ORAL ARGUMENT NOT YET SCHEDULED

No. 10-5057

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN BAR ASSOCIATION,

Plaintiff-Appellee,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia, 1:09-cv-01636-RBW

BRIEF FOR APPELLANT FEDERAL TRADE COMMISSION

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

MICHAEL D. BERGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
Ph. (202) 326-3184; Fax (202) 326-2477
mbergman@ftc.gov

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellant Federal Trade Commission certifies as follows:

A. Parties and Amici

The American Bar Association was a plaintiff before the district court and appears as appellee before this Court.

The Federal Trade Commission was a defendant before the district court and appears as appellant before this Court.

The American Association for Justice appeared as amicus in the district court. The New York State Bar Association and the American Institute of Certified Public Accountants appear as amici before this Court.

B. Rulings Under Review

The rulings under review are the December 1, 2009 Amended Order and the December 28, 2009 Judgment of the Hon. Reggie B. Walton granting plaintiff's motion for partial summary judgment. JA 217, 218-19.[1] The rulings were based on the reasons set forth in the district court's oral rulings at the October 29, 2009 hearing on the motion and in the district court's Memorandum Opinion dated December 1, 2009, which is reported at 671 F. Supp. 2d 64 (D.D.C. 2009). JA

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[1] "JA" refers to the parties' Joint Appendix filed concurrently with this Brief.

177-216. The final judgment under review was entered on December 28, 2009. JA 218-19.

C. Related Cases.

The case on review has not previously been before this Court or any other court. Appellant's counsel is unaware of any related cases pending before this Court or any other United States court of appeals. Two cases involving the same defendant-appellant and very similar legal issues (but different plaintiffs), *American Institute of Certified Public Accountants v. Federal Trade Commission*, No. 1:09-cv-02116-RBW, and *American Medical Association v. Federal Trade Commission*, No. 1:10-cv-00843-RBW, are currently pending (but held in abeyance pending issuance of an opinion in this case) in the United States District Court for the District of Columbia.

/s/ Michael D. Bergman
MICHAEL D. BERGMAN
Attorney for Appellant
Federal Trade Commission

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MISCELLANEOUS

GLOSSARY

"ABA"	American Bar Association
"CCPA"	Consumer Credit Protection Act
"ECOA"	Equal Credit Opportunity Act
"FACT Act"	The Fair and Accurate Credit Transactions Act of 2003
"FCRA"	Fair Credit Reporting Act
"GLBA"	Gramm-Leach-Bliley Act
"JA"	Joint Appendix
"FTC"	Federal Trade Commission
"Op."	District court opinion of December 1, 2009
"Tr."	Transcript of October 29, 2009 hearing before the district court

JURISDICTIONAL STATEMENT

Plaintiff the American Bar Association ("ABA") invoked the district court's jurisdiction under 28 U.S.C. § 1331. Rec. 1 at ¶ 8; JA 9.[1] On December 28, 2009, the court entered final judgment in favor of the ABA. Judgment, Rec. 24, JA 218-19. The Federal Trade Commission ("FTC") filed on February 25, 2010, a timely notice of appeal pursuant to Fed. R. App. P. 4(a)(1)(B). Rec. 25. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court erred by holding that practicing attorneys are categorically exempt from being treated as "creditors" under Section 114 of the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 ("FACT Act"), and under FTC regulations implementing that Act, regardless of the nature of the arrangements they make with their clients regarding billing and the payment of fees.

STATUTES AND REGULATIONS INVOLVED

Pertinent statutory provisions and regulations are reproduced in the addendum to this brief.

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[1] "Rec." refers to the Record on Appeal in the district court proceeding. Citations to the record include the page or paragraph number therein, in the following form: "Rec. [docket number] at –." When a document is included in the Joint Appendix, an additional cite will appear as: "JA –."

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition in the Court Below

The ABA filed a three-count complaint against the FTC seeking a declaratory judgment and injunctive relief, asserting that: 1) the FTC exceeded its statutory authority in violation of 5 U.S.C. § 706(2)(C), by subjecting practicing lawyers to the FTC's Identity Theft Red Flags Rule, 16 C.F.R. § 681.1 ("Red Flags Rule" or "Rule") (Count I), 2) the FTC acted arbitrarily and capriciously, in violation of 5 U.S.C. § 706(2)(A), by subjecting lawyers to the Rule (Count II), and 3) the ABA was therefore entitled to a declaratory judgment under 28 U.S.C. § 2201 (Count III). *See* Rec. 1, JA 6-27. On September 23, 2009, the ABA filed a motion for summary judgment on Count I of its complaint, and requested that the court enjoin enforcement of the Rule against practicing lawyers. Rec. 7. On October 13, 2009, the FTC filed its opposition to the summary judgment motion asserting, *inter alia*, that attorneys who regularly permit their clients to defer payments for their legal bills fall within the terms of the FACT Act and therefore are subject to the Red Flags Rule. Rec. 11.

