
A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:
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Wednesday, October 7, 2009
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The “Red Flags” Rule and Health Care: The Background, Context, and Covered Entities and Accounts for Identity Theft Prevention Programs

Presented by:
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Identity Theft Defined

• “Identity theft” is a fraud committed or attempted using the identifying information of another person without authority.

• “Identifying information” means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person (e.g., name, SSN, DOB, DL#).
How Identity Theft Happens

• Mail theft and other common theft
• Electronic intrusions (hacking)
• Phishing or pretexting
• Stolen laptops or flash (thumb) drives
• Purchases from data brokers
• Skimming
• Insider theft
How Stolen Identity Information Is Used

• Misuse of existing financial accounts
• New financial account fraud
• Brokering of stolen data
• Immigration fraud
• Medical identity theft
Rapper DMX Arrested For Using Fake ID At Hospital (July 2008)

- In April 2008, the 37-year old rapper Lionel Simmons (aka DMX) went for treatment at Scottsdale's Mayo Clinic and had a $7,500 medical bill, but he was alleged to have provided hospital staff with a false name, "Troy Jones," and a fake Social Security number.
Health Care Industry Policy Concerns

- **Insider theft**: Prevent identity information from being stolen from the business

- **Medical identity theft**: Prevent the business from being used by someone who possesses stolen identity information
The Prevalence of Identity Theft

• A 2006 identity theft survey report sponsored by the FTC indicated that approximately 8.3 million adults in the United States were victims in 2005.
  – More recent reports indicate there were nearly 10 million victims in 2008.

• Only 43% of victims reported being aware of how their information was stolen.
  – But about 11% of those victims reported the theft was from a company that maintained their information.

• Three percent of survey participants who reported discovering misuse of their personal information between 2001 and 2005 said their information had been used to obtain medical services.
Why the Health Care Industry Should Be Concerned: The Health Risks of Medical Identity Theft

- False entries made to medical histories and creation of fictitious records can lead to --
  - Improper medical treatment
  - Denial or exhaustion of health insurance
  - Uninsurability for life or health insurance
  - Unemployability where a health check or physical exam is needed
Why the Health Care Industry Should Be Concerned: The **Financial** Risks of Medical Identity Theft

- The federal government and health insurance companies may require the health care provider to pay reimbursement for services rendered to someone other than the insured
- Victims may seek legal recourse against the health care provider
The Federal Government’s Recent Responses to Identity Theft

- The Fair and Accurate Credit Transactions Act of 2003 (FACT Act)
- Identity Theft Penalty Enhancement Act of 2004
- Executive Order 13402 creating the Identity Theft Task Force (2006)
The “Red Flags” Rule

• Joint rulemaking by several federal agencies
• Implements section 114 of the FACT Act
• Issued November 9, 2007
• Became effective January 1, 2008
• Enforcement by the FTC begins November 1, 2009
• Beginning November 1\textsuperscript{st}, entities may be penalized $3,500 per violation and/or ordered to take certain compliance measures
What is the “Red Flags” Rule?

• Requires each “financial institution” and “creditor” that offers or maintains one or more “covered accounts” to develop and implement a written Identity Theft Prevention Program

• The Program must be designed to identify and detect Red Flags and to prevent and mitigate identity theft

• “Red Flags” means a pattern, practice, or specific activity that indicates the possible existence of identity theft
Who Is A “Creditor”?

• “Any person who regularly extends, renews, or continues credit”
  – Includes businesses that regularly defer payment for goods or services or provide goods or services and bill customers later
  – Includes utility companies, telecommunications companies, and health care providers
You Know You’re A “Creditor” If . . .

• You regularly bill patients after the completion of services, including for the remainder of medical fees not reimbursed by insurance.
• You regularly allow patients to set up payment plans after services have been rendered.
• You help patients get credit from other sources (e.g., you distribute and process applications for credit accounts tailored to the health care industry).
You’re **Not A “Creditor”** If . . .

- You require full payment before or at the time of service.
- You accept only direct payment from Medicaid or other programs where the patient has no responsibility for the fees.
  
  * * *

- If you are not a creditor, your mere acceptance of credit cards as a form of payment at the time of service does not make you a creditor.
What is a “Covered Account”?

• (1) An account that a creditor offers or maintains - primarily for personal, family, or household purposes – that involves or is designed to permit multiple payments or transactions (e.g., credit card, utility, cell phone account; mortgage loan; checking and savings account; and patient billing account)
What is a “Covered Account”? 

• (2) Any other account that the creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the creditor from identity theft (e.g., patient records)
But wait . . . The ABA filed a lawsuit against the FTC on August 27, 2009

• The American Bar Association (ABA) claims that the FTC exceeded its statutory authority by seeking to apply the Red Flags Rule to lawyers under the theory that practicing lawyers are “creditors”

• In papers filed with the court on September 23rd, the ABA argued that the court should rule in its favor because:
  – The FACT Act does not suggest that Congress authorized the FTC to regulate lawyers
  – There is no *right* to make deferred payment to lawyers
  – Lawyers do not *regularly* permit deferred payment
ABA v. FTC (continued)

• The ABA asked for a court hearing on or before October 23rd in light of the November 1st FTC enforcement date.

• Notably, the ABA argued that “creditor” cannot include professionals such as lawyers or health care providers who bill their clients after services are rendered.

• If the court ultimately rules for the ABA (and lawyers), the ruling could possibly be broad enough to also exempt certain health care providers from the Red Flags Rule.
THE END

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FTC Defers Enforcement of the Red Flags Rule to November 1, 2009

On July 29, 2009, the U.S. Federal Trade Commission (FTC) deferred enforcement of the Red Flags Rule from August 1, 2009 to November 1, 2009 in order “to give creditors and financial institutions more time to develop and implement written identity theft prevention programs.” As we discussed in our articles from 4/27/09 and 5/4/09, the Red Flags Rule will require many businesses to develop, implement, and administer an Identity Theft Prevention Program that is designed to detect the warnings signs (or “red flags”) of identity theft, as well as to prevent and mitigate it.

As noted earlier, the rule is very broad, and is not limited to any specific business sector – quite the contrary, it is directed to not just financial companies, but also many other types of businesses such as telecommunications, utility, auto, retail and healthcare companies – including hospitals and physician practices. The steps for compliance will vary on the size and nature of the business, as well as existing data protection policies, but failure to comply may result in civil monetary penalties.

The Rule is Being Deferred Only – Not Revised

It is important to note that the Rule is not being revised or amended in any way. Therefore, the scope of businesses coming within its ambit will be the same on November 1 as would have been affected had the August 1 deadline been implemented. The only action point here is that businesses have been granted three extra months in which to examine the Rule’s application to their specific situations, and to develop a set of policies that will comply with the Rule while addressing their specific risk parameters for identity theft.

However, addressing the widespread backlash from those businesses deeming themselves as “low risk” with respect to the occurrence of the identity theft the Rule is meant to combat (and uncertain about the extent of their obligations under the Rule), the FTC noted yesterday that “to assist small businesses and other entities, the Federal Trade Commission staff will redouble its efforts to educate them about compliance with the "Red Flags" Rule and ease compliance by providing additional resources and guidance to clarify whether businesses are covered by the Rule and what they must do to comply.”

As part of this effort, the FTC will be providing additional compliance guidelines on its website at www.ftc.gov. These guidelines will include a special link for small and low-risk entities providing materials such as additional templates and FAQs. For example, the FTC has already stated on its website that Commission staff would be unlikely to recommend bringing a law enforcement action if entities know their customers or clients individually, or if they perform services in or around their customers’ homes, or if they operate in sectors where...
identity theft is rare and they have not themselves been the target of identity theft. Once that additional information is made available, we will distribute another announcement.

**What to Do Now?**

As noted earlier, for those businesses that are “financial institutions” and “creditors” that offer or maintain one or more “covered accounts,” and must therefore comply with the Red Flags Rule by November 1, they must undertake efforts immediately to properly assess the Rule’s applicability, prepare policies as appropriate to reflect identity theft risks per the Rule, and train their employees on the implementation of those Policies – thus avoiding last-minute assessments and potential difficulties arising from such circumstances.

Specifically, businesses subject to the Red Flags Rule must develop and implement a written Identity Theft Prevention Program (the “Program”) that is designed to detect, prevent and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

Every Program must include reasonable policies and procedures related to four elements: (1) the identification of red flags, (2) the detection of red flags, (3) the response to red flags that are detected, and (4) the periodic update of the Program. The FTC and the other federal bank regulatory agencies charged with enforcing the Red Flags Rule have issued guidelines to assist businesses in developing and implementing a Program.

We will be pleased to answer any questions you might have as to the application, implementation or assessment of the Red Flags Rule with respect to your business.
Red Flag Rules for Healthcare Providers

Complying with New FTC Requirements to Combat Identity Theft

October 7, 2009

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Red Flag Rules Requirements
Develop and implement a written “Identity Theft Prevention Program” to DETECT PREVENT and MITIGATE Identity Theft in connection with the opening of covered accounts or any existing covered accounts.
Establishment of an Identity Theft Prevention Program

- Must be written

- Must be appropriate to the size and complexity of your company and the nature and scope of its activities

- Must consider the Guidelines and include in your Program those Guidelines that are appropriate
Four Requirements of a ‘Program’

- **Identify** relevant patterns, practices, and specific forms of activity that are ‘red flags’ signaling possible identity theft

- **Detect** red flags

- **Respond** to those detected to prevent and mitigate identity theft

- **Update** the Program periodically to reflect changes in risks from identity theft
Identify Red Flags

- IDENTIFY relevant patterns, practices and specific forms of activity that are “red flags” signaling possible identity theft, and incorporate those red flags into the program
  - Supplement A to the Guidelines provides 26 Examples
  - Your experience with Identity theft
  - Relevant identity theft methods and changes in identity theft risk
Identification Possibilities

- Five categories of examples given in the ‘Supplement’ to the Guidelines
  - Alerts, Notifications, or Warnings from a Consumer Reporting Agency
  - Suspicious Documents
  - Suspicious Personal Identifying Information
  - Unusual Use of/or Suspicious Activity related to the covered account
  - Notice from Customers, Victims of Identity Theft, Law Enforcement Authorities or other Persons regarding Possible Identity Theft
Detect Red Flags

- How will you **DETECT** red flags that have been incorporated into your program?
  - Obtain identifying information and verify identity
  - Authenticate the patient (Does this person belong to this identity?)
  - Verify the validity of change of address requests
Most Common Ways Patients Find Out:

- Receive a bill from healthcare facility or EOB from insurance
- Provider informs facility and/or patient when reviewing history during visit
- Insurance is denied or a rider is put on for a condition the patient never had
- Patient review of records/records transfer to another physician
Respond to Detected Red Flags

- PREVENTING Identity Theft with an appropriate response to Red Flags detected, based on level of risk
  - Notify real patient
  - Notify law enforcement
  - Consider EMTALA obligations
  - Maybe no response is warranted
Respond to Detected Red Flags

- MITIGATING Identity Theft with an appropriate response to Red Flags detected, based on level of risk
  - Correct medical record
  - Notify real patient
  - Stop collection efforts
  - Repay amounts collected
Update the Program

- Periodic “Risk Assessment” to determine covered accounts
- Experiences with Identity Theft
- Changes in the methods of Identity Theft
- Changes in methods to detect, prevent and mitigate Identity Theft
- Changes in business arrangements, e.g., mergers, acquisitions, alliances, joint ventures, service provider arrangements
Administration of the Program

- Obtain approval of Program from Board of Directors or Board Committee
- Oversight of Program by Board, Board committee, or senior management designee
- Train Staff
- Exercise oversight over service provider arrangements
Administration contd.

- Assign specific responsibility for the Program’s Implementation

- Staff should report to the Board or Senior Manager
  - At least annually
  - Must show effectiveness for covered accounts
Administration, contd.

- Explanation of “Significant Incidents” involving identity theft involving covered accounts and management’s response to the incidents

- Recommendations for material changes in the Program due to evolving risks and methods of detection and mitigation
Oversight of Service Providers

- “Whenever a service provider is engaged to perform an activity in connection with a covered account steps must be taken to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft.”

