

November 24, 2008

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

The Honorable William E. Kovacic
Chairman, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Red Flags Rule

Dear Chairman Kovacic:

The American Dental Association requests that the Federal Trade Commission formally reject a position taken by staff attorneys at the Commission to the effect that dentists are "creditors" within the meaning of the Red Flags Rule, 16 C.F.R. § 681.2. As you know, that Rule requires each "financial institution" and "creditor" to develop a written plan to prevent and detect identity theft. Recently, Commission staff has taken the position that dentists and physicians are "creditors" of patients when they don't receive payment in full from their patients at the time of treatment.

For the reasons set forth below, the ADA respectfully submits that inclusion of dentists within the definition of "creditor" under the Red Flags Rule is contrary to the legislation which the Rule purports to implement, constitutes a substantive rule that was not adopted in accordance with the requirements of the Administrative Procedure Act, and represents unsound public policy. The ADA therefore urges the Commission to postpone indefinitely the effective date of the Rule as to dentists while the applicability of the Rule to dentists is being considered. Indeed, this matter is so important to our members that we would request a meeting with you and the other Commissioners at your and their earliest convenience.

DISCUSSION

A. Background

Section 114 of the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"), 15 U.S.C. § 1681m(e)(1)(A), requires the Commission to "establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary." Section 114 further directs the Commission to "prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the [the Commission's] guidelines ... to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers." *Id.* § 1681m(e)(1)(B).

The Commission issued its final regulation implementing Section 114, referred to as the Red Flags Rule, on November 9, 2007. See 72 Fed. Reg. 63718 et seq. The Rule, 16 C.F.R. § 681.2, was set to become effective on November 1, 2008, but the Commission has suspended enforcement until May 1, 2009. The Rule requires "creditors" with certain "covered accounts" to develop and implement written identity theft prevention programs. These programs must provide for the identification, detection, and response to patterns, practices, or specific activities that could indicate identity theft

(the so-called "red flags"). The programs must be reviewed periodically and approved by senior management.

Nowhere in the Red Flags Rule are dentists or physicians mentioned or included within the term "creditors." Nor are dentists or physicians typically considered creditors within the customary meaning of that term. However, in an article entitled *The "Red Flags" Rule: Are You Complying with New Requirements for Fighting Identity Theft* ("the Article"), staff attorneys in the Commission's Division of Privacy and Identity Protection have taken the position that health care providers are subject to the Rule.

Specifically, the Article states (at p. 2) that "[h]ealth care providers are creditors if they bill consumers after their services are completed." In addition, "[h]ealth care providers that accept insurance are considered creditors if the consumer ultimately is responsible for the medical fees." *Id.* The basis for this interpretation is apparently the view of Commission staff attorneys that whenever "payment is made after [a] product was sold or [a] service performed," the seller or service provider has extended the recipient credit. *Id.* Health care providers are deemed to have "covered accounts" because their "continuing relationships with consumers for the provision of medical services" qualifies as an account "for personal, family, or household services that involves multiple payments or transactions." *Id.*

For three reasons, the ADA urges the Commission to reject the staff attorneys' interpretation of the Red Flags Rule. First, application of the Rule to dentists would be contrary to the FACT Act on which the Rule is based. Second, application of the Rule in this manner must be effectuated through a formal notice and comment rule-making – not through informal statements by Commission staff attorneys or by publication in an article. Finally, application of the Rule to dentists and physicians represents ill-advised public policy.

B. Analysis

1. The Position That Dentists Are Covered By The Red Flags Rule Is Contrary To The Language Of The FACT Act

As noted above, § 114 of the FACT Act requires the Commission to establish guidelines "for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities." The term "creditor" in § 603 of the Fair Credit Reporting Act (FCRA) as amended by § 111 of the FACT Act, incorporates by reference the definition of "creditor" set forth in § 702 of the Equal Credit Opportunity Act (ECOA). 15 U.S.C. § 1681a(e). As used in ECOA, "creditor" means "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." *Id.* at § 1691a(e).

In the broadest sense, permitting a patient to pay for services after the services are rendered might be characterized as extending credit. Judicial precedent makes clear, however, that the definition of "creditor" in ECOA (which was imported into the FACT Act) does not encompass situations in which a service provider allows the client or customer to pay over time. Thus, in *Shaumyan v. Sidetex Co.*, 900 F.2d 16 (2d Cir. 1990), the Court of Appeals held that a home improvement contract calling for progress payments did not make the service provider a "creditor" within the meaning of ECOA. The Court noted that, had it ruled otherwise, "countless transactions in which compensation for services is not instantaneous would be characterized as credit transaction." *Id.* at 19. According to the Court, "(s)uch an indiscriminate application of the ECOA is not appropriate." *Id.*

Even more squarely on point is Riethman v. Berry, 287 F.3d 274, 279 (3d Cir. 2002). There, the Third Circuit held that a law firm's agreement to bill a client on a monthly basis and to charge interest on late payments did not make the firm a "creditor" for purposes of ECOA. The Court explained that the opposite result would extend ECOA far too broadly to "embrace doctors' fees, dentists' fees, accountants' fees ... and virtually all other professional fees" Id. at 278. The Court concluded that it was "implausible that Congress intended to cover not only banks and other such financial institutions but also all professions." Id.

