



MICHIGAN STATE MEDICAL SOCIETY
The Voice of 15,000 Michigan Physicians

MSMS LEGAL ALERT

**'Red Flags Rules' Update and Actions Physicians Should
Take to Ensure Compliance by May 1, 2009**

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In 2003 Congress enacted the Fair and Accurate Credit Transactions Act ("FACTA"). Pursuant to FACTA the Federal Trade Commission ("FTC") issued what have become to be known as the "Red Flags Rules" on November 9, 2007. These Red Flags Rules require "creditors" who maintain "covered accounts" to establish a written identity theft prevention program. The purpose of the program is to establish procedures to detect patterns, practices and other specific activities (i.e., the "Red Flags") that could indicate identity theft has or may occur and to have procedures in place to mitigate its harmful effects.

The Red Flags Rules applies to a physician or other health care provider that: (a) is a "creditor"; and (b) maintains "covered accounts." On February 4, 2009, the FTC responded to the objections of the American Medical Association and several specialty societies to the FTC's interpretation that physicians are "creditors" and therefore subject to the Red Flags Rules. The FTC continues to construe the term "creditor" to encompass any physician who provides services to patients without requiring payment in full at the time services are provided (even if the only amount not collected at the time of service is a copayment, deductible and/or coinsurance amount). The existence of an unpaid co-payment, deductible or other unpaid amount meets the Red Flags Rules definition of "covered account." Therefore physicians who do not require payment in full from all patients at the time of service are creditors with covered accounts, are subject to the Red Flags Rules and must comply with its requirements by May 1, 2009 (the original deadline was November 1, 2008).

The purpose of this Legal Alert is to help MSMS members to implement the identity theft prevention program in compliance with the Red Flags Rules.

Attachment 1 contains the FTC's guidelines for use in implementing an identity theft prevention program. Physicians are only required to include in their identity theft prevention program those parts of the guidelines that are appropriate to their practice. The following is a list of steps to follow in developing your identity theft prevention program:

1. Identify Red Flags for Covered Accounts.

You first must identify those red flags that are applicable to your practice (i.e., suspicious circumstances that should alert you to the possibility that identity theft may be occurring). Attachment 1 provides a list of risk factors that you should consider, including an assessment of the risk factors for identity theft, such as the types of covered accounts you maintain, the methods of providing services to new patients and any previous experiences with identity theft. You should also review any identity theft policies and procedures you already have in place and design your program to identify patterns and behavior that could indicate possible identity theft so that you may respond before it occurs.

Some examples of red flags that are likely applicable to most physician practices are the receipt of alerts from consumer reporting agencies or similar service providers, documents that appear altered or forged, inconsistencies between a photo identification and the appearance of the individual, address discrepancies, and suspicious Social Security Numbers.

2. Detect Red Flags Occurring in your Practice.

You next should develop reasonable approaches for detecting those red flags you have identified as applicable to your practice. Attachment 1 contains recommendations. For example, obtaining identifying information about and verifying the identity of your patients when opening a covered account, and verifying the validity of patient change of address requests. Your program should require all patients to present valid photo identification or other documentation that confirms that the person receiving your services is the person (or another applicable person, e.g., a spouse, child or other dependent of that person) on the covered account.

3. Respond Appropriately to Red Flags to Prevent and Mitigate Identity Theft.

The program should include procedures to respond to red flags once detected (e.g., discovery of unauthorized access to a patient's records, a notice that a patient has provided fraudulent information, etc.). Attachment 1 suggests that the following responses may be appropriate:

- (a) Monitoring a covered account for evidence of identity theft;
- (b) Contacting the patient;
- (c) Changing any passwords, security codes, or other security devices that permit access to a covered account;
- (d) Reopening a covered account with a new account number;
- (e) Not opening a new covered account;
- (f) Closing an existing covered account;

- (g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;
- (h) Notifying law enforcement; or
- (i) Determining that no response is warranted under the particular circumstances.

You may choose to implement a policy in which service is denied to a patient who cannot produce the proper identification. Your policy should also include how you will respond to an identity theft claim by a patient after services were provided to someone else claiming to be the patient. For example, you may require a copy of a police report or an affidavit from the patient before ceasing collection activity on the patient's account. If a person was successful in obtaining services using another patient's identity, a procedure should be in place to extract inaccurate (i.e., the imposter's) medical information from the patient's file. For example, you may create a Jane or John Doe file with the imposter's medical records with a cross reference to the patient's file for tracking purposes.

4. Update the Program Periodically.

You should reassess your program on a periodic basis and update it to reflect changes in risks of identity theft arising in your practice. Attachment 1 recommends that you consider factors such as your experiences with identity theft, changes in known methods of identity theft, changes in methods to detect identity theft, and changes in the types of covered accounts that the practice maintains.

