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Technical Advisory

TA 282 **May 14, 2010**

SUBJECT: Red Flags Rule Enforcement Begins June 1
Insurance agencies should determine whether they are subject to the identity-theft rule.

BACKGROUND: The June 1 deadline is approaching quickly for insurance agencies to determine, if they have not done so already, whether they must comply with the Red Flags Rule (Rule), and if so, to implement a written compliance program (Program). The Rule requires creditors with certain kinds of accounts to implement a Program to detect and prevent identity theft.

MAIN POINTS: Who Must Comply with the Rule?
The Rule does not regulate businesses merely by virtue of them having certain kinds of professionals, such as insurance agents/brokers, lawyers or accountants; it regulates specific activities involving credit that may or may not arise with those or any other businesses. The Rule requires "financial institutions" and "creditors" that hold "covered accounts" to implement a Program to detect warning signs (or "red flags") of identity theft, so that identity theft can be prevented and mitigated.

Under the Rule, a "creditor" is a person, business or entity that provides goods or services in advance of receiving payment (e.g., arranges, extends or renews credit), and "credit" is the right to defer payment of a debt or for services. In general, a "covered account" is an account used for a personal, family or household purpose involving multiple payments (e.g., a credit card account, checking account, car/home loan, etc.), or any other account with a reasonably foreseeable risk of identity theft.

Insurance agencies with questions about if the Rule applies to their specific business activities can seek guidance from local counsel. In addition, some agencies in this position, out of an abundance of caution, may choose to comply with the Rule, rather than spend time or money seeking a definitive answer to a question that may be unduly complex by virtue of the way the Rule is written.

Implementing a Program
For insurance agencies that adopt a Program, the Program requirements under the Rule can be a good starting point for what to include. There is no standard compliance Program because each Program has to be customized to the size, complexity, organizational structure, operations and activities of each individual business. At a minimum, however, a Program must enable the business covered by the Rule to:

- identify red flags (described below) relevant to the entity's experience, industry, and likely risks;
- detect the red flags identified;
- respond appropriately to red flags that are detected in an effort to prevent and mitigate identity theft; and
- update the Program periodically to reflect changes in risk.

Red flags, or warning signs of identity theft, may come from things such as past incidents of identity theft, reports in industry publications and information published by regulators such as the Federal Trade Commission (FTC). Examples of red flags can include things such as warnings/alerts from credit bureaus, presentation of suspicious documents (such as those with suspicious personal identifying information or a suspicious address change) and notice from a person who believes he/she has been a victim of identity theft.

An entity required to have a Program must have the initial Program approved by its board of directors or an appropriate committee of its board of directors. In addition, the board of directors, an appropriate committee of the board, or someone from senior management must be involved in the oversight, development, implementation, and administration of the Program and the entity's staff must be trained to implement the Program.

Additional Information on Who Must Comply, and How
Information on implementing a Program, and on who must comply, can be found in the Big "I" summary of the Rule in a memo titled, "Overview of the Fair Credit Reporting Act, the Fair and Accurate Credit Transactions Act, and the Drivers Privacy Protection Act," starting on page 10 at letter G. This memo is available to Big "I" members who log in to **www.independentagent.com** and select Legal Advocacy, under Memoranda and FAQs. A "how to" guide for businesses, a video explaining the Rule, and a "do-it-yourself" template for low-risk businesses are all available on the **FTC's Web site**, and additional information can be found **here**. On May 4, 2010, the American Institute of Certified Public Accountants (AICPA) posted a template of a written compliance program for accountants on its **Web site** (through the "Show documents in this section"

link), which may contain useful ideas for agencies as they create their own Programs.

Ongoing Litigation

Meanwhile, observers of the FTC's appeal of its loss to the American Bar Association (ABA), when the U.S. District Court for the District of Columbia ruled that lawyers are not "creditors" subject to the Rule, continue to wait for the outcome of that case. The FTC's appeal indicates it intends to seek to enforce the Rule broadly. A second lawsuit, filed against the FTC by the AICPA, which argues that accountants are not "creditors" subject to the Rule for reasons similar to those in the ABA case, is on hold pending the outcome of the appeal in the ABA case. The FTC has agreed to delay enforcement of the Rule against AICPA members for 90 days following the outcome of the ABA appeal.

As noted in prior IN&V articles, the similarities insurance agents have to lawyers and accountants make the arguments in the ABA and AICPA lawsuits of interest to insurance agents concerned about whether the FTC will attempt to apply the Rule to their activities. Although the FTC has not created a list of everyone it considers subject to the Rule, it has stated on its Web site that the definition of "creditor" covers all entities that regularly permit deferred payments for goods or services, and it specifically mentions lawyers, in addition to accountants, health care providers, utilities and telecommunications companies.

The Big "I" will continue to monitor developments in the ABA and AICPA cases, as well as any other lawsuits/regulatory actions about the application of the Rule, and report on anything that may affect its potential application to independent insurance agencies.

NECESSARY ACTION: Determine if your agency must comply with the Red Flags Rule (Rule), and if so, implement a written compliance program. The Rule requires creditors with certain kinds of accounts to implement a Program to detect and prevent identity theft.