

Bureaucracies in Collision

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How is it that dentistry can get caught up in a piece of federal legislation that was intended for the likes of Charles Schwab and American Express? This is a little investigation into how dentists became collateral damage in the war on identity theft and the regulations pertaining to personal information.

If we set the WABAC (pronounced: way back) machine (apologies to all those unfamiliar with “The Rocky and Bullwinkle Show”) for 2003, we can trace how we became entangled with this train wreck.

The 2003 Fair and Accurate Credit Transaction Act is where the story begins. It was estimated that more than 10 million people were victims of identity theft in 2002.¹ In response to the growing concern, Congress adopted provisions to aid victims and prevent identity theft. In designing the new consumer protections, which FACTA would delineate, the normal legislative process was followed. The federal agencies seek public comment from the stakeholders or impacted parties before developing the regulation. During this time, anyone can submit written comments to the agency. After considering the comments, the agency issues the final rules or regulations. “Properly adopted rules have the same effect as a law passed by Congress.”²

This is where the problem began. These regulations were intended for the protection of personal information held by large financial and credit institutions. Physicians and dentists were not mentioned. The FDIC and FTC were the primary players. Security officers in large financial institutions were the ones testifying or writing comments. The possibility that these regulations might apply to den-



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tists was overlooked by almost everyone. Certainly this possibility did not show up on the American Dental Association’s radar until much later.

The Red Flags Rules became law on Jan. 1, 2008, but enforcement was delayed until Sept. 1, 2008. The first alert at the ADA came in July 2008 from a constituent executive director who had been approached by a company offering help for dentists trying to comply with the Red Flags Rules. The entrepreneurial spirit had spurred some individuals to realize that the following FTC definition could include dentists, physicians, and many other small business owners as “creditors.”

“A creditor is any entity that regularly extends, renews, or continues credit; any entity that regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who is involved in the decision to extend, renew, or continue credit. Accepting credit cards as a form of payment does not in and of itself make an entity a creditor ... Where nonprofit and government entities defer payment for goods or services, they, too, are to be considered creditors. Most creditors, except for those regulated by the federal bank regulatory agencies and the National Credit Union Administration, come under the jurisdiction of the FTC.”³

Basically, if you do anything other than accept payment in full at the time of service, you are by definition a creditor and subject to the Red Flags Rules. By September 2008, an FTC attorney wrote an opinion that interpreted the definition to include physicians and dentists. (This was the first specific reference to physicians and dentists.) The American Medical Association wrote a letter objecting to the interpretation by the end of that month. The FTC did not respond to the AMA’s inquiry until February 2009. The president of the ADA also objected to the interpretation. The only action on the FTC’s part has been to delay enforcement.

By April 2009, the decision was made to go directly to the Small Business Committee and appeal based on the Regulatory Flexibility Act of 1980. A letter was written to the FTC requesting a delay of one year in order to assess the impact of the rules on the 177,000 dentists who would be affected by the rules. Dentists had not been solicited for input during the public comments section of the proceedings. The Congressional Doctors Caucus has also become interested in the situation. The Red Flags Rules enforcement has been delayed again until Aug. 1, 2009.

Once it became clear that dentists would be considered “creditors” by the FTC, the ADA made available to its

members a security package designed to satisfy the requirements of the Red Flags Rules. The package was free to members, downloadable, and easy to find on California Dental Association's Practice Support Web Site. This is exactly what we expect our organizations to do to help make our professional lives easier.

It would have been better had the ADA recognized that the proposed rules could be interpreted to include dentists. The organization could have then moved to specifically exclude dentists from enforcement and been spared the energy and attention the Red Flags Rules have demanded. Every year there are literally thousands of pieces of legislation proposed at the federal and state level. It is a herculean task to keep track of the proposed bills and regulations that may have unintended consequences for dentistry. But that is the kind of omniscience we have come to expect of our organizations.

One of CDA's greatest assets is its legislative team. They try to be out in front of every issue that might possibly impact your everyday practice, your professional life or the welfare of your patients. Our legislative team tries to recognize potential problems and address them before they become codified in state law. Their goal is an absence of problems for our members and their patients. When they do their job perfectly, you may never know it. ■■■■

REFERENCES

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