

## RED FLAG RULES – “WHATEVER AM I TO DO?”

(SAID WINNIE THE POOH, STUCK IN A RABBIT HOLE)

By Jeanine Freeman, JD

The Federal Trade Commission (FTC), with little notice to or work with the medical community, determined that hospitals and physicians are subject to its “Red Flag Rules” requiring financial institutions and creditors to develop and implement programs identifying and responding to indicators, or “red flags,” of identity theft. The insurance-based system of payment for medical services means that patients generally do not pay in full after receipt of services. The FTC says that makes doctors “creditors” under the Red Flag Rules and that patient billing and medical records are “covered accounts” at risk for identity theft. Interestingly, the rules reference banks, mortgage brokers, and finance companies and do not mention medical practices.

The AMA and 26 national medical specialty societies protested with compelling legal analysis showing that physicians are not creditors within the meaning of the Fair and Accurate Credit Transactions Act of 2003 (FACTA), the law on which the Red Flag Rules are based. The FTC responded by extending the effective date of the rules to May 1, 2009, to allow for clarification. As of this writing, the FTC is sticking to its position and has provided no further guidance.

The clock is ticking. What, if anything, should medical practices do?

**Become familiar with the rules.** The rules may make good business sense regardless of their applicability to your medical practice. The FTC supports flexibility in developing compliance programs based upon likely risks for identity theft and the size and complexity of your practice’s operations. The Red Flag Rules require 1) identification of indicators or red flags of identity theft likely to be experienced by your medical practice; 2) processes for detecting those

red flags in the course of regular business practice; 3) responding to a red flag to prevent or mitigate identity theft; and 4) periodic updates to your program. A red flag compliance program needs to be approved by your practice’s governing body, must involve the board or senior management designees, calls for training of appropriate staff, and requires oversight of service provider arrangements (i.e., business associates).

**Audit existing security policies and procedures in light of the rules.** It is possible that your current business and HIPAA security policies and practices fairly address aspects of the Red Flag Rules. Develop an outline for compliance. Work with a staff team. *Bear in mind* that a red flag compliance program must conform to other laws (i.e., HIPAA) and rules of ethics (i.e., abandoning patients) impacting medical practices.

**Resources you might consult to get started:** The AMA is working on a toolkit to assist member physicians. To get started, though, you might read the AMA’s protest letter at [www.ama-assn.org/ama1/pub/upload/mm/31/ftc\\_letter20080930.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/31/ftc_letter20080930.pdf) and an AMA “Red Flag” overview at [www.ama-assn.org/ama/pub/category/20168.html](http://www.ama-assn.org/ama/pub/category/20168.html). Review the FTC’s Red Flag business advisory at [www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm](http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm). Go to the rules at [www.ftc.gov/os/fedreg/2007/november/071109redflags.pdf](http://www.ftc.gov/os/fedreg/2007/november/071109redflags.pdf), in particular, Appendix J Guidelines and Supplement A (pp. 63754-63756). Consult a report of the World Privacy Forum at [www.worldprivacyforum.org/pdf/WPF\\_RedFlagReport\\_09242008fs.pdf](http://www.worldprivacyforum.org/pdf/WPF_RedFlagReport_09242008fs.pdf). Contact your malpractice carrier for supportive materials it might have. Check with your local hospital which may have a program, some features of which you might adapt. Watch the *IMS Advocate* and Web site at [www.iowamedical.org](http://www.iowamedical.org) for updates.



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