  - Could require Service Provider to have Red Flag Program and report to Healthcare Provider
  - Could require Service Provider to respond to the Healthcare Provider’s Red Flags
FTC Red Flags Rule

Compliance Tips for Healthcare Providers

October 7, 2009

Presented by
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A successful Identity Theft Prevention Program developed to comply with the FTC Red Flags Rule will build on existing efforts to combat fraud and protect patient privacy.

Identity theft is not new; healthcare providers are already taking steps to protect patients and themselves.

Build on existing practices and pathways to create your Program.

Take advantage of existing compliance tools and templates.
Guiding Principles

- Program must be “appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities” 16 C.F.R. § 681.2(d)
- Keep sight of the core goals of the Red Flags Rule: Being able to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account
Build a Red Flags Rule Compliance Team

- Identify individuals who will be responsible for developing your Red Flags Program and monitoring compliance:
  - Compliance Officer
  - HIPAA Privacy Officer
  - HIPAA Designated Security Official

- Create a list of individuals in your organization who will play a role in Red Flags compliance efforts:
  - Admissions
  - Billing
  - IT
  - Medical Records
  - Legal
Identify External Resources

- FTC Red Flags Rule, including Appendix A and Supplement A to Appendix A (16 C.F.R. Part 681)

- FTC Guidance Materials:
  - The “Red Flags” Rule: What Health Care Providers Need to Know About Complying with New Requirements for Fighting Identity Theft
  - Fighting Fraud with the Red Flags Rule: A How-to Guide for Business
    - Interactive Guide (including tab for a Do-It-Yourself Program for Businesses at Low Risk For Identity Theft): www.ftc.gov/redflagsrule
  - Frequently Asked Questions: Identity Theft Red Flags and Address Discrepancies

- Secondary Sources:
  - AHA, AMA, AHLA, local chapters of trade associations
Is Your Business at Low Risk for Identity Theft?

- Businesses that are at “low risk for identity theft” may use a streamlined do-it-yourself tool, developed by the FTC, to create a Red Flags Program.

- Factors for determining if your business is at “low risk for identity theft” include:
  - Do you know your clients personally?
  - Do you usually provide your services in your customers’ homes?
  - Have you ever experienced an incident of identity theft?
  - Are you in a business where identity theft is uncommon?
Is Your Business at Low Risk for Identity Theft?

- If you conclude that your business is at “low risk for identity theft”:
  - Use the online tool to document your analysis
  - Complete the online compliance template
  - Print a copy of the completed online form for your records
  - Implement your newly created Red Flags Program

- If you conclude that your business is not at “low risk for identity theft”:
  - Go through the steps outlined on the following slides to create your Red Flags Program

- Whatever you conclude, act now, so your Program can be in place by November 1, 2009
Develop List of Red Flags

- Use external resources as a starting point (e.g., Appendix A to the Red Flags Rule, trade association materials)
- Consider your organization’s past experiences with identity theft
- Red Flags should be specific to your organization
  - Different types of providers will have different lists
    - Hospitals versus physician practices versus skilled nursing facilities
Three Categories of Red Flags

- **Patient-raised concerns**
  - Patient receives bill for another individual
  - Patient receives EOB or bill for services not rendered
  - Patient receives bill from an unknown provider

- **Internally raised concerns**
  - Records show medical treatment inconsistent with patient history or physical examination
  - Patient presents suspicious identification or does not have physical evidence of identification
  - Insurer reports that patient has depleted insurance benefits or reached lifetime cap

- **Externally raised concerns**
  - Notice from law enforcement officials
  - Notice from Medicare or Medicaid fraud investigators
Build an Identity Theft Prevention Program

- Build a Red Flags Program that includes methods for:
  - Detecting the Red Flags you have identified
  - Responding to these Red Flags to prevent and mitigate identity theft
- Establish how you will administer your Red Flags Program and keep it current
Fill Your Tool-Box

- Gather, review, and adapt tools used to comply with HIPAA and state privacy, security, and breach notification laws:
  - Policies and Procedures
  - Training materials
  - Forms

- Create a list of new tools that need to be developed, such as:
  - Written Identity Theft Prevention Policy
  - Documents memorializing appropriate Program administration, such as:
    - Corporate instrument for securing Board approval
    - Template for annual report to the Board on Red Flags Rule compliance issues
Adapt Existing Tools: Policies and Procedures

- Identify existing policies and procedures that can be part of the Program
- Determine the extent to which such policies and procedures need to be updated to reflect the Red Flags Rule
- Examples:
  - Detecting Red Flags: Procedures for verifying patient identity
  - Responding to Red Flags: Data breach notification procedures
  - Administering Red Flags Program: Job description for HIPAA Privacy/Security Officer
Adapt Existing Tools: Training Materials

- HIPAA training tools can be modified to address the Red Flags Rule:
  - Existing components may need to be modified (e.g., training explaining steps to be taken to verify a patient’s identity)
  - New components may need to be added (e.g., in some cases, a Red Flags Rule component may need to be appended to existing training documents)
Adapt Existing Tools: HIPAA Forms

- HIPAA forms can be updated to address the Red Flags Rule, such as:
  - Business Associate Agreements
    - “Whenever a service provider is engaged to perform an activity in connection with a covered account steps must be taken to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft” Appendix A, VI(c)
    - Universal and tailored forms can be updated to address this requirement and allocate risks appropriately
  - Notice of Privacy Practices
    - May be used as a tool to advise patients on how to report identity theft or medical identity theft relating to their account
  - Requests for Access and Amendment of Protected Health Information (PHI)
    - Providers can add a check-box inquiring as to whether the request was driven by concerns about a potential identity theft or medical identity theft
Create New Tools: Identity Theft Prevention Policy

- Write an Identity Theft Prevention Policy
  - Elements of the Program (16 C.F.R. § 681.2(d)):
    - Identification of relevant Red Flags
    - Detection of Red Flags
    - Response to Red Flags that are detected in order to prevent and mitigate identity theft
    - Provide for appropriate administration of the Program (training, oversight of service providers, leadership role, etc.)
    - Ensure periodic updates
  - Use existing resources as a starting point, such as the AHA Sample Policy, which is available at http://www.aha.org/aha/advocacy/compliance/redflags.html
Create New Tools: Program Administration

- Leadership will need to play an ongoing role in Red Flags Rule compliance efforts

- The Board (or a subcommittee thereof) must approve the initial written Red Flags Program
  - Entities must “[o]btain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors” 16 C.F.R. § 681.2(e)(1)
  - Check your institution’s bylaws to determine the type of legal instrument you will need to prepare
  - Board approval may often be accomplished through a simple Directors’ resolution by written consent without a meeting
Create New Tools: Program Administration

- The leadership role in Red Flags Rule compliance should not end with this initial approval of the Program
- Entities subject to the Red Flags Rule must:
  - “provide for the continued administration of the Program and must . . . [i]nvolve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the program.” 16 C.F.R. § 681.2(e)(2)
  - “consider the guidelines in Appendix A . . . and include in its Program those guidelines that are appropriate” 16 C.F.R. § 681.2(f)
Create New Tools: Program Administration

- For example, entities subject to the Red Flags Rule should report annually to leadership on compliance efforts.

- The guidelines in Appendix A provide that:
  - “Staff of the [entity] responsible for development, implementation, and administration of its Program should report to the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management, at least annually, on compliance by the [entity] with § 681.2 of this part.” Appendix A, VI(b)(1)

- Consistent with these guidelines, the report should address material matters related to the Program and evaluate:
  - The effectiveness of the Program in addressing the risk of identity theft
  - Service provider arrangements
  - Significant incidents involving identity theft and management’s response, and
  - Recommendations for material changes to the Program

- Toward this end, it may be helpful to develop a report template.
Conclusion

- Red Flags Rule compliance is manageable and can be a natural outgrowth of existing policies and procedures.
- Notably, the FTC has created online tools that may streamline your Red Flags Rule compliance efforts.
- In light of recent changes to the HIPAA regime enacted through the stimulus legislation, this is a good time to revisit your privacy and security compliance efforts anyway.
HEALTH INDUSTRY ALERT

FTC SET TO BEGIN ENFORCING IDENTITY THEFT PREVENTION REGULATIONS ON AUGUST 1, 2009

Entities subject to the Federal Trade Commission’s (FTC) Red Flags Rule promulgated under the Fair and Accurate Credit Transactions (FACT) Act of 2003—including many health care providers—must develop and implement written policies to detect, prevent and mitigate identity theft by August 1, 2009. The FTC issued final Red Flags regulations in conjunction with other agencies in November 2007, but delayed implementation several times. The current deadline comes at a time of increased FTC activity in the privacy and security sphere. Notably, the FTC recently issued proposed regulations concerning breach notification requirements applicable to personal health records and, also, settled charges against retail pharmacy chain CVS Caremark for allegedly failing to take reasonable and appropriate security measures to protect sensitive customer and employee financial and medical information.

A successful Identity Theft Prevention Program developed in response to the FTC Red Flags Rule will build on existing efforts to combat fraud and protect patients. Covered health care providers can build on existing practices and pathways to create a Red Flags Program. For many entities, efforts undertaken to comply with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its implementing regulations may serve as a good springboard for Red Flags Rule compliance activities.

RED FLAGS RULE APPLIES TO MANY HEALTH CARE PROVIDERS

Notwithstanding the efforts of the American Medical Association to sway the agency, the FTC has clearly indicated that the Red Flags Rule applies in the health care setting. The Red Flags Rule applies to all “creditors” who offer or maintain
one or more “covered accounts.” Relevant law defines “creditor” as any entity that regularly defers payments for goods or services, or arranges for the extension of credit. The FTC considers health care providers who bill patients after rendering medical care or who balance-bill patients for medical fees not covered by insurance to be creditors covered by the Red Flags Rule. “Covered accounts” include accounts on which creditors allow multiple payments, including patient billing accounts, and any accounts for which there is a “reasonably foreseeable risk” of identity theft to customers or the creditor, such as patient records.

Under the Red Flags Rule, a covered health care provider must develop and implement a written Identity Theft Prevention Program that enables the provider to detect, prevent and mitigate identity theft. In general, a Red Flags Program must be appropriate given the size and complexity of the institution and the scope of its activities. Entities subject to the Red Flags Rule that fail to comply with its requirements may face civil monetary penalties, as well as potentially costly long-term consent agreements.

**RED FLAGS RULE CORE REQUIREMENTS**

The Red Flags Rule outlines four elements that each written Identity Theft Prevention Program must contain and also includes several requirements concerning how each Program must be administered. In addition, Guidelines appended to the Red Flags Rule provide additional insights for designing and implementing a Program. While covered health care providers must consider the Guidelines in designing Red Flags Programs, they are not required to incorporate any specific suggestions.

**Components of a Red Flags Program**

- **Red Flag Identification.** A Red Flags Program must include reasonable policies and procedures to identify Red Flags (i.e., patterns, practices or specific activities that indicate the possible existence of identity theft). The Guidelines provide many suggestions for flags that may be relevant to a given entity’s operations. Many health care providers may find that Red Flags fall into three general categories: patient-raised concerns (e.g., patient reports receiving a bill for a service that he or she did not receive), internally raised concerns (e.g., provider finds that a patient’s history or physical examination is inconsistent with the patient’s record of medical treatment) and externally raised concerns (e.g., provider receives notice of suspected identity theft situation from law enforcement officials).

- **Red Flag Detection.** The Program must contain reasonable policies and procedures to detect Red Flags. Covered health care providers will need to be able to detect Red Flags at the time
new patient accounts are established, as well as flag problems affecting existing patient accounts. Ongoing detection efforts may involve routine patient identity authentication, procedures for verifying change of address requests and periodic staff surveys to determine whether any patients have presented suspicious documentation or have reported any unusual activity on their accounts.