After you have written your program it must be approved by the board of directors of your professional corporation or by the members of your professional limited liability company. If you are a sole practitioner you need only to adopt the plan yourself. Either yourself or a designee of the practice must be involved in the oversight, development, implementation and administration of the program. Training must be provided for the employees of the practice. The person involved in the oversight of the program should be assigned the responsibility of submitting an annual report to the board of directors, a committee of the board or the members regarding the compliance of the practice with the program. This report should contain any significant identity theft incidents occurring in the course of that year and any recommendations to improve the program.

Note Regarding the Sample Identity Theft Prevention Program

The sample Identity Theft Prevention Program has been designed by MSMS Legal Counsel to provide you with an example of what the Red Flags Rules requires. This sample should assist you in beginning the process of developing your own program. The necessary content of the program will vary from physician practice to physician practice.

Use of the sample program included as Attachment 2 is not intended to replace the need for physicians to consult legal counsel for assistance in ensuring that their practice complies with the requirements of the Red Flags Rules.

ATTACHMENT 1

16 CFR PART 681 APPENDIX A

Appendix A to Part 681 -- Interagency Guidelines on Identity Theft Detection, Prevention, and Mitigation

Section 681.2 of this part requires each financial institution and creditor that offers or maintains one or more covered accounts, as defined in § 681.2(b)(3) of this part, to develop and provide for the continued administration of a written Program to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. These guidelines are intended to assist financial institutions and creditors in the formulation and maintenance of a Program that satisfies the requirements of § 681.2 of this part.

I. The Program

In designing its Program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

II. Identifying Relevant Red Flags

(a) Risk Factors. A financial institution or creditor should consider the following factors in identifying relevant Red Flags for covered accounts, as appropriate:

- (1) The types of covered accounts it offers or maintains;
- (2) The methods it provides to open its covered accounts;
- (3) The methods it provides to access its covered accounts; and
- (4) Its previous experiences with identity theft.

(b) Sources of Red Flags. Financial institutions and creditors should incorporate relevant Red Flags from sources such as:

- (1) Incidents of identity theft that the financial institution or creditor has experienced;
- (2) Methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and
- (3) Applicable supervisory guidance.

(c) Categories of Red Flags. The Program should include relevant Red Flags from the following categories, as appropriate. Examples of Red Flags from each of these categories are appended as Supplement A to this Appendix A.

- (1) Alerts, notifications, or other warnings received from consumer reporting agencies or service providers, such as fraud detection services;
- (2) The presentation of suspicious documents;
- (3) The presentation of suspicious personal identifying information, such as a suspicious address change;

- (4) The unusual use of, or other suspicious activity related to, a covered account; and
- (5) Notice from customers, victims of identity theft, law enforcement authorities, or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor.

III. Detecting Red Flags

The Program's policies and procedures should address the detection of Red Flags in connection with the opening of covered accounts and existing covered accounts, such as by:

- (a) Obtaining identifying information about, and verifying the identity of, a person opening a covered account, for example, using the policies and procedures regarding identification and verification set forth in the Customer Identification Program rules implementing *31 U.S.C. 5318(l) (31 CFR 103.121)*; and
- (b) Authenticating customers, monitoring transactions, and verifying the validity of change of address requests, in the case of existing covered accounts.

IV. Preventing and Mitigating Identity Theft

The Program's policies and procedures should provide for appropriate responses to the Red Flags the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, a financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft, such as a data security incident that results in unauthorized access to a customer's account records held by the financial institution, creditor, or third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor or to a fraudulent website. Appropriate responses may include the following:

- (a) Monitoring a covered account for evidence of identity theft;
- (b) Contacting the customer;
- (c) Changing any passwords, security codes, or other security devices that permit access to a covered account;
- (d) Reopening a covered account with a new account number;
- (e) Not opening a new covered account;
- (f) Closing an existing covered account;
- (g) Not attempting to collect on a covered account or not selling a covered account to a debt collector;
- (h) Notifying law enforcement; or
- (i) Determining that no response is warranted under the particular circumstances.

V. Updating the Program

Financial institutions and creditors should update the Program (including the Red Flags determined to be relevant) periodically, to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

- (a) The experiences of the financial institution or creditor with identity theft;
- (b) Changes in methods of identity theft;
- (c) Changes in methods to detect, prevent, and mitigate identity theft;
- (d) Changes in the types of accounts that the financial institution or creditor offers or maintains; and
- (e) Changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures, and service provider arrangements.

VI. Methods for Administering the Program

(a) Oversight of Program. Oversight by the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management should include:

- (1) Assigning specific responsibility for the Program's implementation;
- (2) Reviewing reports prepared by staff regarding compliance by the financial institution or creditor with § 681.2 of this part; and
- (3) Approving material changes to the Program as necessary to address changing identity theft risks.

(b) Reports.

(1) In general. Staff of the financial institution or creditor responsible for development, implementation, and administration of its Program should report to the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management, at least annually, on compliance by the financial institution or creditor with § 681.2 of this part.

(2) Contents of report. The report should address material matters related to the Program and evaluate issues such as: The effectiveness of the policies and procedures of the financial institution or creditor in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; service provider arrangements; significant incidents involving identity theft and management's response; and recommendations for material changes to the Program.

