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October 9, 2008

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Director, Bureau of Consumer Protection  
United States Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Joel C. Winston  
Associate Director, Privacy and Identity Protection  
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United States Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Washington, D.C. 20580

**Re: Comments on behalf of American Health Care Association:  
Applicability of the Red Flag Rules to Long-Term Care Facilities**

Dear Ms. Parnes and Mr. Winston:

The American Health Care Association (“AHCA”) wishes to express its strong support for the concerns raised by the American Medical Association (“AMA”) in its September 30, 2008 letter to Chairman Kovacic (the “AMA Letter”) regarding the application of the Federal Trade Commission’s (“FTC’s”) identity theft regulations (the “Red Flag Rules” at 72 Fed. Reg. 63, 718 (Nov. 9, 2007) to health care providers (copy enclosed). AHCA is a national trade association representing nearly 11,000 non-profit and for-profit providers dedicated to continuous improvement in the delivery of professional and compassionate care for our nation’s frail, elderly and disabled citizens who live in nursing facilities, assisted living residences, subacute centers and homes for persons with mental retardation and developmental disabilities (“long-term care facilities”).

Our discussions with the FTC staff and public statements indicate that the agency may view long-term care facilities and other health care providers as “creditors” that are subject to the Red Flag Rules. While AHCA firmly encourages the government’s attempts to prevent identity theft, we believe that the application of the Red Flag Rules to our members will not help to achieve this goal. Rather, subjecting our members to these rules could be confusing to facilities, residents, and families and create an unnecessary burden on already financially-strapped providers of vital health care services. In addition to our support for the AMA’s positions, AHCA would like to address several additional considerations for the FTC’s review.

**First**, AHCA’s members—nursing facilities, assisted living residences, subacute centers and homes for persons with mental retardation and developmental disabilities—are not “creditors” nor do they maintain “covered accounts” to which the Red Flag Rules apply. According to the FTC’s regulations:

- A “creditor” is “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.”
- An “account” is a “continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes” and includes “[a]n extension of credit, such as the purchase of property or services involving a deferred payment.”
- An account is considered “covered” if it is offered or maintained by a financial institution or creditor “primarily for personal, family, or household purposes” and “involves or is designed to permit multiple payments or transactions.” An account is also “covered” if there is a “reasonably foreseeable risk to costumers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.”<sup>1</sup>

Based on these definitions, the FTC appears to be considering health care providers, such as our members, creditors that offer or maintain covered accounts simply because they permit payment to be deferred—*e.g.*, an extension of credit—or to be paid in multiple installments.

We respectfully disagree. The Red Flag Rules do not mention long-term care facilities or health care providers. The regulations do, however, make careful mention of the types of entities subject to the regulations—banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies—as well as the types of covered accounts that are of concern—credit card accounts, mortgage loans, automobile loans, margin accounts, cell phone accounts, utility accounts, checking accounts or savings accounts.<sup>2</sup>

Furthermore, a long-term care facility and the services it provides are fundamentally unlike a bank, finance company, car dealer, mortgage broker or similar entity. A bank or finance company reviews a loan applicant’s credit history and other personal information

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<sup>1</sup> 16 C.F.R. § 681.2(b).

<sup>2</sup> *See id.*; *see also* 15 U.S.C. § 1691a(e).

to determine financial solvency before furnishing the applicant with a line of credit or loan, expecting to be repaid with interest at a predetermined date. The entire relationship between the parties is premised upon one party (the debtor) asking for an extension of funds from the other party (the creditor). The relationship between our members and their residents, on the other hand, is premised exclusively upon one party (the resident) asking for vital care from the other party (the facility), not a loan.

Additionally, a long-term care facility does not *voluntarily* provide services in the present and expect to be paid in the future, as do other entities listed in the Red Flag Rules, such as utility companies or cellular phone providers. Rather, the nature of health care payment in the United States generally *requires* a long-term care facility to furnish its residents with care and to receive payment at regular, future intervals from the resident's insurance, such as Medicare and Medicaid. Consider the following examples:

- The Smith Home provides services to Mr. Garcia during the month of June, and then sends a bill for those services to Mr. Garcia's insurer (Medicare) in July. By means of that arrangement, the Smith Home, under the FTC's reasoning, would become a creditor to Mr. Garcia within a strict understanding of the Red Flag Regulations.
- Mr. Jones has been admitted to the Smith House. On admission or shortly thereafter, Medicaid gives the Smith House permission to bill Medicaid for services provided to Mr. Jones, subject to certification that the patient continues to receive the same degree of care. However, the Smith House is not paid by Medicaid until after services are rendered. Under a strict reading of the regulations, the Smith House facility is a creditor.