- **Red Flag Response.** The Program must include reasonable policies and procedures to prevent and mitigate identity theft by responding to detected Red Flags. For example, covered health care providers may find that appropriate responses to a trigger may include monitoring a patient’s account and medical records for evidence of identity theft, contacting the affected patient to investigate the matter or notifying law enforcement officials.

- **Program Update.** The Program must contain reasonable policies and procedures to ensure that it is updated periodically to reflect changes in risks to patients from identity theft. This will typically involve reassessing the health care provider’s list of Red Flags, learning from any experiences with identity theft, reevaluating methods for detecting triggers, and updating staff training materials, among other activities.

**Highlights of Red Flags Program Administration Requirements**

- **Leadership Role.** The FTC envisions that an entity’s board of directors (or other leaders) will play an ongoing role in Red Flags Rule compliance efforts. For example, each covered health care provider must secure approval of its initial written Program from its board of directors (or an appropriate board committee). In a similar vein, the Guidelines recommend, among other steps, that health care providers present an annual report to the board (or other designated senior management officials) on Red Flags compliance issues.

- **Training.** Covered health care providers must train relevant staff to implement the Program effectively, as necessary. Many covered health care providers may find that individuals working in admissions, billing, legal and information technology departments, for example, may need to be trained. In many cases, training modules developed for HIPAA compliance purposes may be modified for use in connection with Red Flags Rule compliance efforts.

- **Service Provider Oversight.** Covered health care providers must exercise appropriate and effective oversight of service provider arrangements. The Guidelines expand upon this concept, suggesting that entities ensure that any service providers engaged to perform activities in connection with one or more covered accounts implement reasonable policies and procedures.
to detect, prevent and mitigate identity theft. Many covered health care providers may find that HIPAA compliance mechanisms, such as lists of entities with which they have entered into business associate agreements, provide a good starting point for service provider oversight efforts.

CONCLUSION

Identity theft is a growing problem in the health care industry. The FTC reports that roughly 5 percent of all identity theft victims have experienced medical identity theft, which occurs when someone falsely uses another person’s name or insurance information to obtain medical services or products. Recently, cases involving thefts of laptops containing patient records and the unauthorized access of patient health information by facility employees have garnered national media attention. Medical identity theft creates financial and administrative problems for health care providers and may dangerously complicate patient care.

A Red Flags Program that is a natural outgrowth of existing policies and procedures can be an effective tool for combating identity theft in the health care setting. Moreover, such a Program can be readily incorporated into an organization’s overall corporate compliance program in a relevant and appropriate manner, which will enable it to benefit from the centralized focus, resources and initiatives that characterize comprehensive compliance programs.

CONTACT INFORMATION

If you have any questions regarding this alert, the Red Flags Rule or laws concerning the privacy and security of health information more generally, please contact—

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HEALTH INDUSTRY ALERT

FTC DELAYS ENFORCEMENT OF IDENTITY THEFT PREVENTION REGULATIONS UNTIL NOVEMBER 1, 2009

The Federal Trade Commission (FTC) announced on July 29, 2009, that it would again delay enforcement of its anti-identity theft regulation, commonly known as the “Red Flags Rule,” until November 1, 2009. The Red Flags Rule, promulgated by the FTC pursuant to the Fair and Accurate Credit Transactions (FACT) Act of 2003, is aimed at preventing identity theft. It requires “creditors” and financial institutions with “covered accounts”—including many health care providers—to implement programs to identify, detect and respond to the warning signs that could indicate identity theft. This recent delay represents the third time that the FTC has postponed enforcement of the Red Flags Rule.

The FTC stated in a press release that it delayed the August 1, 2009, deadline so that it could redouble its efforts to educate small businesses and other entities on compliance with the Red Flags Rule. The FTC further noted that it intends to ease the burden of compliance by providing additional resources and guidance to clarify whether businesses are covered by the Red Flags Rule and what they must do to comply. The FTC also promised to offer guidance specifically for small and low-risk entities through the Red Flags Rule Web site, www.ftc.gov/redflagsrule. The FTC has already posted some guidance (in the form of FAQs), which is available at www.ftc.gov/bcp/edu/microsites/redflagsrule/faqs.shtm.

Critics from various industries, including the health sector, have voiced concerns over the FTC’s approach to the Red Flags Rule, and they have some allies in Congress. For example, the American Medical Association has objected to the FTC’s position that physicians may be “creditors” that are subject to the Red Flags Rule.
The American Bar Association has threatened to file a lawsuit against the FTC unless the agency exempts attorneys from compliance with the Red Flags Rule. The House Appropriations Committee recently requested that the FTC defer enforcement as well as make additional efforts to minimize the burdens of the Red Flags Rule on health care providers and small businesses with a low risk of identity theft problems. In April 2009, the chair of the House Small Business Committee similarly urged the FTC to delay enforcement and to analyze the burden of the Red Flags Rule on health care professionals.

CONTACT INFORMATION

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60654

Plaintiff,

v.

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, NW
Washington, DC 20580

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW Plaintiff American Bar Association (the “ABA”), by and through its attorneys Proskauer Rose LLP, who files this Complaint for Declaratory and Injunctive Relief against Defendant Federal Trade Commission (the “FTC” or “Commission”), alleging as follows:

NATURE OF THE ACTION

1. This action is brought by the ABA on behalf of its nearly 400,000 members to declare unlawful and set aside the FTC’s application of its regulation, commonly known as the “Red Flags Rule,” to lawyers engaged in the practice of law, each of whom is already subject to strict confidentiality and privacy requirements set forth in the statutes, rules of professional conduct, and other disciplinary rules of the States in which the members are licensed to practice law.

2. In direct conflict with the law of this circuit, see ABA v. FTC, 430 F.3d 457 (D.C. Cir. 2005), the FTC is again attempting to exceed its statutory authority by now seeking to
enforce its Red Flags Rule, a rule designed to prevent identity theft, against the legal profession. The FTC seeks to take this action in the absence of an express statutory mandate, by arbitrarily and capriciously including lawyers engaged in the practice of law as “creditors” under its Red Flags Rule, in arrogation of powers that Congress has not given to it. Timely judicial relief is required to stop the FTC’s unlawful enforcement of the Red Flags Rule against the legal profession, which is scheduled to begin on November 1, 2009.

PARTIES

3. Plaintiff ABA is the world’s largest voluntary professional association with nearly 400,000 members. A not-for-profit corporation organized under the laws of Illinois, the ABA’s principal place of business is 321 North Clark Street, Chicago, Illinois 60654. The ABA’s membership spans all 50 States and other jurisdictions, and includes lawyers in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and law students. The ABA’s mission is “[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.” ABA Mission and Association Goals (Aug. 2008).

4. Among the ABA’s goals are to: preserve the independence of the legal profession and the judiciary; promote improvements in the American system of justice; increase public understanding of, and respect for, the law, the legal process, and the role of the legal profession; achieve the highest standards of professionalism, competence and ethical conduct for lawyers; and advance the rule of law worldwide. To assist the legal profession in achieving and maintaining high standards for professionalism and ethical conduct, the ABA promulgates Model Rules of Professional Conduct, which require lawyers to maintain the confidentiality and privacy of
information disclosed by and to clients. Most States base their lawyer confidentiality and privacy rules on the ABA’s Model Rules.¹

5. The ABA has standing to pursue this action on behalf of its members under the three-element test enunciated in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977), because (1) the ABA’s members would otherwise have standing to sue in their own right, (2) the interests at stake in this case are germane to the ABA’s organizational purposes, and (3) neither the claims asserted nor the relief requested requires the participation of the ABA’s individual members.

6. Defendant FTC is an independent agency of the United States. It is one of several entities Congress authorized to enforce, and promulgate regulations pursuant to, the Fair Credit Reporting Act (“FCRA”) and the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”). The FTC has taken the position that it may enforce the Red Flags Rule, promulgated pursuant to the FACTA, against lawyers engaged in the practice of law on the theory that lawyers qualify as “creditors” pursuant to the FCRA and the FACTA. The FTC’s business address is 600 Pennsylvania Avenue, NW, Washington, District of Columbia 20580.

7. The Federal Government’s sovereign immunity does not preclude this suit because this is “an action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.” 5 U.S.C. § 702.

¹ The ABA’s Model Rules of Professional Conduct are the basis for the lawyer ethics codes in every State except California. California’s rules are currently under review, in response to developments in the field and to the Report and Recommendation of the ABA’s Ethics 2000 Commission.
JURISDICTION AND VENUE

8. This Court has jurisdiction over this action and the parties thereto pursuant to 28 U.S.C. § 1331.


BACKGROUND AND FACTUAL ALLEGATIONS

The Fair and Accurate Credit Transactions Act of 2003


12. The FACTA codified a number of measures intended to improve the accuracy of credit transactions and to curb identity theft, including entitling each American to one free annual credit report and enabling consumers to place fraud alerts in their credit files.

13. Section 114 of the FACTA, 15 U.S.C. § 1681m, directs the FTC and other agencies to issue guidelines regarding identity theft. It states, in relevant part:

(e) RED FLAG GUIDELINES AND REGULATIONS REQUIRED.

(1) GUIDELINES. The Federal banking agencies, the National Credit Union Administration, and the [FTC] shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 621 [15 U.S.C. § 1681s]—

(A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account
holders at, or customers of, such entities, and update such guidelines as often as necessary; [and]

(B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers[.]

... (2) CRITERIA.

(A) IN GENERAL. In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft. ... FACTA § 114(e) (codified at 15 U.S.C. § 1681m(e)).

14. The FTC, among other agencies, is empowered to enforce the rules it promulgates pursuant to the FACTA. 15 U.S.C. § 1681s.

15. The FTC thus is empowered to create and enforce identity theft guidelines against “creditor[s],” among others. The FACTA adopts the definitions of “credit” and “creditor” contained in the Equal Credit Opportunity Act (“ECOA”). 15 U.S.C. § 1681a(r)(5).

16. “Credit” is defined in the ECOA as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.” 15 U.S.C. § 1691a(d).

17. “Creditor” is defined in the ECOA as “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.” 15 U.S.C. § 1691a(e).

19. Among other things, the Proposed Red Flags Rule required creditors to create written identity theft prevention programs tailored specifically to a particular creditor’s business.

20. The Proposed Red Flags Rule provided no indication that the FTC or its sister agencies believed lawyers engaged in the practice of law fell within the definition of “creditor.”

The Final Red Flags Rule


22. In parts relevant to this litigation, the Final Red Flags Rule, like the Proposed Red Flags Rule, required creditors to develop written identity theft prevention programs, stating:

§ 681.2 Duties regarding the detection, prevention, and mitigation of identity theft.

(a) Scope. This section applies to financial institutions and creditors that are subject to administrative enforcement of the FCRA by the Federal Trade Commission pursuant to 15 U.S.C. 1681s(a)(1).

(b) Definitions. For purposes of this section, and appendix A, the following definitions apply:

(1) Account means 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. Account includes:
(i) An extension of credit, such as the purchase of property or services involving a deferred payment; and

(ii) A deposit account.

(2) The term *board of directors* includes:

(i) In the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency; and

(ii) In the case of any other creditor that does not have a board of directors, a designated employee at the level of senior management.

(3) *Covered account* means:

(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account; and

(ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.

(4) *Credit* has the same meaning as in 15 U.S.C. 1681a(r)(5).

(5) *Creditor* has the same meaning as in 15 U.S.C. 1681a(r)(5), and includes lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies.

(6) *Customer* means a person that has a covered account with a financial institution or creditor.

(7) *Financial institution* has the same meaning as in 15 U.S.C. 1681a(t).

(8) *Identity theft* has the same meaning as in 16 CFR 603.2(a).

(9) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.
(10) Service provider means a person that provides a service directly to the financial institution or creditor.

(c) Periodic Identification of Covered Accounts. Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor must conduct a risk assessment to determine whether it offers or maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

(1) The methods it provides to open its accounts;

(2) The methods it provides to access its accounts; and

(3) Its previous experiences with identity theft.

