

**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,

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

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GLOSSARY

ABA	American Bar Association
APA	Administrative Procedure Act
BHCA	Bank Holding Company Act of 1956
ECOA	Equal Credit Opportunity Act
FACTA	Fair and Accurate Credit Transactions Act of 2003
FTC	Federal Trade Commission
GLBA	Gramm-Leach-Bliley Act

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

The Fair and Accurate Credit Transactions Act of 2003 ("FACTA") codified a number of measures intended to prevent identity theft, improve resolution of consumer disputes, improve the accuracy of consumer records, and improve the use of, and consumer access to, credit information. *See* Pub. L. No. 108-159, 117 Stat. 1952 (codified at 15 U.S.C. §§ 1681-1681x). 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.

H.R. Conf. Rep. No. 108-396, at 65-66 (2003), *reprinted in* 2003 U.S.C.C.A.N. 1753-54.

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, § 502, 88 Stat. 1500, 1521 (1974) (codified at 15 U.S.C. § 1691 note). As originally enacted, the ECOA made it “unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.”

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).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).² The FTC’s October 22, 2008 press release explained that the delay was moti-

² Available at <http://www.ftc.gov/opa/2008/10/redflags.shtm> (last visited Sept. 23, 2009).

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”).³ 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.

³ Available at <http://www.ftc.gov/os/2008/10/081022idtheftredflagsrule.pdf> (last visited Sept. 23, 2009).

30, 2009).⁴ 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”).⁵ 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).⁶ According to the FTC’s July 29, 2009 press release, the three-month extension was “consistent with the House

⁴ Available at <http://www.ftc.gov/opa/2009/04/redflagsrule.shtm> (last visited Sept. 23, 2009).

⁵ Available at <http://www.ftc.gov/os/2009/04/P095406redflagsextendedenforcement.pdf> (last visited Sept. 23, 2009).

⁶ Available at <http://www.ftc.gov/opa/2009/07/redflag.shtm> (last visited Sept. 23, 2009).

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).⁷

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,

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

party's evidence as true. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986). However, the non-moving party cannot rely on "mere allegations or denials," *Burke v. Gould*, 286 F.3d 513, 517 (D.C. Cir. 2002), because "conclusory allegations unsupported by factual data will not create a triable issue of fact," *Pub. Citizen Health Research Group v. FDA*, 185 F.3d 898, 908 (D.C. Cir. 1999) (internal citation and quotation marks omitted). If the Court concludes that "the non-moving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986).

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 rule-making, 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).⁹ 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.

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,¹⁰ 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.

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 “creditor[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 “creditor[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 “Creditor[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.* The

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]

**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)

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).

3. 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).

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).

6. On July 18, 2006, the FTC, the Office of the Comptroller of the Currency (“OCC”), the Board of Governors of the Federal Reserve System (“Board”), the Federal Deposit Insurance Corporation (“FDIC”), the Office of Thrift Supervision (“OTS”), and the National Credit Union Administration (“NCUA”) jointly issued a proposed rule under the authority 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).¹

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

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).²

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.

² The portion of the Red Flags Rule at issue in this case 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). References to the Code of Federal Regulations set forth above are to the current location of the Red Flags Rule.

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

13. The Red Flags Rule had 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.

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

³ Available at <http://www.ftc.gov/opa/2008/10/redflags.shtm> (last visited Sept. 23, 2009).

⁴ Available at <http://www.ftc.gov/os/2008/10/081022idtheftredflagsrule.pdf> (last visited Sept. 23, 2009).

⁵ Available at <http://www.ftc.gov/opa/2009/04/redflagsrule.shtm> (last visited Sept. 23, 2009).

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”).⁶

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).⁷

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.

⁶ Available at <http://www.ftc.gov/os/2009/04/P095406redflagsextendedenforcement.pdf> (last visited Sept. 23, 2009).

⁷ Available at <http://www.ftc.gov/opa/2009/07/redflag.shtm> (last visited Sept. 23, 2009).

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