Under each example, the facility has, in essence, deferred payment until a later date. To the extent that the FTC considers this to be similar to a utility company or cellular phone provider, AHCA is careful to point out that this method of billing and paying is not a voluntary one. It is how the health care system in the United States pays for our members to provide care; insurance companies and governmental health care programs simply do not pay for long-term care in advance or at the time that care is provided. Whereas a utility company or cellular phone provider could choose to be paid before services are rendered, a long-term care facility generally cannot.

**Second**, as noted in the AMA Letter, it would be impractical for the FTC to extend the Red Flag Rules to health care providers such as long-term care facilities simply because they bill residents for services. The AMA is correct in concluding that (a) the logical extension of this interpretation would be to subject to these rules every business or entity that issues a bill or invoice and (b) such an extension of the regulations is based on uncertain legal justifications.

AHCA further believes that the unintended consequence of applying the Red Flag Rules so broadly is to encourage businesses to require simultaneous performance of services

and payment. Taken to its logical conclusion, this could severely impact access to long-term care. If nursing homes and other facilities require simultaneous payment, only a very small fraction of residents (those who pay in cash) would be capable of paying immediately upon receiving services. This could have a chilling effect on the provision of the vital, necessary health care that our members furnish.

**Third**, unlike entities listed in the Red Flag Rules which are subject to a high risk of identity theft (*e.g.*, mortgage companies, banks, phone companies, and utility companies), the risk of identity theft in the long-term care facility setting is significantly low. Specifically:

- Our members—like the AMA’s members—are already subject to significant patient privacy and security obligations under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and its regulations. HIPAA rules require our members to take the utmost caution and concern with the personal and medical information of our residents and obligate long-term care facilities to have in place key measures to protect patient privacy. Accordingly, many of the policy considerations underlying the Red Flag Rules are already met by HIPAA requirements.<sup>3</sup>
- It would be uncommon and unlikely for an individual to attempt to steal an identity to gain access to long-term care. In fact, we have never heard of a situation in which someone has impersonated another person to gain access to care. The more common problem as it relates to the health care industry would be identity theft in order to receive immediate access to prescription drugs—typically, painkillers or narcotic substitutes—from a hospital or pharmacy. Because drugs are only furnished in the long-term care facility setting to admitted residents and not to individuals walking into a facility off the street, the risk of identity theft in the long-term care facility setting is extremely low.
- Stealing an identity to gain access to long-term care would be impractical because the risk of being caught is high for the thief or his/her beneficiary,

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<sup>3</sup> We also point out that the FTC’s regulation of personal information in the long-term care setting—including information already protected by HIPAA—too closely touches on the regulation of medical privacy, which the agency itself has indicated is outside of its jurisdiction. *See* Deborah Platt Majoras, Chairman, Federal Trade Commission, *Identity Theft: Recent Developments Involving the Security of Sensitive Consumer Information*, a prepared statement before the U.S. Senate, Committee on Banking, Housing, and Urban Affairs (Mar. 10, 2005), *available at* <http://www.ftc.gov/os/testimony/050310idtheft.pdf>; *see also* Joel Winston, Associate Director, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, *Statement of Joel Winston*, a prepared statement before the U.S. House of Representatives, Subcommittee on Social Security of the House Committee on Ways and Means (Mar. 30, 2006), *available at* <http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=4790>.

given that the identity thief or the beneficiary of identity theft would be living in a member's facility.

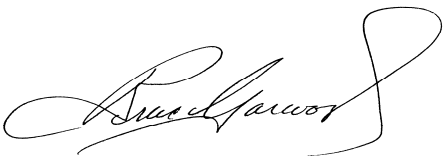
- Finally, there are already sufficient checks and balances in place to guarantee our residents' medical identities. Admissions to a long-term care facility generally come from hospitals that have presumably already performed an identity check. Importantly, our members also perform identity checks for many residents for purposes of confirming insurance coverage eligibility, either through private insurance companies or Medicare and Medicaid.

In other words, the policy considerations underlying the Red Flag Rules—*e.g.*, certain lending institutions should do more to prevent identity theft—are already met and, as such, the risk of identity theft is dramatically low. In fact, as noted, in conversations with our members, we have been unable to find any instance in which a medical identity has been stolen and used to gain improper access to long-term care services. Nor have we found an instance of an individual obtaining improper access to a long-term care facility's medical records in order to steal a resident's medical identity. Accordingly, the regulations, which focus on areas in which there is “reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft,” should not apply to long-term care facilities.

In closing, AHCA respectfully requests that the FTC reconsider its position to apply the Red Flag Rules to long-term care facilities such as our members. In the alternative, we request that the FTC delay subjecting long-term care facility such as our members to the Red Flag Rules until the agency has issued its planned guidance for the health care industry. We believe that our members will be better equipped to comply with the Red Flag Rules once they have had an opportunity to review and understand how the agency intends to implement the regulations based on the concerns specific to health care providers.

If you have any questions about this letter or our members' continuing commitment to patient privacy and security, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Yarwood". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Bruce Yarwood  
President & CEO