(d) Establishment of an Identity Theft Prevention Program.—(1) Program requirement. Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program (Program) that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account. The Program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

(2) Elements of the Program. The Program must include reasonable policies and procedures to:

(i) Identify relevant Red Flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those Red Flags into its Program;

(ii) Detect Red Flags that have been incorporated into the Program of the financial institution or creditor;

(iii) Respond appropriately to any Red Flags that are detected pursuant to paragraph (d)(2)(ii) of this section to prevent and mitigate identity theft; and

(iv) Ensure the Program (including the Red Flags determined to be relevant) is updated periodically, to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

(e) Administration of the Program. Each financial institution or creditor that is required to implement a Program must provide for the continued administration of the Program and must:

(1) Obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors;
(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the Program;

(3) Train staff, as necessary, to effectively implement the Program; and

(4) Exercise appropriate and effective oversight of service provider arrangements.

(f) Guidelines. Each financial institution or creditor that is required to implement a Program must consider the guidelines in appendix A of this part and include in its Program those guidelines that are appropriate.


23. The Final Red Flags Rule provided no indication that the FTC or its sister agencies believed lawyers engaged in the practice of law fell within the definition of “creditor.”

24. Likewise, the FTC’s public releases regarding the Final Red Flags Rule did not mention lawyers. For example, a June 2008 FTC Business Alert did not list lawyers as among those covered, stating:

Who must comply with the Red Flags Rules?

The Red Flags Rules apply to “financial institutions” and “creditors” with “covered accounts.”

... 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. Creditors include finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies. Where non-profit 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.


**The FTC’s Original Enforcement Policy**

26. On October 22, 2008, the FTC issued a press release informing the general public that it was suspending enforcement of the Red Flags Rule until May 1, 2009, in order to “give creditors and financial institutions additional time in which to develop and implement written identity theft prevention programs.” Press Release, FTC Will Grant Six-Month Delay of Enforcement of ‘Red Flags’ Rule Requiring Creditors and Financial Institutions to Have Identity Theft Prevention Programs (Oct. 22, 2008).

27. The FTC’s October 22, 2008 press release further noted that the delay was motivated in part by confusion concerning the scope of the Final Red Flags Rule and the definition of “creditor,” stating:

> [FTC] staff launched outreach efforts last year to explain the Rule to the many different types of entities that are covered by the Rule. . . . During the course of these efforts, [FTC] staff learned that some industries and entities within the FTC’s jurisdiction were uncertain about their coverage under the Rule. These entities indicated that they were not aware that they were engaged in activities that would cause them to fall under the [FACTA’s] definition of creditor or financial institution. Many entities also noted that, because they generally are not required to comply with FTC rules in other contexts, they had not followed or even been aware of the rulemaking, and therefore learned of the Rule’s requirements too late to be able to come into compliance by November 1, 2008.

*Id.*

28. Also on October 22, 2008, the FTC published on its website a two-page document entitled “FTC Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.2” (the “Enforcement Policy”).
29. Neither the October 22, 2008 press release nor the Enforcement Policy provided any indication that the FTC believed lawyers engaged in the practice of law fell within the definition of “creditor.”

The FTC’s Unexpected Extended Enforcement Policy


31. In the press release, the FTC Chairman noted an “ongoing debate” concerning the scope of the FACTA. Id.

32. Also on April 30, 2009, the FTC published on its website a three-page document entitled “FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.1” (the “Extended Enforcement Policy”).

33. In the Extended Enforcement Policy, the FTC announced publicly for the first time its belief that lawyers engaged in the practice of law are “creditor[s]” subject to the Final Red Flags Rule.

34. In a footnote to the Extended Enforcement Policy, the FTC explained the basis for its belief that lawyers engaged in the practice of law are “creditors” under the FACTA as follows:

In FACTA, Congress imported the definition of creditor from the [ECOA] for purposes of the [FCRA]. This definition covers all entities that regularly permit deferred payments for goods or services. The definition thus has a broad scope and may include entities that have not in the past considered themselves to be creditors. For example, creditors under the ECOA include professionals, such as lawyers or health care providers, who bill their clients after services are ren-
dered. Similarly, a retailer or service provider that, on a regular basis, allows its customers to make purchases or obtain services and then bills them for payment at the end of each month would be a creditor under the ECOA.

*Id.* (emphasis added).

35. The FTC’s inclusion of “lawyers” in this footnote ignores the reality that, in order for a lawyer to fall within the ECOA’s definition of “creditor,” the lawyer must regularly extend, renew, or continue credit; or regularly arrange for the extension, renewal, or continuation of credit; or be any assignee of an original creditor who participates in the decision to extend, renew, or continue credit. 15 U.S.C. § 1691a(e) (quoted in full in paragraph 17 above).

36. A lawyer does not “regularly extend” credit merely by providing services to a client in advance of billing for those services. In fact, state rules of professional conduct generally prohibit lawyers from receiving compensation before services are rendered. Similarly, that a client may not timely or entirely pay its bill, and the lawyer or law firm may voluntarily choose to delay collection and to continue to perform work for that client, does not transform the lawyer or law firm into a “creditor” who “regularly extends credit.” The FTC is improperly attempting to sweep the entire legal profession within the ambit of the Red Flags Rule based on the way in which clients pay for legal services.

37. Further, the FTC’s attempt to regulate “lawyers” under the Red Flags Rule fails to recognize that Congress incorporated only the ECOA’s definition of “creditor,” but could not incorporate the ECOA’s scope and purpose. The ECOA prohibits discrimination with respect to any aspect of a credit transaction on the basis of race or other protected characteristics, because all or part of the applicant’s income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. 15 U.S.C. § 1691(a). Assuming that lawyers engaged in the practice of law are included within ECOA’s definition of “creditors”—which the ABA does not concede—the ECOA applies to all
creditors, irrespective of whether those creditors’ activities affect interstate commerce. Section 5 of the Fourteenth Amendment permits Congress to enact such anti-discriminatory legislation irrespective of the Tenth Amendment’s limitations on federal power.

38. By contrast, the FACTA serves no anti-discriminatory purpose; it is a typical consumer protection statute. Congress’s authority to enact the FACTA derived from the Commerce Clause, not the Fourteenth Amendment. The FACTA therefore is subject to the standard limitations on Congress’s power to regulate interstate commerce, including the Tenth Amendment and the law of this circuit.

39. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” In ABA v. FTC, 430 F.3d 457 (D.C. Cir. 2005), the United States Court of Appeals for the District of Columbia Circuit concluded that “[i]t is undisputed that the regulation of the practice of law is traditionally the province of the [S]tates” and that federal law “may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion.” Id. at 471 (citing City of Abilene v. FCC, 164 F.3d 49, 52 (D.C. Cir. 1999)). The D.C. Circuit noted that “if Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” Id. at 471-72 (quoting Will v. Michigan Dep’t of State Police, 491 U.S. 58, 65 (1989)).

40. The States have the power to regulate the practice of law absent a clear Congressional statement in the language of a statute indicating otherwise. No such intention was stated in the FACTA or, for that matter, in the ECOA.
41. Without a clear statement from Congress granting the FTC power to regulate lawyers engaged in the practice of law, the FTC has overstepped the constitutional limitations placed on its regulatory authority.

**The FTC’s July 29, 2009 Last-Minute Delay**

42. Three days before the Extended Enforcement Policy was scheduled to take effect, the FTC issued a press release informing the general public that it was delaying the Red Flags Rule enforcement deadline until November 1, 2009. *See Press Release, FTC Announces Expanded Business Education Campaign on ‘Red Flags’ Rule (July 29, 2009)* (“July 29 Press Release”).

43. According to the July 29 Press Release, the three-month extension was “consistent with the House Appropriations Committee’s recent request that the Commission defer enforcement in conjunction with additional efforts to minimize the burdens of the Rule on health care providers and small businesses with a low risk of identity theft problems.”

44. The July 29 Press Release explained that many covered entities, particularly small businesses and entities with a low risk of identity theft, remained uncertain about their obligations. The FTC sought to ameliorate those concerns by citing an agency document entitled “The Red Flags Rule: Frequently Asked Questions” (“FAQs”). According to the FTC:

> The enforcement FAQ[s] state[] that Commission staff would be unlikely to recommend bringing a law enforcement action if entities know their customers or clients individually, or if they perform services in or around their customers’ homes, or if they operate in sectors where identity theft is rare and they have not themselves been the target of identity theft.

July 29 Press Release. These FAQs, couched in vague and conditional language, have no legal or binding effect whatsoever, not even on the FTC or its staff. They are essentially meaningless, except as evidence that the FTC has not reconsidered its conclusion that lawyers are “creditors” under the FACTA.
45. The prosecutorial discretion exercised by FTC staff likewise does not bind state government agencies who are authorized to enforce the FACTA, see 15 U.S.C. § 1681s(c), nor will it preclude private parties from arguing that the FACTA and the Red Flags Rule should be interpreted as creating an implied right of action. See FAQs ¶ E.1 (asserting that under the FACTA, “there is no private right of action. Only certain federal and state government agencies can enforce the Rule, but consumers can file a complaint with the FTC about a company’s Program”) (footnote omitted).

46. As for the FAQs themselves, they confirm the FTC’s previously stated position that lawyers engaged in the practice of law are “creditors” subject to the FACTA. See FAQs ¶ B.1.

47. The FAQs also explain what “creditor[s]” must do to comply with the FACTA even if there exists a low risk of identity theft, stating:

I’m a creditor with consumer or household accounts, but I think it’s very unlikely that an identity thief will try to defraud me. Do I still have to prepare an Identity Theft Prevention Program?

The Red Flags Rule requires all creditors with covered accounts to prepare an Identity Theft Prevention Program (“Program”). At the same time, the Commission staff recognizes that your risk of identity theft may be so low that, as a matter of prosecutorial discretion, Commission staff would be unlikely to recommend bringing a law enforcement action under the following circumstances:

- You know your clients individually. For example, some medical practices and law firms are familiar with everyone who walks into the office. In such circumstances, the likelihood that an identity thief can defraud a business by impersonating someone else is extremely low.

- You provide services to customers in or around their home, such as by operating a lawn care or a home cleaning business. For these types of businesses, the risk of identity theft is extremely low because identity thieves generally do not want people to know where they live.

- You are involved in a type of business where identity theft is rare. For example, if there are no reports in the news, trade press, or among people in your line of business about identity theft and your business itself has not
experienced incidents of identity theft, it is unlikely that identity thieves are targeting your sector.

Of course, from time to time you need to consider whether your identity theft risk has changed, warranting a different approach with respect to the Rule.

FAQs ¶ E.3.

48. With respect to penalties, the FAQs explain that the FTC can “seek both monetary civil penalties and injunctive relief for violations of the Red Flags Rule. Where the complaint seeks civil penalties, the U.S. Department of Justice typically files the lawsuit in federal court, on behalf of the FTC. Currently, the law sets $3,500 as the maximum civil penalty per violation. Each instance in which the company has violated the Rule is a separate violation.” FAQs ¶ E.4.

The Requirements Imposed by the Extended Enforcement Policy Have Harmed and Will Continue to Harm the ABA’s Members Irreparably

49. The ABA’s members are “adversely affected or aggrieved” within the meaning of 5 U.S.C. § 702 by the requirements set forth in the Red Flags Rule, as applied to lawyers by the Extended Enforcement Policy.

50. Compliance with the Red Flags Rule imposes significant burdens upon lawyers, particularly sole practitioners and those practicing in small firms, who comprise the majority of the lawyers in the United States.

51. Compliance with the Red Flags Rule in the first instance requires development of a plan to detect “red flags.” This cannot be done on a “cookie-cutter” basis. A plan for a lawyer who handles consumer credit matters will be different from one who represents plaintiffs in personal injury cases or matrimonial matters. Once a plan is developed, it has to be implemented and maintained. “Red flags” must be detected and appropriate responses must be made. This is likely to create a substantial drain on the financial resources of lawyers, particularly those whose support systems are limited and already devoted to serving their clients. Correspondingly, the
time required to comply with the Red Flags Rule will necessarily detract from the attention
lawyers are able to give their clients’ matters.