The district court (Walton, J.) held a hearing on the ABA's motion for partial summary judgment on October 29, 2009, at the conclusion of which it orally ruled in favor of the ABA. *See* Rec. 20, JA 101-176. On October 30, 2009, the Court issued an order granting the motion. Rec. 15, JA 97-98. On December 1, 2009, the Court issued a Memorandum Opinion ("Op.") explaining its reasons for granting the motion, and issued an Amended Order. Rec. 21, 22, JA 177-216, 217.[2] The Court held that the FTC lacked authority to regulate attorneys as creditors under the FACT Act. On December 28, 2009, after the ABA agreed to dismiss Counts II and III of its complaint without prejudice, the district court issued its final judgment declaring that the FTC exceeded its statutory authority by subjecting practicing lawyers to the Red Flags Rule and enjoining the FTC from enforcing the Rule against practicing lawyers. Rec. 24, JA 218-19. This appeal followed.

STATEMENT OF THE FACTS

A. Statutory Background: Definition of "Creditor" in the FACT Act and the Equal Credit Opportunity Act

In part to respond to the serious increase in identity theft, Congress enacted the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act"), Pub. L. No. 108-159, 117 Stat. 1952, which amended the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* Most significantly for present purposes, Section 114 of the FACT Act (codified at 15 U.S.C. § 1681m(e)), amended section

[2] The district court's Memorandum Opinion is published at 671 F. Supp. 2d 64 (D.D.C. 2009).

615 of the FCRA, 15 U.S.C. § 1681m, to require the Commission and the federal banking regulators[3] to issue joint regulations and guidelines regarding the detection, prevention and mitigation of identity theft by financial institutions and creditors.[4] Specifically, Section 114 required the agencies to jointly "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 agencies were also directed to "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." 15 U.S.C.

[3] The relevant agencies are the "federal banking agencies" (*i.e.*, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System ("FRB"), the Office of the Comptroller for the Currency, and the Office of Thrift Supervision), the National Credit Union Administration, and the Commission (collectively "agencies").

[4] Section 111 of the FACT Act defines "identity theft" as "a fraud committed using the identifying information of another person, subject to such further definition as the Commission may prescribe, by regulation." 15 U.S.C. § 1681a(q)(3).

§ 1681m(e)(1)(B).[5] In developing these guidelines, the agencies "shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft." 15 U.S.C. § 1681m(e)(2)(A).[6]

The entities to be covered under the identity theft provisions are to be covered based either on their status as a "financial institution" or on activities that make them a "creditor." "Financial institution" under the FACT Act is defined primarily in terms of an entity's status as a bank-related institution.[7] In contrast, Congress adopted a functional approach to the terms "creditor" and "credit," expressly incorporating the definitions from the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 *et seq*. *See* 15 U.S.C. § 1681a(r)(5).[8] The ECOA

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[5] The second reference to "customers" is probably a drafting error and should likely be "creditor."

[6] Congress provided the agencies the authority to enforce their administrative rules and guidelines issued under the FACT Act through injunctive relief and the imposition of civil penalties. *See* 15 U.S.C. § 1681m(h)(8)(B).

[7] "Financial institution" is defined to include "a State or National bank, a State or Federal savings & loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 461(b) of Title 12) belonging to a consumer." 15 U.S.C. § 1681a(t).

[8] The ECOA and the FCRA are separate sections within the same umbrella statute, the Consumer Credit Protection Act ("CCPA"), 15 U.S.C. § 1601 *et seq*. The CCPA is a comprehensive statute designed to protect consumers in credit transactions by, *inter alia*, requiring full disclosure of financial terms in such

(continued...)

makes it unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction on the basis of race, sex, or a number of other categories. 15 U.S.C. § 1691(a).[9] The ECOA defines "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). "Credit," in turn, is defined in the

[8](...continued)
transactions, making unlawful the use of certain unethical practices in the garnishment of wages and debt collection, regulating the transfer of funds by electronic means, and prohibiting discrimination in credit transactions. The FCRA and the ECOA are Titles VI and VII, respectively, of the CCPA; other titles in the CCPA include the Truth in Lending Act ("TILA") (Title I) and the Fair Debt Collection Practices Act ("FDCPA") (Title VIII).

[9] The legislative history of the 1976 amendments to the ECOA, which extended the scope of that statute beyond gender and marital status, show that Congress intended the statute to apply very broadly and to encompass all forms of credit, including that extended incidentally in the course of the creditor's core business. *See, e.g.*, H.R. Rep. No. 94-210, at 3 (May 14, 1975) (Report for the Committee on Banking Currency and Housing on H.R. 6516, the ECOA Amendments of 1975) (quoting Dr. Arthur S. Flemming: "It would be difficult to exaggerate the role of credit in our society. Credit is involved in an almost endless variety of transactions reaching from the medical delivery of the newborn to the rituals associated with the burial of the dead."); 94 Cong. Rec. 16740-41 (daily ed. June 3, 1975) (remarks of Mr. Annunzio on H.R. 6516) ("Credit discrimination cannot be dismissed lightly. Credit has a profound effect on the life of virtually every person in this country. Few of us pay cash. We pay for meals, transportation, homes, cars, hospital care, and numerous other every day necessities through extensions of credit.").

