Licensed Health Care Professionals Seek Commitment from FTC on Application of the Red Flags Rule

By Cynthia S. Marietta, J.D., LL.M. Candidate (Health Law)
csmarie@central.uh.edu

Introduction

If the FTC does not apply the Red Flags Rule\(^1\) to lawyers, then it should not apply the Rule to licensed health care professionals! This argument forms the basis for a recent joint plea by four professional health care organizations’ to the Federal Trade Commission (FTC), seeking exclusion from the Red Flags Rule.\(^2\)

In 2007, in an effort to combat identity theft, the FTC and other regulatory agencies promulgated the Red Flags Rule (the Rule), pursuant to the Fair and Accurate Credit Transactions Act of 2003 (FACTA).\(^3\) The Rule applies to “creditors,”\(^4\) who regularly allow deferred payments for goods or services provided, and it requires such creditors to develop and implement written identity theft prevention programs to help identify, detect, and respond to certain warning signs or “red flags” that could indicate identity theft.\(^5\) Although there are no criminal penalties for failing to comply with the Rule, noncompliant creditors may be subject to civil monetary penalties.\(^6\)

The broad scope of the Rule’s definition of “creditor” encompasses professional service providers who, in the past, have not considered themselves to be creditors. Since first learning this Rule may apply to them, physicians, lawyers, and other professional service providers have adamantly argued they should not be subject to the Rule.\(^7\)

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4 Congress imported the definition of “creditor” from the Equal Credit Opportunity Act for use in FACTA. This definition covers all entities that regularly permit deferred payments for goods or services. In FACTA, “creditor” is defined as an entity that regularly extends, renew, 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. See 15 U.S.C. § 1681(r)(5) (West 2008); Pub. L. No. 108-159, § 2, 111 Stat. 1952, 108th Cong. (2003); EQUAL CREDIT OPPORTUNITY ACT, Tit. VII, § 702 (2008); see also Fed. Trade Comm’n, FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, available through http://www.ftc.gov.
5 FTC Extended Enforcement Policy, supra, note 4.
In August 2009, the American Bar Association (ABA) filed suit against the FTC, seeking declaratory and injunctive relief from imposition of the Rule on lawyers. In late November 2009, a Washington, D.C., District Court judge agreed with the ABA and barred application of the rule to lawyers. In late January 2010, on the heels of that decision, four national professional health care organizations representing hundreds of thousands of licensed physicians, dentists, and veterinarians (LHCPs), jointly sent a letter to the FTC, asking it not to apply the Rule against the LHCPs in light of the district court decision. The LHCPs are seeking a two-fold commitment from the FTC: (1) that it will not apply the Rule to LHCPs during the appeals process of the ABA case, and (2) that, if the final resolution of the ABA case is that the Rule does not apply to lawyers, the FTC will not apply the Rule to LHCPs, as well.

To date, the FTC has not responded to the LHCPs’ request, and the FTC has not indicated whether it will respond before the Rule’s extended enforcement date of June 1, 2010. Meanwhile, Congress is waiting for finalization of pending HR 3763, a bill which would exempt certain businesses, including health care, accounting and legal practices with 20 or fewer employees, from the Rule. However, the LHCPs want more than just a limited exemption for small health care practices. They want the FTC’s full commitment that all LHCPs will be excluded from the Rule if the lawyers are excluded. Whether the FTC will make that commitment remains to be seen.

Background on Medical Identity Theft

Medical identity theft is reportedly the fastest growing form of identity theft and potentially may be the costliest and perhaps deadliest form of fraud for victims. According to some estimates, more than 250,000 Americans are victims of medical identity theft each year. Unlike traditional forms of identity theft where an individual’s credit cards and bank account numbers have been compromised, in medical identity theft, the thief steals personal information, such as a name, Social Security number, insurance card, or Medicare number, to obtain medical care, purchase medications, or submit false billings to Medicare or insurance companies in the victim’s name.
When a thief steals the identity of a patient for medical purposes, the costs to health care and the patient may be significant and could potentially be irreversible.\(^\text{17}\) Once the thief obtains health care under the victim’s name or Social Security number, the medical records of that victim/patient are compromised and may contain commingled, inaccurate information, which ultimately could prove to be fatal in an emergency.\(^\text{18}\)

In an effort to protect consumers from such theft, as outlined in FACTA, Congress directed the FTC and other financial regulatory agencies to promulgate rules requiring “creditors” and “financial institutions” with “covered accounts” to implement programs to specifically identify and deter identity theft.\(^\text{19}\) In November 2007, the FTC and other agencies finalized the Red Flags regulations and guidelines, which became effective on January 1, 2008, with full compliance initially scheduled by November 1, 2008.\(^\text{20}\) However, when the FTC was prompted by questions about the scope of the Rule and confusion over to whom the Rule should apply, the FTC delayed enforcement of the Rule on its own initiative on three separate occasions in an effort to allow affected entities to gather information and guidance.\(^\text{21}\) Congress requested a fourth delay in enforcement pending finalization of HR 3763.\(^\text{22}\) As it stands today, June 1, 2010 is the targeted enforcement date.\(^\text{23}\)

**Under What Circumstances are Health Care Professionals Subject to the Red Flags Rule?**

The Rule applies to “financial institutions” and “creditors” with “covered accounts.”\(^\text{24}\) The AMA and nearly 100 other physician groups wrote letters to the FTC, arguing that the agency’s definition of “creditor” is too broad and contending that, while physicians defer payment for services, they are not “creditors.”\(^\text{25}\) The FTC disagreed and specifically issued a document, addressing the Rule’s applicability to the healthcare industry.\(^\text{26}\)