52. The requirements imposed by the Red Flags Rule, as applied to lawyers by the
Extended Enforcement Policy, are contrary to law. Included within the ABA’s membership are a
significant number of lawyers and law firms who will be required to comply with the Red Flags
Rule absent timely judicial relief. Many of the ABA’s members have already been forced to
dedicate significant resources to prepare for this eventuality. Because of the Federal Govern-
ment’s sovereign immunity, the ABA’s members will be unable to obtain money damages from
the FTC in the event the application of the Red Flags Rule to lawyers is declared unlawful. As
such, the financial injuries suffered by the ABA’s members cannot be remedied at law and are
irreparable.

53. The Red Flags Rule and the Extended Enforcement Policy constitute “final
agency action” within the meaning of 5 U.S.C. § 704.

CAUSES OF ACTION

COUNT I:
The Extended Enforcement Policy Violates the Clear Statement Doctrine

54. The ABA repeats and realleges paragraphs 1-53 as if set forth fully herein.

55. Pursuant to 5 U.S.C. § 706(2)(C), a reviewing court shall hold unlawful and set
aside agency action found to be “in excess of statutory jurisdiction, authority, or limitations, or
short of statutory right.”

56. By applying the Red Flags Rule to lawyers engaged in the practice of law, the
FTC has exceeded its statutory mandate from Congress.

57. Specifically, by purporting to regulate lawyers engaged in the practice of law pur-
suant to the Extended Enforcement Policy, the FTC has intruded upon an area of traditional state
regulation. See Leis v. Flynt, 439 U.S. 438, 442 (1979) (“Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.”); ABA v. FTC, 430 F.3d 457, 471 (D.C. Cir. 2005) (“It is undisputed that the regulation of the practice of law is traditionally the province of the [S]tates.”).

58. In enacting the FACTA, Congress did not directly and plainly grant the FTC the authority to regulate practicing lawyers.

59. The FTC therefore has taken agency action in excess of its statutory jurisdiction, authority, and limitations, and short of statutory right.

60. The Court therefore should set aside the Extended Enforcement Policy to the extent the FTC purports to apply the Red Flags Rule to lawyers engaged in the practice of law, as well as any other application of the Red Flags Rule to lawyers engaged in the practice of law.

COUNT II:
Application of the Red Flags Rule to Lawyers Engaged in the Practice of Law Is Arbitrary, Capricious and Contrary to Law

61. The ABA repeats and realleges paragraphs 1-53 as if set forth fully herein.

62. Pursuant to 5 U.S.C. § 706(2)(A), a reviewing court shall hold unlawful and set aside agency action found to be “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.”

63. The FTC has acted arbitrarily, capriciously and contrary to law by failing to articulate, among other things: a rational connection between the practice of law and identity theft; an explanation of how the manner in which lawyers bill their clients can be considered an extension of credit under the FACTA; or any legally supportable basis for application of the Red Flags Rule to lawyers engaged in the practice of law.
64. Because application of the Red Flags Rule to lawyers engaged in the practice of law is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, it must be set aside.

**COUNT III:**
The ABA’s Members Are Entitled To a Judgment Declaring Their Legal Rights and Duties Under the Red Flags Rule

65. The ABA repeats and realleges paragraphs 1-53 as if set forth fully herein.

66. As demonstrated by the foregoing allegations, there is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of the ABA’s members and the proper legal relations between the ABA’s members and the FTC to warrant relief under 28 U.S.C. § 2201.

67. The harm to the ABA’s members as a direct and indirect result of the FTC’s conduct is sufficiently real and imminent to warrant the issuance of a conclusive declaratory judgment clarifying the legal relations of the parties.

**REQUEST FOR RELIEF**

WHEREFORE, the ABA respectfully requests that this Court:

A. Provide for expeditious proceedings in this action in light of the Extended Enforcement Policy’s November 1, 2009 effective date;

B. Enter judgment in the ABA’s favor;

C. Declare the application of the Red Flags Rule to lawyers engaged in the practice of law unlawful and void;

D. Permanently enjoin the FTC, its agents, servants, employees, successors and assigns from implementing the Red Flags Rule in any manner that includes lawyers engaged in the practice of law;
E. Award the ABA its costs and reasonable attorneys’ fees incurred in this action pursuant to 28 U.S.C. § 2412; and

F. Grant the ABA such other relief as the Court deems just and proper.

Dated: August 27, 2009

Respectfully submitted,

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* Motion for Admission Pro Hac Vice to Be Filed

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BAR ASSOCIATION,

Plaintiff,

v.

FEDERAL TRADE COMMISSION,

Defendant.

Civil Action No. 09-1636 (RBW)

ORAL ARGUMENT REQUESTED
ON OR BEFORE OCTOBER 23, 2009

PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT

More than twenty days having passed since the commencement of this action, Plaintiff American Bar Association (the “ABA”) respectfully moves for summary judgment on Count I of its Complaint for Declaratory and Injunctive Relief pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. As set forth more fully in the Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Partial Summary Judgment, Defendant Federal Trade Commission (the “FTC”) has exceeded its statutory authority by seeking to apply identity theft regulations commonly known as the “Red Flags Rule” to lawyers engaged in the practice of law under the attenuated theory that lawyers are “creditor[s].” In doing so, the FTC has once again sought to regulate the legal profession in the absence of an unmistakably clear congressional authorization. Its doing so violates the law of this Circuit as established by ABA v. FTC, 430 F.3d 457 (D.C. Cir. 2005), aff’g N.Y. State Bar Ass’n v. FTC, Civil Action No. 02-810 (RBW), 2004 WL 964173 (D.D.C. Apr. 30, 2004). There exists no genuine issue of material fact regarding the FTC’s violation of its statutory authority.

Pursuant to Local Civil Rule 7(f), the ABA requests oral argument on this motion. Because the FTC has stated that it will apply the Red Flags Rule to lawyers beginning November 1,
2009, the ABA requests that oral argument be scheduled on or before October 23, 2009. As required by Local Civil Rules 7(h) and 56.1, Plaintiff’s Statement of Material Facts Not In Dispute is attached hereto. In accordance with Local Civil Rules 7(c), (h) and 56.1, a proposed order granting the relief requested herein is also attached hereto. Consultation with opposing counsel pursuant to Local Civil Rule 7(m) is not required because this is a dispositive motion.

Dated: September 23, 2009

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BAR ASSOCIATION,

Plaintiff,

v.

FEDERAL TRADE COMMISSION,

Defendant.

Civil Action No. 09-1636 (RBW)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT

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<td>American Bar Association</td>
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<td>APA</td>
<td>Administrative Procedure Act</td>
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<tr>
<td>BHCA</td>
<td>Bank Holding Company Act of 1956</td>
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<td>ECOA</td>
<td>Equal Credit Opportunity Act</td>
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<td>FACTA</td>
<td>Fair and Accurate Credit Transactions Act of 2003</td>
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<td>FTC</td>
<td>Federal Trade Commission</td>
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<td>GLBA</td>
<td>Gramm-Leach-Bliley Act</td>
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Plaintiff American Bar Association (the “ABA”) respectfully submits this Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Partial Summary Judgment.

PRELIMINARY STATEMENT

In 2003, Congress enacted legislation directing Defendant Federal Trade Commission (the “FTC” or “Commission”) and certain other agencies to issue identity theft regulations that would govern “creditor[s],” among others. At no time during the legislative process did Congress suggest that lawyers engaged in the practice of law are “creditor[s],” nor was any such suggestion made by Congress 29 years earlier when it defined “creditor” and “credit” in the 1974 statute cross-referenced by the 2003 statute. The regulations required by the 2003 statute were finalized in 2007 and are commonly known as the “Red Flags Rule.” Like Congress, the FTC and its sister agencies never suggested during the rule-making process that lawyers engaged in the practice of law are “creditor[s]” subject to the Red Flags Rule.

Over a year after the Red Flags Rule was finalized, the FTC first formally announced its belief that lawyers engaged in the practice of law are “creditor[s]” subject to the Red Flags Rule. In a press release accompanying its announcement, the FTC explained that it would enforce the Red Flags Rule against lawyers beginning August 1, 2009. That deadline has since been extended until November 1, 2009.

As set forth more fully below, the FTC’s assertion that lawyers engaged in the practice of law are “creditor[s]” subject to the Red Flags Rule is patently incorrect and in violation of the law of this Circuit. In ABA v. FTC, 430 F.3d 457 (D.C. Cir. 2005), aff’g N.Y. State Bar Ass’n v. FTC, Civil Action No. 02-810 (RBW), 2004 WL 964173 (D.D.C. Apr. 30, 2004) (collectively, “ABA v. FTC I”), the United States Court of Appeals for the District of Columbia Circuit held that Congress must provide an unmistakably clear statutory statement if it intends to abrogate
centuries of tradition by authorizing a federal agency to regulate lawyers engaged in the practice of law. No such unmistakably clear statement can be found in the legislation authorizing the Red Flags Rule, nor can the FTC’s interpretation of the words “creditor” and “credit” be reconciled with those terms’ statutory definitions or interpretive case law.

As in ABA v. FTC I, this Court should issue an order enjoining the FTC from enforcing the Red Flags Rule against lawyers engaged in the practice of law because the FTC has once again exceeded its statutory authority.

STATUTORY AND REGULATORY BACKGROUND

A. The Fair And Accurate Credit Transactions Act Of 2003


As explained by the Joint Explanatory Statement of the Committee of Conference that accompanied the FACTA’s enactment:

Despite the myriad benefits of technology to the American consumer, there has been one drawback. Namely, the free flow information has enabled the explosive growth of a new crime—identity theft. Both Committees developed comprehensive hearing records regarding the growth of this crime, and the havoc it visits upon the lives of its victims. Law enforcement professionals are cognizant of the growth of this crime, and have worked with the affected industries to combat it. While criminal prosecutions and strict fraud detection protocols can curtail identity theft, and punish the wrongdoers, not enough had been done heretofore to aid the real victims of this crime—the consumer whose identity is assumed, and can spend months or years trying to rehabilitate their credit and reorder their affairs.


To address the problem of identity theft, the FACTA directs the FTC and certain other agencies to “establish and maintain guidelines for use by each financial institution and each
creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary.” 15 U.S.C. § 1681m(e)(1)(A). The FTC and its sister agencies are also instructed to “prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing” the foregoing guidelines and “to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers.” 15 U.S.C. § 1681m(e)(1)(B). In developing these guidelines and regulations, the FACTA directs the agencies to “identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.” 15 U.S.C. § 1681m(e)(2)(A). The agencies can enforce their identity theft guidelines and regulations by seeking injunctive relief and civil monetary penalties. See 15 U.S.C. § 1681m(h)(8)(B) (incorporating enforcement scheme established by 15 U.S.C. § 1681s).

The FACTA incorporates by reference the definitions of “creditor” and “credit” found in the Equal Credit Opportunity Act (“ECOA”). 15 U.S.C. § 1681a(r)(5). Congress enacted the ECOA in 1974 because it found that there is a need to insure that the various financial institutions and other firms engaged in the extensions of credit exercise their responsibility to make credit available with fairness, impartiality, and without discrimination on the basis of sex or marital status. Economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of credit would be strengthened by an absence of discrimination on the basis of sex or marital status, as well as by the informed use of credit which Congress has heretofore sought to promote. It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all credit-worthy customers without regard to sex or marital status.

Pub. L. No. 93-495, § 503, 88 Stat. at 1521. The ECOA’s liability provision was expanded two years later to include forms of discrimination other than those based on sex or marital status. See Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat. 251. In its current form, the ECOA makes it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant’s income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under this chapter.” 15 U.S.C. § 1691(a).

As for its definitions, the ECOA provides that the word “creditor” means “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.” 15 U.S.C. § 1691a(e). “Credit” is “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.” 15 U.S.C. § 1691a(d). The foregoing definitions have remained unchanged since the ECOA’s enactment in 1974. See Pub. L. No. 93-495, § 503, 88 Stat. at 1522.

