

HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Checkered Flag For The Red Flag Rule: Congress Passes The Red Flag Program Clarification Act of 2010

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On December 18, 2010, after a series of enforcement date delays and recurring debates over the scope of the Federal Trade Commission's ("FTC's") "Red Flags Rule,"¹ President Obama signed into law the "Red Flag Program Clarification Act of 2010" (S.B. 3897), which amends the Red Flags Rule by narrowing the scope of the definition of a "creditor" subject to the rule's requirements. While some larger healthcare entities could still be subject to the Red Flags Rule, this legislation provides a welcome relief for many healthcare providers who may have otherwise been required to implement identity theft prevention programs by December 31, 2010.

The FTC issued the Red Flags Rule in late 2007 in response to rising concerns about identity theft. Effective January 1, 2008, the Red Flags Rule requires any "creditor" who offers or maintains covered accounts for its customers to implement its own identity theft prevention program. A "creditor" subject to these requirements was originally defined broadly to include 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."² This broad definition sparked confusion in the healthcare industry over whether healthcare providers would be required to comply with the Red Flags Rule. For example, a physician who provides services for a patient but does not collect payment for such services when rendered, but instead defers payment such as by billing the patient, would presumably be a creditor within the original meaning of the Red Flags Rule. Further, in the preamble to the final regulations, the FTC recognized that certain healthcare entities may be at risk of medical identity theft and would be obligated to implement identity theft prevention programs.³

Although the original compliance deadline was set for October 1, 2008, the FTC extended this deadline several times, largely due to concerns about the scope of the rule's application to a broad group of creditors as originally defined by the Red Flags Rule, including healthcare providers. On January 27, 2010, the leaders of the American Osteopathic Association, American

¹ "Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003," 72 Fed. Reg. 63717 (November 9, 2007). The "Red Flags Rule" was the subject of a *Health Law Update* issued on October 8, 2008, [available here](#).

² 15 U.S.C. §§ 1681a(r)(5); 1691a(e).

³ 72 Fed. Reg. 63727 (November 9, 2007).

Medical Association, American Dental Association, and the American Veterinary Medical Association submitted a joint request to the FTC seeking confirmation that the Red Flags Rule cannot be applied to licensed healthcare professionals. The request from these organizations was based on a November 2009 U.S. District Court decision (*American Bar Association v. FTC*), in which the court held that the Red Flags Rule did not apply to legal professionals. In that opinion, the court held that the application of the Red Flags Rule to lawyers was inconsistent with the purpose underlying the statute and that applying the original definition of “creditor” to lawyers simply by virtue of the fact that they use monthly invoice billing is arbitrary. The healthcare organizations contended by analogy that the Red Flags Rule should not apply to licensed healthcare professionals.

During the period of delayed enforcement of the Red Flags Rule, legislation was introduced to limit the scope of creditors subject to the identity theft prevention requirements. In October of 2009, the House of Representatives passed H.R. 3763 which would have specifically exempted certain small businesses from the definition of creditor, including medical practices with 20 or fewer employees. While the legislation was pending in the Senate, the FTC again delayed enforcement of the Red Flags Rule until December 31, 2010 (or on the date the legislation passed, if earlier).

Although H.R. 3763 did not pass, on December 18, 2010, President Obama signed into law the Red Flag Program Clarification Act of 2010, which amends the Fair Credit Reporting Act by narrowing the scope of the Red Flags Rule. The legislation amends the definition of a “creditor” subject to the Red Flags Rule to mean one that regularly and in the ordinary course of business: (1) obtains or uses consumer reports, directly or indirectly, in connection with a credit transaction; (2) furnishes information to certain consumer reporting agencies in connection with a credit transaction; or (3) advances funds to or on behalf of a person, based on the person's obligation to repay the funds or on repayment from specific property pledged by or on the person's behalf. The definition also includes a “catchall” provision including as a creditor “any other type of creditor as the federal agency (banking agency, National Credit Union Administration, or the Federal Trade Commission [FTC]) having authority over that creditor may determine appropriate, if the creditor offers or maintains accounts subject to a reasonably foreseeable risk of identity theft.” The definition excludes any creditor that “advances funds on behalf of a person for expenses incidental to a service the creditor provides to that person.”

Although the legislation does not expressly exempt any specific industry from the definition of a creditor, in effect it excludes many healthcare providers from the Red Flags Rule requirements. However, certain healthcare providers (such as large hospitals) that use or obtain consumer reports routinely in connection with credit transactions or that furnish information to consumer reporting agencies may still meet the definition and thus be subject to the Red Flags Rule.

If you have any questions regarding this *Health Law Update*, please contact any of the attorneys listed in our Healthcare Practice Group listed below.

Bass, Berry & Sims Healthcare Attorneys

Philip F. Berg
(615) 742-7908
pberg@bassberry.com

Krista Thornton Cooper
(615) 742-7734
kcooper@bassberry.com

Meredith Edwards
(615) 742-7823
medwards@bassberry.com

Mary Beth Fortugno
(615) 742-7739
mfortugno@bassberry.com

Valere Fulwider
(615) 742-7822
vfulwider@bassberry.com

Lauren Gaffney
(615) 742-7824
lgaffney@bassberry.com

Pooneh Ghiassi
(615) 742-7782
pghiassi@bassberry.com

Anna Grizzle
(615) 742-7732
agrizzle@bassberry.com

Elisa E. Harris
(615) 742-6553
eharris@bassberry.com

Angela Humphreys
(615) 742-7852
ahumphreys@bassberry.com

**J. James Jenkins, Jr.,
Chair**
(615) 742-6236
jjenkins@bassberry.com

Seth A. Killingbeck
(615) 742-7707
skillingbeck@bassberry.com

David King
(615) 742-7890
dking@bassberry.com

Daniel Kuninsky
(615) 742-7837
dkuninsky@bassberry.com

Claire F. Miley
(615) 742-7847
cmiley@bassberry.com

T. Scott Noonan
(615) 742-6273
snoonan@bassberry.com

Shannon Pinkston
(615) 742-7727
spinkston@bassberry.com

Cynthia Y. Reisz
(615) 742-6283
creisz@bassberry.com

Brian D. Roark
(615) 742-7753
broark@bassberry.com

Catherine J.B. Sloan
(615) 742-7789
csloan@bassberry.com

Danielle M. Sloane
(615) 742-7763
dsloane@bassberry.com

Nesrin Garan Tift
(615) 742-7903
ntift@bassberry.com

Leigh Walton
(615) 742-6201
lwalton@bassberry.com

Elizabeth S. Warren
(615) 742-7719
ewarren@bassberry.com

Douglas M. Wolford
(615) 742-7917
dwolford@bassberry.com

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