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RED FLAGS CLARIFICATION: PHYSICIANS EXEMPT

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ON DECEMBER 18, 2010, President Barack Obama signed the Red Flag Program Clarification Act of 2010. This new law limits the definition of a “creditor” under the U.S. Federal Trade Commission’s (FTC) Red Flags Rule¹, which requires “creditors” to adopt identity theft detection and prevention programs. Under the new law, physicians and other health care service providers will not be required to implement identity theft detection and prevention programs.

Since the promulgation of the Red Flags Rule in November 2007, its enforcement against health care providers has been highly controversial. The FTC previously determined physicians were “creditors” and were therefore subject to the regulations. Before December 18, 2010, a “creditor” was “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 In support of its position, the FTC relied upon a broad interpretation of “creditor” which said, “[i]f a service provider (such as a hospital, doctor, lawyer, or merchant) allows the client or customer to defer the payment of a bill, this deferral of a debt is credit for purposes of the regulation, even though there is no finance charge and no agreement for payment in installments.”³ The American Medical Association and others fought the FTC’s previous interpretation of the Red Flags Rule through letters and lawsuits. In part, as a result of these legal attacks, the FTC repeatedly delayed enforcement of the Red Flags Rule (five times) with the most recent delaying implementation until December 31, 2010.

The new law limits the definition of “creditor,” to those individuals or entities that *regularly and in the ordinary course of business*: (a) obtain or use consumer reports (either directly or indirectly) in connection with a credit transaction; (b) furnish information to consumer reporting agencies in connection with a credit

¹ 16 C.F.R. Part 681.

² 15 U.S.C. § 1691a(d). The Red Flags Rule relies on the definition of “creditor” used in the Consumer Credit Protection Act (15 U.S.C. § 1681a(r)(5)), which relies on the definition utilized in the Equal Credit Opportunity Act (ECOA) (15 U.S.C. § 1691a(d)).

³ 12 C.F.R. Part 202, Supp. I.

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transaction; or (c) advance funds to or on behalf of a person who has an obligation to repay the funds.⁴ The law also specifically exempts those individuals and entities that advance funds on behalf of a person for expenses incidental to a service being provided by the individual or entity to that person.⁵ This provision exempts physicians and other health care service providers who accept payment after services are provided to patients. There is, however, one potential minefield. The new law allows government agencies, including the FTC, to designate certain persons as “creditors” thus subjecting the person to the Red Flags Rule, where the agency determines “that such creditor offers or maintains accounts that are subject to a reasonably foreseeable risk of identity theft.”⁶ It remains to be seen whether the FTC will conclude that physicians and other health care service providers maintain accounts that are subject to a reasonably foreseeable risk of identity theft.

Although a physician’s failure to receive payment in full at the time the health care service is rendered will not make the physician a “creditor” for purposes of the Red Flags Rule, there may be other physician office practices that may subject them to the Red Flags Rule. For example, if a physician, regularly and in the ordinary course of business, uses consumer credit reports prepared by credit reporting agencies (i.e., the physician runs a credit check before entering into a deferred payment arrangement with a patient for services that may not be covered by insurance or if the patient is uninsured) or reports information to credit reporting agencies (i.e., the patient fails to pay his/her account in a timely manner) this potentially brings the physician under creditor category (a) or (b) listed above.

In the upcoming months, the FTC is expected to issue interpretative guidance concerning the new law. While most physicians and health care service providers are not expected to come within the law, this does not mean they should not utilize best practices to protect and secure their patients’ personal information. For instance, on December 3, 2010, the FTC issued guidance for safeguarding data stored on hard drives of digital copiers.⁷ The FTC’s recommendations included: (a) making sure that those employees responsible for maintaining the security of information contained on computers are also responsible for securing the information stored on the copiers; (b) acquiring encryption or overwriting capabilities to secure the information on the copiers, and in the case of overwriting, overwriting the hard drive at least once a month; and (c) securing the hard drive when the copiers will no longer be used.⁸

Although physicians and other health care service providers may not have to comply with the Red Flags Rule, it is important for the medical community to continue to be vigilant in protecting patients’ personal information. The new law does *not* change the medical community’s obligations to adhere to the HIPAA/HITECH privacy, administrative, and security safeguards.

⁴ S.B. 3987, § 2 (emphasis added).

⁵ S.B. 3987, § 2.

⁶ S.B. 3987, § 2.

⁷ Copier Data Security: A Guide for Business, available at <http://business.ftc.gov>.

⁸ Copier Data Security: A Guide for Business, available at <http://business.ftc.gov>.

FOR FURTHER INFORMATION

If you have questions or want more information regarding this new law, you should contact your legal counsel to ensure compliance with the new rule. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. Brooke Bennett Aziere is available to assist you. Brooke Bennett Aziere can be reached at (316) 291-9768 or baziere@foulston.com. If you are looking for general health care counsel you may contact Scott Palecki at (316) 291-9578 or spalecki@foulston.com.

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