At no point in enacting the FACTA or the ECOA did Congress suggest that lawyers engaged in the practice of law are “creditor[s].”

B. The Proposed Red Flags Rule

On July 18, 2006, the FTC and several other agencies jointly issued a proposed rule to begin implementation of the FACTA. See Proposed Rule, Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 71 Fed. Reg. 40,786
(July 18, 2006) (the “Proposed Red Flags Rule”). Among other things, the Proposed Red Flags Rule explained that it would require “creditor[s]” to create written identity theft prevention programs tailored specifically to a particular creditor’s business. The Proposed Red Flags Rule provided no indication that the FTC or its sister agencies believed lawyers engaged in the practice of law fell within the definition of “creditor.”

C. The Red Flags Rule

On November 9, 2007, the FTC and several other agencies jointly issued a final rule to implement the FACTA. See Final Rule, Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63,718 (Nov. 9, 2007) (the “Red Flags Rule”). “Each financial institution or creditor that offers or maintains one or more covered accounts,” the Red Flags Rule instructs, “must develop and implement a written Identity Theft Prevention Program (Program) that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account.” 16 C.F.R. § 681.1(d)(1).

The Red Flags Rule incorporates by reference the definition of “credit” found in the ECOA. 16 C.F.R. § 681.1(b)(4). The regulatory definition of “creditor,” however, goes one step further, stating that “creditor” has the “same meaning as in 15 U.S.C. § 1681a(r)(5) [referring to the ECOA], and includes lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies.” 16 C.F.R. § 681.1(b)(5).

1 The portion of the Red Flags Rule at issue here was originally codified at 16 C.F.R. § 681.2. See Red Flags Rule, 72 Fed. Reg. at 63,772. However, it has since been redesignated § 681.1. See Technical Corrections, Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 74 Fed. Reg. 22,639, 22,645 (May 14, 2009).
As for the definition of “covered account,” it includes “[a]n account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account.” 16 C.F.R. § 681.1(b)(3)(i). A “covered account” also includes “[a]ny other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.” 16 C.F.R. § 681.1(b)(3)(ii).

The preamble to the Red Flags Rule provided no indication that the FTC or its sister agencies believed lawyers engaged in the practice of law fell within the definition of “creditor.” The Red Flags Rule was given an effective date of January 1, 2008, and a “mandatory compliance date” of November 1, 2008. Red Flags Rule, 72 Fed. Reg. at 63,718.

D. The FTC’s First Delay And Its Original Enforcement Policy

Ten days before the Red Flags Rule’s mandatory compliance date of November 1, 2008, the FTC issued a press release informing the general public that the FTC was suspending enforcement of the Red Flags Rule until May 1, 2009, in order to “give creditors and financial institutions additional time in which to develop and implement written identity theft prevention programs.” Press Release, FTC Will Grant Six-Month Delay of Enforcement of ‘Red Flags’ Rule Requiring Creditors and Financial Institutions to Have Identity Theft Prevention Programs (Oct. 22, 2008). The FTC’s October 22, 2008 press release explained that the delay was moti-
vated in part by confusion concerning the scope of the Red Flags Rule and the definition of “creditor,” stating:

[FTC] staff launched outreach efforts last year to explain the Rule to the many different types of entities that are covered by the Rule. . . . During the course of these efforts, [FTC] staff learned that some industries and entities within the FTC’s jurisdiction were uncertain about their coverage under the Rule. These entities indicated that they were not aware that they were engaged in activities that would cause them to fall under the [FACTA’s] definition of creditor or financial institution. Many entities also noted that, because they generally are not required to comply with FTC rules in other contexts, they had not followed or even been aware of the rulemaking, and therefore learned of the Rule’s requirements too late to be able to come into compliance by November 1, 2008.

Id.

Also on October 22, 2008, the FTC published on its website a two-page document entitled “FTC Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.2” (the “Original Enforcement Policy”). Neither the October 22, 2008 press release nor the Original Enforcement Policy provided any indication that the FTC believed lawyers engaged in the practice of law fell within the definition of “creditor.”

E. The FTC’s Second Delay And Its Extended Enforcement Policy

On April 30, 2009, the FTC issued another press release informing the general public that the FTC was extending the Red Flags Rule’s mandatory compliance date until August 1, 2009. See Press Release, FTC Will Grant Three-Month Delay of Enforcement of ‘Red Flags’ Rule Requiring Creditors and Financial Institutions to Adopt Identity Theft Prevention Programs (Apr.

30, 2009). Among other things, the press release noted an “ongoing debate” concerning the scope of the FACTA. *Id.*

Also on April 30, 2009, the FTC published on its website a three-page document entitled “FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.1” (the “Extended Enforcement Policy”). In its Extended Enforcement Policy, the FTC announced for the first time its belief that lawyers engaged in the practice of law are “creditor[s]” subject to the Red Flags Rule. The FTC explained the basis for its belief in a footnote reading as follows:

> In FACTA, Congress imported the definition of creditor from the [ECOA] . . . . This definition covers all entities that regularly permit deferred payments for goods or services. The definition thus has a broad scope and may include entities that have not in the past considered themselves to be creditors. For example, creditors under the ECOA include professionals, such as lawyers or health care providers, who bill their clients after services are rendered. Similarly, a retailer or service provider that, on a regular basis, allows its customers to make purchases or obtain services and then bills them for payment at the end of each month would be a creditor under the ECOA.

Extended Enforcement Policy at 1 n.3.

**F. The FTC’s Third Delay And Its Frequently Asked Questions**

Three days before the Red Flags Rule’s mandatory compliance date of August 1, 2009, the FTC issued another press release informing the general public that the FTC was delaying enforcement of the Red Flags Rule until November 1, 2009. *See* Press Release, FTC Announces Expanded Business Education Campaign on ‘Red Flags’ Rule (July 29, 2009). According to the FTC’s July 29, 2009 press release, the three-month extension was “consistent with the House

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Appropriations Committee’s recent request that the Commission defer enforcement in conjunction with additional efforts to minimize the burdens of the Rule on health care providers and small businesses with a low risk of identity theft problems.” The press release explained that many entities, particularly small businesses and entities with a low risk of identity theft, remained uncertain about their legal obligations under the Red Flags Rule. See id.

The July 29, 2009 press release did not retract the FTC’s previous assertion in its Extended Enforcement Policy that lawyers engaged in the practice of law are “creditor[s]” required to comply with the Red Flags Rule. Instead, the press release referenced a series of frequently asked questions that confirmed the FTC’s continued belief that lawyers engaged in the practice of law are “creditor[s]” required to comply with the Red Flags Rule. According to the FTC’s frequently asked questions: “Under the [Red Flags] Rule, the definition of ‘creditor’ is broad, and includes businesses or organizations that regularly provide goods or services first and allow customers to pay later. . . . Examples of groups that may fall within this definition are utilities, health care providers, lawyers, accountants, and other professionals, and telecommunications companies.” FTC, The Red Flags Rule: Frequently Asked Questions ¶ B.1 (emphasis added; footnote omitted).

**PROCEDURAL BACKGROUND**

The ABA commenced this action on August 27, 2009, on behalf of its nearly 400,000 members because the FTC has persisted in the position stated in its Extended Enforcement Policy that lawyers engaged in the practice of law are “creditor[s]” subject to the Red Flags Rule, and because the FTC will begin enforcing the Red Flags Rule against lawyers on November 1,

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7 Available at http://www.ftc.gov/bcp/edu/microsites/redflagsrule/faqs.shtm (last visited Sept. 23, 2009).
2009. The ABA’s three-count Complaint for Declaratory and Injunctive Relief (“Complaint”) alleges that the FTC’s application of the Red Flags Rule to lawyers exceeds the FTC’s statutory authority, Compl. ¶¶ 54-60 (Count I), and is arbitrary and capricious, Compl. ¶¶ 61-64 (Count II). Count III of the Complaint seeks declaratory relief under 28 U.S.C. § 2201. Compl. ¶¶ 65-67 (Count III). Among other things, the Complaint asks this Court to declare application of the Red Flags Rule to lawyers engaged in the practice of law unlawful and to permanently enjoin the FTC from implementing the Red Flags Rule in any manner that includes lawyers engaged in the practice of law. Compl. at 19.

Although the FTC currently has until October 30, 2009, to respond to the Complaint under Rule 12(a)(2) of the Federal Rules of Civil Procedure, Rule 56(a)(1) expressly provides that “[a] party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim” after “20 days have passed from commencement of the action.” Accordingly, this motion is timely under Rule 56(a)(1) and prudent in light of the November 1, 2009 deadline on which the FTC will begin enforcing the Red Flags Rule against lawyers engaged in the practice of law.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006). The Court must also draw “all justifiable inferences” in the non-moving party’s favor and accept the non-moving

As for the substance of the ABA’s legal claim to be adjudicated in this motion, the Administrative Procedure Act (“APA”) instructs that a reviewing court shall hold unlawful and set aside agency action found to be “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C). To determine if an agency has exceeded its statutory authority, a court must engage in the two-step inquiry required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). *N.Y. State Bar Ass’n v. FTC*, 276 F. Supp. 2d 110, 115 (D.D.C. 2003) (Walton, J.). “First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781 (footnote omitted). When addressing *Chevron* step one, a court should employ traditional tools of statutory interpretation, including “examination of the statute’s text, legislative history, and structure[,] as well as its purpose.” *Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005). In addition, a reviewing court “should not confine itself to examining a particular statu-
tory provision in isolation. The meaning . . . of certain words or phrases may only become evident when placed in context.” FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132, 120 S. Ct. 1291, 1300-01 (2000).

Only “if the statute is silent or ambiguous with respect to the specific issue” does a court move to step two, which asks whether “the agency’s answer is based on a permissible construction of the statute.” Chevron, 467 U.S. at 843, 104 S. Ct. at 2782. However, the “existence of ambiguity is not enough per se to warrant deference to the agency’s interpretation. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity.” ABA v. FTC, 430 F.3d 457, 469 (D.C. Cir. 2005). Furthermore, because this Court is asked to review a policy statement (i.e., the Extended Enforcement Policy) and not agency action arrived at after formal adjudication or notice-and-comment rulemaking, the FTC’s decision that lawyers are “creditor[s]” subject to the Red Flags Rule is not entitled to Chevron-style deference. See N.Y. State Bar Ass’n, 276 F. Supp. 2d at 115-16 (citing United States v. Mead Corp., 533 U.S. 218, 121 S. Ct. 2164 (2001), and Christensen v. Harris County, 529 U.S. 576, 120 S. Ct. 1655 (2000)). Instead, interpretations contained in policy statements are “‘entitled to respect’ under the Supreme Court’s decision in [Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161 (1944)] but only to the extent that those interpretations have the ‘power to persuade[,]’” Id. at 116 (quoting Christensen, 529 U.S. at 587, 120 S. Ct. at 1657) (last alteration supplied by this Court).8

8 The APA also provides that a reviewing court shall hold unlawful and set aside agency action found to be arbitrary and capricious. 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if the agency has “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Motor Vehicle Mfrs. (continued)
ARGUMENT

THE ABA IS ENTITLED TO SUMMARY JUDGMENT ON COUNT I OF ITS COMPLAINT BECAUSE THE FTC HAS EXCEEDED ITS STATUTORY AUTHORITY BY APPLYING THE RED FLAGS RULE TO LAWYERS ENGAGED IN THE PRACTICE OF LAW

A. No Unmistakably Clear Congressional Authorization Supplies the FTC With A Basis On Which To Apply The Red Flags Rule To Lawyers Engaged In The Practice Of Law

As set forth below, the law of this Circuit instructs that, before the FTC may regulate lawyers engaged in the practice of law, the FTC must be given an unmistakably clear grant of statutory authority to do so. Because neither the FACTA nor the ECOA provide such an unmistakably clear grant of statutory authority, the FTC’s application of the Red Flags Rule to lawyers through the Extended Enforcement Policy is unlawful and must be set aside under the APA because it exceeds the FTC’s statutory authority.

