

The “Red Flags” Rule: Key Points and Safe Harbors

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What's a safe harbor?



Example: Who must approve the ITP program?

- Red Flags Rule: Must be approved by the board of directors, or if there is no board of directors, an employee at the level of senior management
- Who must approve a LHD's program?
 - Board of health?
 - Health director?

Who must approve the ITP program?

Safe Harbor

- Obtain approval of both health director and BOH



Other Approaches

- If you obtain the approval of the health director only, you are taking the position that the LHD has no board of directors.
- If you obtain the approval of the BOH only, you are taking the position that it is a board of directors for the LHD.

Key points

- Is a LHD a “creditor”?
- Which of a LHD’s accounts are “covered accounts”?
- What are some examples of “red flags”?
- What responses to red flags are appropriate for a LHD?
- What’s the compliance deadline?

Is the LHD a “creditor”?

- A “creditor” is any entity that regularly extends, renews, or continues credit; or regularly arranges for the extension, renewal, or continuation of credit.
- “Credit” includes transactions in which the client is allowed to defer payment for services.
- FTC – Health care providers are creditors:
 - If they regularly allow clients to defer payment for services
 - If they accept insurance that makes patient responsible for underlying charges (not Medicaid)

Is the LHD a “creditor”?

Safe Harbor

- If the LHD allows patients to defer payment for services, or if the LHD accepts insurance other than Medicaid, assume you are a creditor who must comply with the rule.



Other Approaches

- Discuss your particular payment practices with your attorney and get his or her opinion on whether they amount to extending (or arranging for the extension of) credit, and/or whether you are “regularly” extending (or arranging for the extension of) credit.

Which LHD accounts are covered accounts?

- An “account” is a continuing relationship a person establishes with a creditor to obtain a product or services—including arrangements that allow the person to defer payment.
- A “covered account” is:
 - An account that involves or is designed to permit multiple transactions, or
 - An account for which there is a reasonably foreseeable risk to either a client or the creditor from identity theft

How can you tell what's a covered account?

- Start with definition
- Take into consideration (from rule):
 - Methods used to open accounts
 - Methods provided to access accounts
 - Previous experiences with ID theft
- Special consideration for LHDs (from NC law): Sometimes you can't charge the client for services. No charge → no opportunity for deferred payment.

Which LHD accounts are covered accounts?

- LHD may not charge clients for:
 - STD diagnosis and treatment
 - TB diagnosis and treatment
 - State-supplied immunizations
 - HIV testing and counseling
 - Sickle cell testing and counseling
- If you can't charge the client, you're not allowing the client to defer payment—doesn't appear to meet definition of “account.”

Is there a safe harbor approach to covered accounts?

- Consider your own practices re: setting up accounts for deferred payment, using the definitions and factors in the rule
- Include anything that does or could involve the extension of credit to a client



What are some examples of red flags?

- Patterns, practices, or specific activities that may indicate identity theft
- Examples:
 - Suspicious identification documents – i.e., appear forged, photo doesn't look like the client, etc.
 - Suspicious identifying information – i.e., info provided today is inconsistent with info provided previously, client presents SSN that is the same as the SSN of another client already in system, etc.

What are appropriate responses to red flags for a LHD?

- Examples of responses that may be appropriate depending on circumstances
 - Monitor account
 - Communicate with client
 - Notify law enforcement
 - Determine that no response is warranted
- Must keep in mind other legal obligations—e.g., confidentiality

Example of response that implicates HIPAA

- Notifying law enforcement:
 - HIPAA limits disclosures of information to LE
 - Limits circumstances under which disclosures may be made
 - Limits amount of information that can be disclosed in each circumstance
 - Fact-specific; need to consider particular disclosures individually.
 - Safe harbor? Talk to your attorney.

Compliance deadline?

- May 1, 2009
- Happy sailing!

