Medical Association