According to the FTC’s guidance documents, a health care professional is subject to the Rule if it is a “creditor” who offers or maintains “covered accounts.”\(^\text{27}\) Health care professionals fall within the definition of a “creditor” if they regularly extend, renew, or

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\(^{17}\) CreditLoan®,
\(^{18}\) Id.
\(^{20}\) Id.
\(^{21}\) FTC Extended Enforcement Policy, supra, note 4.
\(^{22}\) Id.
\(^{23}\) Id.
\(^{25}\) Gold, supra, note 15.
\(^{27}\) Id.
continue credit, or in other words, bill patients after their services are provided.\textsuperscript{28} Moreover, health care providers who accept insurance payments are considered creditors if the patient is ultimately responsible for the medical bill.\textsuperscript{29} A “covered account” is an account used for personal, family, or household purposes that involves multiple payments or transactions, and includes continuing relationships between health care providers and patients for the provision of medical services.\textsuperscript{30}

Thus, healthcare professionals are subject to the Rule if they regularly bill patients after rendering services, including the remaining amount not reimbursed by insurance.\textsuperscript{31} Additionally, any provider who regularly allows patients to set up payment plans after services have been rendered, are deemed creditors under the Rule.\textsuperscript{32} However, a healthcare provider is not subject to the Rule if it requires payment before or at the time of service or if it only accepts direct payment from Medicaid or other similar programs where the patient has no financial responsibility.\textsuperscript{33}

What Health Care Providers Must Do To Comply with the Red Flags Rule

To comply with the Rule, health care professionals must develop and implement a written plan to: (1) identify the kinds of warning signs or “red flags”\textsuperscript{34} that are relevant to the practice; (2) detect warning signs or “red flags”; (3) describe how to respond to “red flags” to prevent and/or mitigate identity theft; and (4) monitor and update the program.\textsuperscript{35}

Although there are no criminal penalties associated with violations of the Rule, the FTC can seek both monetary civil penalties and injunctive relief for violations. Civil monetary penalties may amount to $3,500 per violation of the Rule\textsuperscript{36} and enforcement of a court order on injunctive relief could amount to $16,000 per violation.\textsuperscript{37}

Why are Health Care Providers Opposed to the Rule?

From a practical standpoint, LHCPs’ most prevailing complaint about the Rule is that it will add another degree of regulatory burden for health care providers and patients to a system that is already over-burdened with responsibilities.\textsuperscript{38} The Rule could severely impact a physician’s administrative work load at the front desk, cause increased

\begin{footnotesize}
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\item \textsuperscript{28} Id.; see also “creditor,” supra, note 4.
\item \textsuperscript{29} Toporoff, supra, note 26.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Specific types of “red flags” may include suspicious documents that appear to have been altered; photo identification not resembling the individual; suspicious changes of address or phone number; or if a person provides an entity with information that is inconsistent with what is in the patient’s health record.
\item \textsuperscript{35} Id.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Gold, supra, note 15.
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administrative costs, and more importantly, could potentially cause acutely ill patients to be detained at the check-in desk.\textsuperscript{39}

From a legal standpoint, LHCPs contend the Rule exceeds the scope of the FTC’s authority under the enabling statute, FACTA.\textsuperscript{40} This is consistent with the court’s ruling in \textit{American Bar Ass’n v. Fed. Trade Comm’n}, in which the court specifically stated that in applying the Rule to attorneys, the FTC “not only seeks to extend its regulatory power beyond that authorized by Congress, but it also untimely and arbitrarily selects monthly invoice billing as the activity it seeks to regulate.”\textsuperscript{41} The LHCPs believe these dispositive considerations should equally apply to them and there is no basis to conclude that Congress intended the Rule to apply to LHCPs, but not attorneys.\textsuperscript{42} Moreover, “implementation the Rule with respect to LHCPs, but not lawyers, would be manifestly unfair and anomalous.”\textsuperscript{43}

\textbf{Conclusion}

While the LHCPs assert a well-reasoned, “\textit{what’s good for the goose is good for the gander}” argument, there is no telling how the FTC will respond to the LHCPs’ plea for fairness. Meanwhile, LHCPs should perhaps consider practical common sense of taking the necessary steps to protect against medical identity theft in their office practices regardless of whether the FTC will apply the Rule to them in the future. Under state medical records privacy laws, HIPAA and now the HITECH Act, LHCPs owe a duty to their patients to protect their confidential medical information from unauthorized use. Since the inception of the Red Flags Rule, the FTC has issued numerous guidance brochures and resource materials\textsuperscript{44} for sample identity theft programs. LHCPs would be well-served by utilizing these materials to lay the basic framework for an effective medical identity theft program in their office practices.

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\textsuperscript{39} Id.
\textsuperscript{40} American Medical Ass’n Correspondence, \textit{supra}, note 2, at 1.
\textsuperscript{41} \textit{American Bar Ass’n v. Federal Trade Comm’n} (D.D.C. No. 09-1636 (RBW)), \textit{supra}, note 8, at p. 40.
\textsuperscript{42} American Medical Ass’n Correspondence, \textit{supra}, note 2, at 1.
\textsuperscript{43} Id.
\textsuperscript{44} See brochures and resources available through http://www.ftc.gov/redflagsrule.