1. The Unlearned Lessons Of ABA v. FTC I

One need not travel far to find the precedent governing this Court’s decision, as the ABA and the FTC were engaged in nearly identical litigation just a few years ago. In 1999, Congress enacted the Gramm-Leach-Bliley Act (“GLBA”), Pub. L. No. 106-102, 113 Stat. 1338. Among other things, the GLBA contained consumer privacy protections designed to regulate the dissemination of consumers’ personal financial information by “financial institution[s].” The GLBA defined the term “financial institution” as “any institution the business of which is engaging in financial activities as described in section 1843(k) of Title 12.” 15 U.S.C. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983). However, because the FTC has not filed the administrative record in this matter, the ABA does not yet seek summary judgment on Count II of its Complaint, which asserts that the FTC’s application of the Red Flags Rule to lawyers engaged in the practice of law is arbitrary and capricious.
§ 6809(3)(A). The cross-referenced section of the Bank Holding Company Act of 1956 ("BHCA") identified institutions engaged in nonbanking activities that are financial in nature, such that bank holding companies could retain ownership interests in institutions engaged in their pursuit. The section of the BHCA defining those activities also incorporated by reference a regulation offering an extensive list of examples of such "financial activities" so closely related to banking as to be permissible.

Like the FACTA, the GLBA gave several agencies authority to establish consumer privacy standards for the "financial institution[s]" subject to their respective jurisdictions. 15 U.S.C. § 6801(b). In a residual capacity, the FTC was authorized to regulate "financial institution[s]" not subject to the other agencies' regulations. 15 U.S.C. § 6805(a)(7). Nothing in Congress’s grant of rulemaking power, however, included any authority to expand or alter the GLBA’s definition of the term "financial institution.” Furthermore, like the FACTA and the ECOA, the GLBA at no point described the statutory or regulatory scheme as governing the practice of law.

After regulations implementing the GLBA were promulgated, the FTC asserted in a letter that certain types of lawyers engaged in the practice of law were "financial institution[s]" covered by the GLBA’s privacy requirements.

The ABA and the New York State Bar Association ("NYSBA") filed separate actions in this Court challenging the FTC’s assertion. Among other things, the bar associations argued that the FTC had exceeded its statutory authority by interpreting the GLBA to apply to lawyers engaged in the practice of law, that the FTC’s interpretation constituted an unlawful and unconstitutional intrusion into an area traditionally regulated by the States, and that the FTC had acted arbitrarily and capriciously in making its determination.
The FTC moved to dismiss the complaints filed by the ABA and the NYSBA. Because the GLBA indirectly incorporated regulations permitting banks to engage in “real estate settlement services” and “tax planning and tax preparation services,” for example, the FTC argued that a lawyer who significantly engaged in such activities was a “financial institution” subject to the GLBA.

This Court rejected the FTC’s arguments in a published opinion. *N.Y. State Bar Ass’n v. FTC*, 276 F. Supp. 2d 110 (D.D.C. 2003). In doing so, this Court undertook a thorough examination of the relevant authorities and explained that Congress did not intend the GLBA’s privacy provisions to apply to lawyers, as most lawyers did not meet the dictionary definition of an “institution,” the practice of law is not a financial activity, and Congress’s concerns about the dissemination of private financial information were inapplicable to lawyers. See *id.* at 118-24.

The GLBA’s purpose—to promote affiliation among financial institutions—did not apply to lawyers, and the legislative history reflected no concern about attorneys disseminating client information. See *id.* at 124. This Court then concluded that Congress would not have intended to authorize federal regulation of lawyers, whose ethical conduct has historically been regulated solely by the States, through a subtle, non-explicit grant of authority to the FTC. See *id.* at 124-36. After all, Congress knew how to use the words “lawyers” or “attorneys” if it meant for a statute to cover them. *Id.* at 135. Congress did neither in the GLBA, but instead chose a specific term, “financial institution,” that evoked banks, insurance companies, and securities brokers—not lawyers.

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9 Although the ABA’s and NYSBA’s cases were never formally consolidated by this Court, the FTC’s motions to dismiss were disposed of by this Court in a single opinion that, because the NYSBA’s case was filed first, lists the NYSBA caption first.
Even if the GLBA were ambiguous, this Court concluded that there was no reason to defer to the FTC’s interpretation applying the GLBA to lawyers, as it was not the product of formal adjudication or notice-and-comment rulemaking, it appeared to have been made without any degree of deliberation or comment from the public, and it was supported only by post hoc rationalizations. *Id.* at 138-39. In denying the FTC’s motion to dismiss, this Court also found it likely that the FTC’s interpretation constituted arbitrary and capricious agency action because the FTC had failed to articulate any explanation for its interpretation. *Id.* at 141-42.

The denial of the FTC’s motions to dismiss was followed by cross-motions for summary judgment. This Court, incorporating the sound logic of its previous decision on the FTC’s motions to dismiss and noting the absence of any record evidence of reasoned decisionmaking by the FTC, awarded summary judgment to the plaintiff bar associations in an unpublished ruling. *See N.Y. State Bar Ass’n v. FTC*, Civil Action No. 02-810 (RBW), 2004 WL 964173, at *3 (D.D.C. Apr. 30, 2004) (copy attached as Exhibit A).

The D.C. Circuit later affirmed this Court’s grant of summary judgment to the plaintiff bar associations. *See ABA v. FTC*, 430 F.3d 457 (D.C. Cir. 2005). Assuming for purposes of decision that the FTC’s interpretation of the GLBA was entitled to *Chevron*-style deference, the court of appeals concluded that Congress had not explicitly or implicitly delegated to the FTC the authority to regulate lawyers engaged in the practice of law. *Id.* at 471. Citing the Supreme Court’s admonition that “[Congress] does not . . . hide elephants in mouseholes,” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 909-10 (2001), the D.C.

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10 The D.C. Circuit explicitly noted that the plaintiff bar associations had preserved their argument—previously accepted by this Court—that the FTC’s interpretation of the statutory term “financial institution” was not entitled to *Chevron*-style deference since it was not the product of formal adjudication or notice-and-comment rulemaking. 430 F.3d at 471 n.4.
Circuit explained that, in order to allow the FTC to regulate lawyers based only on the statutory grant of authority over “financial institution[s],” the court of appeals would have to “conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence.” *Id.* at 467.

The D.C. Circuit then concluded that the FTC’s interpretation of the term “financial institution” was unreasonable in light of the fact that the “regulation of the practice of law is traditionally the province of the states.” *Id.* “Federal law,” the court of appeals explained, “may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion.” *Id.* (quoting *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999)). “Otherwise put, ‘if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.’” *Id.* at 471-72 (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65, 109 S. Ct. 2304, 2309 (1989)) (internal quotations omitted; emphasis added). As the D.C. Circuit explained:

> The states have regulated the practice of law throughout the history of the country; the federal government has not. This is not to conclude that the federal government could not do so. We simply conclude that it is not reasonable for an agency to decide that Congress has chosen such a course of action in language that is, even charitably viewed, at most ambiguous.

*Id.* at 472. Because it was “abundantly plain” that Congress had failed to make its intention to regulate the practice of law unmistakably clear in the language of the GLBA, the court of appeals held that the FTC’s interpretation of the term “financial institution” was unreasonable. *Id.* at 472.
2. **Under ABA v. FTC I, The FTC Has Once Again Exceeded Its Statutory Authority By Seeking To Regulate The Practice Of Law Without An Unmistakably Clear Congressional Authorization**

Only one lesson, it seems, was learned by the FTC following ABA v. FTC I: the FTC does not contend that lawyers engaged in the practice of law are “financial institution[s],” even though the FACTA authorizes the FTC to “prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing” the FTC’s identity theft guidelines. 15 U.S.C. § 1681m(e)(1)(B) (emphases added). Instead, the FTC has selected a different “mousehole,” arguing that lawyers engaged in the practice of law are “creditori[s]” for purposes of the ECOA and the Red Flags Rule itself.

The FTC’s flawed reasoning cannot stand in light of ABA v. FTC I. Just like the GLBA, neither the FACTA nor the ECOA speak of lawyers or suggest that Congress has authorized the FTC to regulate the practice of law. At no point in enacting the FACTA or the ECOA did Congress make the counterintuitive suggestion that lawyers engaged in the practice of law are “creditori[s].” Because neither the FACTA nor the ECOA contain an unmistakably clear grant of statutory authority allowing the FTC to regulate the practice of law, D.C. Circuit precedent teaches that the FTC has exceeded its statutory authority in this case just as it did in ABA v. FTC I.

**B. Even If An Unmistakably Clear Congressional Authorization Were Not Required, The FTC’s Reasoning Should Be Rejected Because Lawyers Engaged In The Practice Of Law Are Not “Creditori[s]”**

According to the FTC, the statutory definition of “creditor” is so expansive that it “covers all entities that regularly permit deferred payments for goods or services.” Extended Enforcement Policy at 1 n.3. The FTC therefore concludes that “creditors” include “professionals, such as lawyers or health care providers, who bill their clients after services are rendered.” *Id.*
FTC’s reasoning, however, cannot be reconciled with the plain language of the statutory definitions in question or interpretive case law. Therefore, the FTC’s legal position should be rejected even if an unmistakably clear grant of statutory authority were not required to support the FTC’s latest attempt to regulate lawyers engaged in the practice of law.

As noted above, the FACTA incorporates by reference the ECOA’s definition of the word “creditor” and “credit.” 15 U.S.C. § 1681a(r)(5). The Red Flags Rule does the same. 16 C.F.R. § 681.1(b)(4), (5). The ECOA, however, defines the word “creditor” as “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.” 15 U.S.C. § 1691a(e) (emphasis added). The word “credit” is defined as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.” 15 U.S.C. § 1691a(d) (emphasis added).

Contrary to the position advocated by the FTC, lawyers and law firms are not “creditor[s]” within the meaning of the ECOA simply because they provide legal services prior to receiving payment or because they may permit clients additional time to pay outstanding bills for legal services already rendered. Such was the conclusion of Riethman v. Berry, 287 F.3d 274 (3d Cir. 2002). In Riethman, two former clients sued a law firm and certain of its attorneys alleging they had extended credit in violation of the ECOA. The district court granted the defendants’ motion for summary judgment, finding that the defendants were not “creditor[s]” under the ECOA. Riethman v. Berry, 113 F. Supp. 2d 765, 769 (E.D. Pa. 2000).

In affirming the district court’s decision, the Third Circuit explained that the “hallmark of ‘credit’ under the ECOA is the right of one party to make deferred payment.” Riethman, 287
F.3d at 277 (emphasis added). Simply because the law firm failed to enforce its right to prompt payment did not give its former clients the “right” to defer payment. Id. The court of appeals also noted that the former clients failed to identify any language in the ECOA’s legislative history suggesting that Congress was “thinking about legal fees when it enacted the ECOA.” Id. at 278. “In view of the statutory purpose underlying the ECOA,” the Third Circuit concluded that it was “implausible that Congress intended to cover not only banks and other such financial institutions but also all professions.” Id.; accord Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 408 (6th Cir. 1998) (holding that lawyer-defendant was not a “creditor” under the ECOA simply because he offered to settle preexisting claims against the debtor-plaintiff, explaining that, “[o]therwise, an attorney would be a creditor under the ECOA anytime the attorney offered to settle a case”).

Although the D.C. Circuit has not yet considered whether lawyers engaged in the practice of law qualify as “creditor[s]” under the ECOA, the D.C. Circuit’s decision in Mick’s at Pennsylvania Avenue, Inc. v. BOD, Inc., 389 F.3d 1284 (D.C. Cir. 2004), like the Third Circuit’s decision in Riethman, emphasizes that all of the words in the ECOA’s definition of “creditor” and “credit” have important meaning, particularly the words “right” and “regularly.” In Mick’s, the sublessor of a restaurant property (Mick’s at Pennsylvania Avenue, Inc.) and its guarantor (Morton’s Restaurant Group, Inc.) filed suit against the former sublessee (BOD, Inc.) and its husband-and-wife principals after BOD, Inc. abandoned the property and ceased paying rent. See id. at 1286. The husband later argued that the sublease violated the ECOA because Mick’s at Pennsylvania Avenue, Inc. required him to co-sign the sublease for what was, in reality, his wife’s restaurant. See id. at 1288-89. The basis for the husband’s argument was a regulation instructing that a creditor “‘shall not require the signature of an applicant’s spouse or other
person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor’s standards of creditworthiness for the amount and terms of the credit requested.’” Id. at 1288-89 (quoting 12 C.F.R. § 202.7(d)(1)).

