

## Red Flags Rule: The FTC Cries Wolf Again

On the last business day before they were to begin enforcing the Red Flags Rule, the Federal Trade Commission again extended the deadline – this time until December 31, 2010. The Red Flags Rule was promulgated by the FTC to address the risk of identity theft. In announcing the latest delay, FTC Chairman Jon Leibowitz blamed Congress for the uncertainty concerning the Rule. According to Leibowitz:

“Congress needs to fix the unintended consequences of the legislation establishing the Red Flags Rule – and to fix this problem quickly. . . . As an agency we’re charged with enforcing the law, and endless extensions delay enforcement.”

In blaming Congress, the FTC says it developed the Rule because Congress directed it to develop regulations requiring “creditors” as well as “financial institutions” to address the risk of identity theft when it passed the Fair and Accurate Credit Transactions Act. Because the Act applied to “creditors” the FTC claims it was obligated to include in its Red Flags Rule all entities that have “covered accounts”, including medical practices. Numerous efforts to get the FTC to alter its opinion have proven unsuccessful.

When it last delayed enforcement, in October of 2009, the FTC announced that it was doing so to allow Congress time to finalize legislation that would limit the scope of business covered by the Rule. Since then, Congress has failed to act. However, according to the FTC, it has received another request from “certain Members of Congress” for another delay in enforcement of the Rule beyond June 1, 2010.

In announcing the latest delay, the FTC urged Congress to act quickly to pass legislation that will resolve any questions as to which entities are covered by the Rule and obviate the need for further enforcement delays. If Congress passes legislation limiting the scope of the Red Flags Rule with an effective date earlier than December 31, 2010, the FTC will begin enforcement as of that effective date to those entities still within the scope of the new legislation.

Just one week before the latest announcement the AMA and the American Osteopathic Association filed a lawsuit asking the courts to declare that the legislation which resulted in the Red Flags Rule was not intended to apply to physician offices. However, neither organization asked the courts to immediately enjoin enforcement.

Unfortunately, the delay in enforcement by the FTC does not delay numerous state laws which also address identity theft. Some of these state laws are even more burdensome than the federal regulations.

It is inexcusable that Congress cannot quickly clarify its intent and, hopefully, remove physician offices from the scope of a law that most observers believe was initially intended only to apply to banks and other financial institutions. While most believe that the FTC has drastically overstepped its bounds in applying the law to physician offices, only Congress or the Courts can eliminate this uncertainty, which has already cost physicians many millions of dollars, and untold lost time.

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