



Michael D. Maves, MD, MBA, Executive Vice President, CEO

March 9, 2009

The Honorable Jon Leibowitz
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 Leibowitz:

The purpose of the Administrative Procedure Act (APA) is to make entities aware of regulations that affect them and to allow such entities the opportunity to comment. A *BNA* article, "FTC, Medical Association Spar Over Application of ID Theft Prevention Rules," that was published on March 6, includes a statement by the Federal Trade Commission (FTC) staff acknowledging that "a lot of entities were not aware that they were covered by this [the Red Flags Rule]." By the FTC staff's own admission, it is clear that the physician community was not informed that physicians are required to develop and implement written identity theft prevention programs in accordance with the Red Flags Rule.

Speaking on behalf of the physician community, the American Medical Association (AMA) strongly believes that the FTC did not provide physicians with an opportunity to review and comment on this Rule. 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 is clear that there was no consideration of the applicability of the final rule to physicians during the rule-making process that led up to the issuance of the final rule.

We urge the FTC to allow the physician community to have the opportunity to provide meaningful input to the Commission on the implications, for physicians and their patients, of the Red Flags Rule. **The AMA, on behalf of the physician community, requests that the FTC publish a new rule that proposes to subject physicians to the Red Flags Rule so**

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that physicians have a chance to review the Rule and provide comments. We again urge the FTC to suspend the application of the Red Flags Rule to physicians pending the outcome of a rulemaking procedure that complies with the requirements of the APA.

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,

A handwritten signature in black ink, appearing to read "Mike Maves". The signature is written in a cursive, flowing style.

Michael D. Maves, MD, MBA

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Privacy

FTC, Medical Association Spar Over
Application of ID Theft Prevention Rules

The Federal Trade Commission and the American Medical Association are at odds over whether health care providers are covered under new rules requiring organizations to implement identity theft prevention programs.

In a recent letter to the AMA, Eileen Harrington, acting director of the FTC's Bureau of Consumer Protection, said that health care professionals are subject to the rules as "creditors," which are entities that regularly extend, renew, or continue credit.

Despite objections from the association, the commission is standing behind that position, according to Betsy Broder, assistant director of the FTC Division of Privacy and Identity Protection.

"It's about any entities that defer payments on a regular basis," Broder said in a March 5 BNA interview.

The AMA argues that physicians forced to comply with the rules would face an "unfunded, costly, burdensome mandate," one that duplicates existing requirements under the Health Insurance Portability and Accountability Act (HIPAA). The association is calling on the FTC to exempt the industry from a May 1 compliance deadline and to open a comment period on the issue.

Under the rules, financial institutions and creditors must develop prevention programs that identify relevant patterns, practices, and specific activities that are "red flags" for possible identity theft.

The rules were finalized in October 2007 under the Fair and Accurate Credit Transactions Act (FACT Act) by the FTC, the Office of the Comptroller of the Currency, the Federal Reserve, the Federal Deposit Insurance Program, the Office of Thrift Supervision, and the National Credit Union Administration (NCUA).

The rules became effective Jan. 1, but covered financial institutions were given until Nov. 1 to comply. The FTC extended the deadline for creditors until May 1 after learning that some industries and entities within its jurisdiction were uncertain about their coverage under the rules.

Asked whether physicians will be exempted from the upcoming compliance deadline, Broder said the commission has already extended the deadline once and does not anticipate another extension. However, she said the agency will take a "very measured approach" with enforcement.

"We know that a lot of entities were not aware they were covered by this, so what we're looking for are good faith efforts," she said.

She added that the commission should be issuing further guidance on how to comply with the rules in the "very near future."

Creditor Category Viewed as Broad

According to the FTC, the creditor category can apply to a diverse mix of industries that come under the commission's jurisdiction, including finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications firms.

In early February, Harrington sent a letter to the AMA explaining FTC staff's position that health care providers are covered by the red flag rules. In her letter, she said the rules were intended to address all forms of identity theft, including those involving the health care industry.

“Although identity theft most commonly is associated with financial transactions, there are increasing concerns about identity fraud in the context of medical care,” she said. Harrington argued that the “plain language and purpose of the rule dictate that health care professionals are covered by the rule when they regularly defer payment for goods or services.” However, she said the burden on health care professionals “need not be substantial,” and she said that FTC staff was willing to work with the AMA in helping its members to comply with the rule in the “least burdensome manner possible.”

On Feb. 23, the AMA sent a letter to the FTC saying that it “strongly” objects to the interpretation by commission staff that physicians are creditors under the red flag rules and should therefore comply.

The letter was addressed to FTC Commissioner William E. Kovacic, who previously chaired the agency under the Bush administration.

The AMA said the commission had failed to comply with the Administrative Procedure Act (APA), which requires the agency to explain its regulatory proposals and provide the public with notice and opportunity to comment.

“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,” the group said.

An AMA spokeswoman told BNA March 5 that the association maintains this position and has not yet received a response from the FTC.

By Alexei Alexis

*A copy of the FTC letter on the red flag rules is available at
<http://www.ftc.gov/os/closings/staff/090204amareponse.pdf>.*