The D.C. Circuit affirmed the district court’s grant of summary judgment against BOD, Inc. and its husband-and-wife principals, explaining:

The [ECOA] defines “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment [sic] or to purchase property or services and defer payment therefor.” Mick’s did not grant any credit right to BOD under the sublease but acted simply as a sublessor of the restaurant property entitled to receive monthly rent payments for the term of the sublease. Further, neither Mick’s nor Morton’s falls within the Act’s definition of “creditor” as “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.” There is no evidence that either Mick’s or Morton’s, each of which is in the restaurant business, “regularly” extends or arranges credit . . . .

Id. at 1289 (citations and footnote omitted; first emphasis supplied; alteration supplied by court of appeals).

Against this backdrop, it is clear that the FTC cannot assert under either the plain language of the ECOA or existing case law that the ECOA’s definition of “creditor” is sufficiently expansive to cover “all entities that regularly permit deferred payments for goods or services,” such that it includes “professionals, such as lawyers or health care providers, who bill their clients after services are rendered.” Extended Enforcement Policy at 1 n.3 (emphasis added).

Nor can the customary billing arrangements for legal services be considered deferral of payment. The FTC admits that payment of fees by retainer does not meet the statutory definition of “credit.” See FTC, The Red Flags Rule: Frequently Asked Questions ¶ B.5 (“The Red Flags Rule applies to businesses that regularly defer payment until after services have been performed.
Because the law firm [requiring payment of a retainer before services are provided] is paid before they provide services, these arrangements aren’t ‘credit,’ as the law defines that word.”).

That is, the FTC draws a distinction between invoicing for services and retainers. However, a retainer cannot constitute payment before services are provided under the applicable ethical rules. To the extent that a lawyer uses a retainer or another form of prepayment mechanism, lawyers are required to hold client funds in trust. See, e.g., ABA Model Rule of Professional Conduct 1.5(c).\(^{11}\) Although the lawyer might have possession of the funds, the funds are held for the benefit of the client, and do not become the property of the lawyer unless and until services are rendered. That is, even when a lawyer holds funds in connection with not-yet-delivered services, the lawyer is not paid for services until after the services are rendered. Nevertheless, the FTC asserts that lawyers who draw their fees from retainers do not permit deferred payments and, accordingly, are not creditors under the Red Flags Rule, while lawyers who do not require retainers are deemed to permit deferred payments and thus are creditors.

Similarly, the FTC concedes that contingency-fee arrangements do not meet the statutory definition of “credit.” See FTC, The Red Flags Rule: Frequently Asked Questions ¶ B.6 (“Generally, under a contingency fee arrangement, a law firm will not earn its fee unless and until it wins a recovery for its client. Therefore, this arrangement is not a credit relationship, and the law firm would not be a creditor under the Red Flags Rule.”). Under contingency, partial contingency, or success-fee arrangements, however, the lawyer is not entitled to payment of fees until a specified event occurs or a result is obtained. Accordingly, under the FTC’s reasoning,

\(^{11}\) Of course, some fee arrangements permit for payment in advance of services, such as flat fees and fees for future availability, which become the lawyer’s property on payment. See ABA, Annotated Model Rules of Professional Conduct 233 (6th ed. 2007). The ABA assumes that the Red Flags Rule would not be applicable to these fee arrangements.
lawyers who do not receive payment until they are entitled to their fees under contingency and similar arrangements do not permit deferred payments and, accordingly, are not “creditor[s]” under the Red Flags Rule, while lawyers who do not bill until they are entitled to receive payment are deemed to permit deferred payments and thus, are “creditor[s].”

Contrary to the distinctions drawn by the FTC, there is no functional difference between fees paid by retainer, contingency arrangements and invoice. Regardless of the specific billing arrangements that lawyers may have with their clients, lawyers are not entitled to payment for legal services under these arrangements until the services have been rendered, and the FTC cannot assert—under any of these billing arrangements—that lawyers “regularly permit deferred payments for goods or services.” Extended Enforcement Policy at 1 n.3; see also Riethman, 287 F.3d at 278 (fact that counsel permitted clients “to pay by check or credit card, or provided legal services prior to receiving a retainer, does not alone bring them within ECOA”).

The plain language of the FACTA itself also reinforces the conclusion that Congress did not authorize the FTC to regulate lawyers engaged in the practice of law simply by cross-referencing the ECOA’s definition of “creditor” and “credit.” The FACTA directs the FTC to establish guidelines for use by “each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary.” 15 U.S.C. § 1681m(e)(1)(A) (emphases added). The FTC’s regulations must also “identify possible risks to account holders or customers . . . .” 15 U.S.C. § 1681m(e)(1)(B) (emphases added). Congress also instructed the FTC to “consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies and procedures that provide for notice to be given to a consumer in a
manner reasonably designed to reduce the likelihood of identity theft with respect to such account.” 15 U.S.C. § 1681m(e)(2)(B) (emphases added).

The FACTA’s reference to “account holders,” “entities,” “customers,” “consumers,” “transaction[s],” and “credit or deposit account[s]”—terms that are not associated with the practice of law—further underscores the conclusion that Congress did not intend to give the FTC the statutory authority to regulate lawyers engaged in the practice of law simply by cross-referencing the ECOA’s definition of “creditor” and “credit.” Similarly, the language of the FTC’s own regulation reinforces the conclusion that those statutory terms are not so all-encompassing. See 16 C.F.R. § 681.1(b)(5) (stating that “creditor” has the “same meaning as in 15 U.S.C. § 1681a(r)(5), and includes lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies”) (emphasis added).

CONCLUSION

For the foregoing reasons, the ABA respectfully requests that the Court issue an order prior to November 1, 2009, that (1) grants the ABA summary judgment on Count I of its Complaint, (2) declares unlawful the FTC’s application of the Red Flags Rule to lawyers engaged in the practice of law as being in excess of the FTC’s statutory authority, and (3) enjoins the FTC from enforcing the Red Flags Rule against lawyers engaged in the practice of law.

[Signature Page Follows]
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BAR ASSOCIATION,

Plaintiff,

v.                                                        Civil Action No. 09-1636 (RBW)

FEDERAL TRADE COMMISSION,

Defendant.

PLAINTIFF’S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Civil Rules 7(h) and 56.1, Plaintiff American Bar Association (the “ABA”) respectfully submits that no genuine dispute exists with respect to the following material facts:

1. Section 114 of the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”) directs Defendant Federal Trade Commission (the “FTC”) and certain other agencies to “establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary.” 15 U.S.C. § 1681m(e)(1)(A).

2. Section 114 of the FACTA also directs the FTC and certain other agencies to “prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing” the foregoing guidelines and “to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers.” 15 U.S.C. § 1681m(e)(1)(B).

4. The ECOA defines the word “creditor” as “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.” 15 U.S.C. § 1691a(e).

5. The ECOA defines the word “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.” 15 U.S.C. § 1691a(d).


7. On November 9, 2007, the FTC, the OCC, the Board, the FDIC, the OTS, and the NCUA jointly issued a final rule under the authority of the FACTA. See Final Rule, Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63,718 (Nov. 9, 2007) (the “Red Flags Rule”).

8. In relevant part, the Red Flags Rule instructs that “[e]ach financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program (Program) that is designed to detect, prevent, and

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1 Local Civil Rule 56.1 instructs that a statement of material facts as to which the moving party contends there is no genuine issue “shall include references to the parts of the record relied on to support the statement.” The FTC has not yet filed the administrative record in this matter. (continued)
mitigate identity theft in connection with the opening of a covered account or any existing covered account.” 16 C.F.R. § 681.1(d)(1).

9. The Red Flags Rule incorporates by reference the definition of “credit” found in the ECOA. See 16 C.F.R. § 681.1(b)(4) (”Credit has the same meaning as in 15 U.S.C. 1681a(r)(5).”).

10. The Red Flags Rule incorporates by reference the definition of “creditor” found in the ECOA. See 16 C.F.R. § 681.1(b)(5) (”Creditor has the same meaning as in 15 U.S.C. 1681a(r)(5), and includes lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies.”).

11. The Red Flags Rule defines the term “covered account” as “[a]n account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account.” 16 C.F.R. § 681.1(b)(3)(i).

12. The Red Flags Rule provides that a “covered account” also includes “[a]ny other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or

Therefore, the ABA has cited relevant portions of the administrative record as they are generally available to the public.

creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.” 16 C.F.R. § 681.1(b)(3)(ii).


14. Ten days before the Red Flags Rule’s mandatory compliance date of November 1, 2008, the FTC issued a press release informing the general public that the FTC was suspending enforcement of the Red Flags Rule until May 1, 2009, in order to “give creditors and financial institutions additional time in which to develop and implement written identity theft prevention programs.” Press Release, FTC Will Grant Six-Month Delay of Enforcement of ‘Red Flags’ Rule Requiring Creditors and Financial Institutions to Have Identity Theft Prevention Programs (Oct. 22, 2008).³

15. Also on October 22, 2008, the FTC published on its website a two-page document entitled “FTC Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.2.”⁴

16. On April 30, 2009, the FTC issued a press release informing the general public that the FTC was extending the Red Flags Rule’s mandatory compliance date until August 1, 2009. Press Release, FTC Will Grant Three-Month Delay of Enforcement of ‘Red Flags’ Rule Requiring Creditors and Financial Institutions to Adopt Identity Theft Prevention Programs (Apr. 30, 2009).⁵


17. Also on April 30, 2009, the FTC published on its website a three-page document entitled “FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.1” (the “Extended Enforcement Policy”).

18. In its Extended Enforcement Policy, the FTC announced that lawyers engaged in the practice of law are “creditor[s]” subject to the Red Flags Rule. The FTC explained the basis for its belief in a footnote reading as follows:

   In FACTA, Congress imported the definition of creditor from the [ECOA] . . . . This definition covers all entities that regularly permit deferred payments for goods or services. The definition thus has a broad scope and may include entities that have not in the past considered themselves to be creditors. For example, creditors under the ECOA include professionals, such as lawyers or health care providers, who bill their clients after services are rendered. Similarly, a retailer or service provider that, on a regular basis, allows its customers to make purchases or obtain services and then bills them for payment at the end of each month would be a creditor under the ECOA.

Extended Enforcement Policy at 1 n.3.

19. Three days before the Red Flags Rule’s mandatory compliance date of August 1, 2009, the FTC issued a press release informing the general public that the FTC was delaying enforcement of the Red Flags Rule until November 1, 2009. See Press Release, FTC Announces Expanded Business Education Campaign on ‘Red Flags’ Rule (July 29, 2009).

20. The FTC’s July 29, 2009 press release did not retract the FTC’s previous assertion in its Extended Enforcement Policy that lawyers engaged in the practice of law are “creditor[s]” required to comply with the Red Flags Rule.

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21. The FTC’s July 29, 2009 press release referenced a series of frequently asked questions that confirmed the FTC’s continued belief that lawyers engaged in the practice of law are “creditor[s]” required to comply with the Red Flags Rule. According to the FTC’s frequently asked questions: “Under the [Red Flags] Rule, the definition of ‘creditor’ is broad, and includes businesses or organizations that regularly provide goods or services first and allow customers to pay later. . . . Examples of groups that may fall within this definition are utilities, health care providers, lawyers, accountants, and other professionals, and telecommunications companies.” FTC, The Red Flags Rule: Frequently Asked Questions ¶ B.1 (footnote omitted).

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8 Available at http://www.ftc.gov/bcp/edu/microsites/redflagsrule/faqs.shtm (last visited Sept. 23, 2009).
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