Further support for the proposition that Congress did not intend to cover dentists comes from the fact that § 114 of the FACT Act calls upon the Commission to establish guidelines for use by each financial institution and creditor "with respect to account holders at, or customers of, such entities" The terms "account holders" and "customers" denote banking and primarily financial transactions. They do not apply to the relationship between dentists and patients.

With respect to "account holders," the term "account" is defined in the FACT Act, 15 U.S.C. § 1681a(r)(4), by reference to § 903 of the Electronic Fund Transfer Act (EFTA). In turn, EFTA defines an "account" as "a demand deposit, savings deposit, or other asset account." 15 U.S.C. § 1693(a)(2). Patients do not keep demand deposits, savings deposits, or asset accounts with dentists. They are therefore not "account holders" for purposes of the FACT Act.

The word "customers" is not defined in the Act. However, patients do not describe themselves, and dentists do not refer to patients, as "customers." Individuals treated by dentists are commonly thought of as "patients" – not "customers." Had Congress intended for dentists to be covered by the Act, it would have included in the FACT Act terms like "patient accounts" and "patients." Instead, it limited the Act to "account holders" and "customers." In addition, we know of nothing in the legislative history that would suggest that dentists and other healthcare professionals were intended to be covered under the Act.

Moreover, the circuit court opinions interpreting the term 'creditor' as used in ECOA were in existence at the time the FACT Act was enacted. Despite this, the Act passed by Congress specifically declares that the term "creditor" has the "same meaning" as in ECOA, 15 U.S.C. §. 1681a(r)(5).

In short, any construction that extends the Rule to dentists is contrary to the governing statute and must therefore be rejected.

2. The Position That Dentists Are Covered By The Red Flags Rule Does Not Appear In The Language Of The Rule And Can Be Imposed Only After Notice And Comment Rule-Making

Dentists are conspicuously absent from the Rule's list of entities that qualify as "creditors." See 16 C.F.R. § 681.2(b)(5). Dentists are not "banks, finance companies, automobile dealers, mortgage brokers, utility companies, [or] telecommunications companies." Id. Notably, there was no consideration of the applicability of the Rule to dentists in the rule-making procedures leading up to the Rule. Rather, the first indication that dentists are thought to be covered by the Rule came from informal advice by staff attorneys and by statements in the Article.

The extension of the Rule to dentists and physicians is a substantive rule. It cannot be effectuated by informal advice or by an article. Rather, 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. That procedure was not followed here. At the very least, therefore, the Commission should publish for public comment any provision of the Rule which would

subject dentists to its requirements. Application of the Rule to dentists should be suspended pending the outcome of a rulemaking procedure that accords with the requirements of the Administrative Procedure Act.

3. The Position That Dentists Are Covered By The Red Flags Rule Is Unsound Public Policy

The position of Commission staff that dentists are covered by the Rule is unsound public policy. First, while a recent town hall meeting at the Department of Health and Human Services suggests that identity theft may be an issue in hospitals, we are not aware of any evidence that identity theft is a significant issue in dental offices. Yet compliance with the Rule will require dental offices to incur substantial costs – costs that dental practices are ill-equipped to afford and that will have to be passed on to patients. It is simply bad policy to inject these new costs into the health care system without a substantial reason to do so.

Second, by applying the Rule to dentists who allow patients to pay for services over time, the interpretation given by Commission staff attorneys incentivizes dentists always to require payment in advance or at the time of service – lest they be deemed “creditors” under the Rule. It further incentivizes dentists not to take new patients who cannot pay in advance or at the time of service. This result is, of course, anti-patient and contrary to the societal goal of expanding access to medical and dental care.

Third, application of the Rule to dentists is particularly onerous in light of privacy requirements imposed upon health care practitioners by other federal regulations. In particular, the privacy and security regulations under the Health Insurance Portability and Accountability Act of 1996, P.L. 104-191, require health care providers to go to great lengths to protect the privacy of information regarding their patients. See 45 C.F.R. Parts 160, 162, 164. Application of the Red Flags Rule to dentists will put them at risk of violating the HIPAA regulations as they endeavor to comply with the Rule. In any event, they will have to bear the additional costs of determining how to harmonize the requirements of the HIPAA regulations with those of the Red Flags Rule.

CONCLUSION

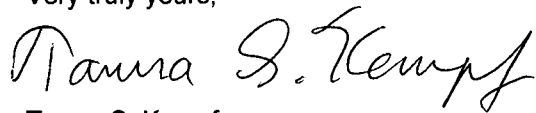
Extension of the Red Flags Rule to dentists is contrary to the statute which the Rule implements, to the Administrative Procedure Act, and to sound policy. Accordingly, the Commission should make clear that the Rule does not apply to dentists. At a minimum, the Commission should announce that, quite apart from the general delay in enforcement until May 1, 2009, it will not require compliance with the Rule by dentists pending review of the issues raised in this letter.

This matter is sufficiently important to our members that we would like to meet with you and with each of the other Commissioners to discuss it at your earliest convenience. Accordingly, I would respectfully ask whether you would be willing to meet with ADA representatives. If so, I would ask whether your staff could help us arrange meetings on the same day with each of the other Commissioners.

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On behalf of the American Dental Association, I thank you for your consideration of this letter. I would appreciate it if you could have someone from the staff call me at 312-440-2813 to follow up. Thank you very much.

Very truly yours,

A handwritten signature in black ink that reads "Tamra S. Kempf". The signature is written in a cursive, flowing style.

Tamra S. Kempf
Chief Legal Counsel

cc: Dr. John S. Findley
Dr. Ronald L. Tankersley