(c) Oversight of service provider arrangements. Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant Red Flags that may arise in the performance of the service provider's activities, and either report the Red Flags to the financial institution or creditor, or to take appropriate steps to prevent or mitigate identity theft.

VII. Other Applicable Legal Requirements

Financial institutions and creditors should be mindful of other related legal requirements that may be applicable, such as:

- (a) For financial institutions and creditors that are subject to *31 U.S.C. 5318(g)*, filing a Suspicious Activity Report in accordance with applicable law and regulation;
- (b) Implementing any requirements under *15 U.S.C. 1681c-1(h)* regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert;
- (c) Implementing any requirements for furnishers of information to consumer reporting agencies under *15 U.S.C. 1681s-2*, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and
- (d) Complying with the prohibitions in *15 U.S.C. 1681m* on the sale, transfer, and placement for collection of certain debts resulting from identity theft.

Supplement A to Appendix A

In addition to incorporating Red Flags from the sources recommended in section II.b. of the Guidelines in Appendix A of this part, each financial institution or creditor may consider incorporating into its Program, whether singly or in combination, Red Flags from the following illustrative examples in connection with covered accounts:

Alerts, Notifications or Warnings from a Consumer Reporting Agency

- 1. A fraud or active duty alert is included with a consumer report.
- 2. A consumer reporting agency provides a notice of credit freeze in response to a request for a consumer report.
- 3. A consumer reporting agency provides a notice of address discrepancy, as defined in § 681.1(b) of this part.
- 4. A consumer report indicates a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as:
 - a. A recent and significant increase in the volume of inquiries;
 - b. An unusual number of recently established credit relationships;
 - c. A material change in the use of credit, especially with respect to recently established credit relationships; or
 - d. An account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

Suspicious Documents

- 5. Documents provided for identification appear to have been altered or forged.
- 6. The photograph or physical description on the identification is not consistent with the appearance of the applicant or customer presenting the identification.

7. Other information on the identification is not consistent with information provided by the person opening a new covered account or customer presenting the identification.

8. Other information on the identification is not consistent with readily accessible information that is on file with the financial institution or creditor, such as a signature card or a recent check.

9. An application appears to have been altered or forged, or gives the appearance of having been destroyed and reassembled.

Suspicious Personal Identifying Information

10. Personal identifying information provided is inconsistent when compared against external information sources used by the financial institution or creditor. For example:

a. The address does not match any address in the consumer report; or

b. The Social Security Number (SSN) has not been issued, or is listed on the Social Security Administration's Death Master File.

11. Personal identifying information provided by the customer is not consistent with other personal identifying information provided by the customer. For example, there is a lack of correlation between the SSN range and date of birth.

12. Personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is the same as the address provided on a fraudulent application; or

b. The phone number on an application is the same as the number provided on a fraudulent application.

13. Personal identifying information provided is of a type commonly associated with fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example:

a. The address on an application is fictitious, a mail drop, or a prison; or

b. The phone number is invalid, or is associated with a pager or answering service.

14. The SSN provided is the same as that submitted by other persons opening an account or other customers.

15. The address or telephone number provided is the same as or similar to the account number or telephone number submitted by an unusually large number of other persons opening accounts or other customers.

16. The person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete.

17. Personal identifying information provided is not consistent with personal identifying information that is on file with the financial institution or creditor.

18. For financial institutions and creditors that use challenge questions, the person opening the covered account or the customer cannot provide authenticating information beyond that which generally would be available from a wallet or consumer report.

Unusual Use of, or Suspicious Activity Related to, the Covered Account

19. Shortly following the notice of a change of address for a covered account, the institution or creditor receives a request for a new, additional, or replacement card or a cell phone, or for the addition of authorized users on the account.

20. A new revolving credit account is used in a manner commonly associated with known patterns of fraud patterns. For example:

- a. The majority of available credit is used for cash advances or merchandise that is easily convertible to cash (e.g., electronics equipment or jewelry); or
- b. The customer fails to make the first payment or makes an initial payment but no subsequent payments.

21. A covered account is used in a manner that is not consistent with established patterns of activity on the account. There is, for example:

- a. Nonpayment when there is no history of late or missed payments;
- b. A material increase in the use of available credit;
- c. A material change in purchasing or spending patterns;
- d. A material change in electronic fund transfer patterns in connection with a deposit account; or
- e. A material change in telephone call patterns in connection with a cellular phone account.

22. A covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of account, the expected pattern of usage and other relevant factors).

23. Mail sent to the customer is returned repeatedly as undeliverable although transactions continue to be conducted in connection with the customer's covered account.

24. The financial institution or creditor is notified that the customer is not receiving paper account statements.

25. The financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

Notice from Customers, Victims of Identity Theft, Law Enforcement Authorities, or Other Persons Regarding Possible Identity Theft in Connection With Covered Accounts Held by the Financial Institution or Creditor

26. The financial institution or creditor is notified by a customer, a victim of identity theft, a law enforcement authority, or any other person that it has opened a fraudulent account for a person engaged in identity theft.