August 11, 2013

The Federal Trade Commission ("FTC") recently issued updated guidance regarding the Red Flags Rule. The guidance can be located at the following website:

http://business.ftc.gov/documents/bus23-fighting-identity-theft-red-flags-rule-how-guide-business

The guidance was published to assist businesses in determining whether they are subject to the Red Flags Rule as a "financial institution" or "creditor" that maintains "covered accounts." As noted in the guidance, the Red Flags Rule "requires many businesses and organizations to implement a written identity theft prevention program designed to detect the "red flags" of identity theft in their day-to-day operations, take steps to prevent the crime, and mitigate its damage."

The guidance document was revised in part to incorporate amendments made in an interim final federal rule published in December, 2012 which adopted the narrower definition of the term "creditor" that was included in the Red Flag Program Clarification Act of 2010.

The original Red Flags Rule defined the term "creditor" to include any businesses that accepted deferred payments for goods and services. This original definition was met with strong opposition from physicians, attorneys, and other professionals who routinely bill clients and patients a period of time after providing services instead of at the time of service. In fact, both the American Medical Association and the American Bar Association commenced litigation to address this issue. As a result of the amendments to the Red Flags Rule, the FTC guidance document now includes the following question and answer:

> "I am a professional who bills my clients for services at the end of the month. Am I a creditor just because I allow clients to pay later? No. Deferring payment for goods or services, payment of debt, or the purchase of property or services alone doesn't constitute "advancing funds" under the Rule."

Under the new definition of the term "creditor," a business or organization (including a health care provider) is covered by the Red Flags Rule only if it regularly and in the ordinary course of business engages in the following:

- Obtains or uses consumer reports (including credit reports) in connection with a credit transaction;
- Furnishes information to consumer reporting agencies in connection with a credit transaction; or
- Advances funds to or on behalf of a person, in certain instances.

For businesses that are required to comply with the Red Flags Rule, the guidance establishes a process for compliance, including the establishment of a written identity theft prevention program which includes policies and procedures to assist businesses in identifying suspicious patterns or practices which indicate the possibility of identity theft.

If you have any questions about any of these new developments, please contact one of our attorneys at the Law Offices of Pullano & Farrow at 585-730-4773.