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). Because "credit" and "creditor" have the same definition in the FACT Act and the ECOA, the interpretation of those terms under the existing ECOA becomes important.

B. Lawyers can be "Creditors" within the ECOA Implementing Rule, "Regulation B"

Pursuant to its authority to issue regulations to implement the ECOA's protections, 15 U.S.C. § 1691b(a), the FRB issued "Regulation B" under 12 C.F.R. pt. 202. The FRB has authorized its staff to issue official interpretations of Regulation B, which have consistently emphasized the broad nature of the types of credit and creditors subject to the ECOA. *See* Official Staff Interpretations, 12 C.F.R. pt. 202, Supp. I, § 202.1, ¶ 1(a) ("Scope. The Equal Credit Opportunity Act and Regulation B apply to all credit – commercial as well as personal – *without regard to the nature or type of credit or the creditor*") (emphasis added).

The FRB Official Staff Commentaries have stated since 1985, that depending on their billing practices, lawyers can be "creditors" who extend "incidental credit" under 12 C.F.R. § 202.3(c).[10] *See* Equal Credit Opportunity;

[10] "Incidental credit refers to extensions of consumer credit" – other than the "public utilities credit" and the "securities credit" – that are "not made pursuant to (continued...)

Revision of Regulation B, Official Staff Commentary, 12 C.F.R. pts. 202 and 202a, Supp. I, § 202.3, ¶ 3(c)-1, 50 Fed. Reg. 48,018, 48,049 (Nov. 20, 1985), 1985 WL 126616. Service providers who extend such “incidental credit” are subject to the general prohibition against discrimination in the ECOA and Regulation B, but are exempt from certain procedural requirements under Regulation B. 12 C.F.R. § 202.3(c)(2). The current FRB Official Staff Commentary states as examples of “incidental credit”:

> If a service provider (such as a hospital, doctor, *lawyer*, or merchant) allows the client or customer to defer the payment of a bill, this deferral of debt is credit for purposes of the regulation, even though there is no finance charge and no agreement for payment in installments. Because of the exceptions provided by this section, however, these particular credit extensions are excepted from compliance with certain procedural requirements as specified in § 202.3(c).

12 C.F.R. pt. 202, Supp. I, § 202.3, ¶ 3(c)-1 (emphasis added).

The keystone for all types of “credit” under Regulation B is simply whether there has been a deferral of payment for services. *See, e.g.*, 12 C.F.R. pt. 202, Supp. I, § 202.3, ¶ 3(a)-2 (“[a] utility company is a creditor [under the “Public utilities credit”] when it supplies utility service and bills the user after the service has been provided.”).

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[10](...continued)
the terms of a credit card account,” “are not subject to a finance charge,” and “are not payable by agreement in more than four installments.” 12 C.F.R. § 202.3(c).

C. The FTC's Red Flags Rule

On July 18, 2006, the agencies published a joint notice of proposed rulemaking ("NPRM"), 71 Fed. Reg. 40,786, proposing rules and guidelines to implement the identity theft provisions of the FACT Act.[11] JA 31-36. On November 9, 2007, after the rulemaking notice and comment period, the agencies jointly issued final rules and guidelines. 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) ("Red Flags Rule" or "Rule"). JA 45-69. The FTC issued its Identity Theft Rules, including its Red Flags Rule, in 16 C.F.R. pt. 681. *See* 72 Fed. Reg. at 63,771-04, JA 65-68.[12] The Rule requires "creditors" and "financial institutions" to implement a written program to detect, prevent, and mitigate identity theft. In specifying its coverage, the Rule incorporated the statutory definitions of "credit" and "creditor." As stated in the Rule, the term "[c]redit has the same meaning as in 15 U.S.C. 1681a(r)(5) [the ECOA]." 16

[11] While certain commenters responding to the NPRM noted the potentially broad scope of the proposed "creditor" definition, no attorneys or bar associations submitted comments regarding whether attorneys should or should not be covered as "creditors" under the Act.

[12] The FTC's Red Flags Rule was originally codified as 16 C.F.R. § 681.2 (2003), *see* 72 Fed. Reg. at 63,772, but was recodified as 16 C.F.R. § 681.1 in 2009. The rule defined the term "Red Flag" to mean "a pattern, practice or specific activity that indicates the possible existence of identity theft." 16 C.F.R. § 681.1(b)(9).

C.F.R. § 681.1(b)(4). Similarly, the term "[c]reditor has the same meaning as in 15 U.S.C. 1681a(r)(5) [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). The Commission recognized in the commentary to the final Rule that a "broad scope of entities" was covered. 72 Fed. Reg. at 63,741, JA 62.

Under the Rule, each creditor or financial institution must take certain steps to guard against identity theft.[13] The Rule was drafted to be risk-based, *i.e.*, the nature and complexity of the steps a covered entity needed to take would be proportional to the risk of identity theft it encounters. Thus, low-risk entities

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[13] Each creditor or financial institution "must periodically determine whether it offers or maintains covered accounts . . .," a defined term that includes consumer-type accounts or other accounts for which there is a reasonable risk of identity theft. 16 C.F.R. § 681.1(b), (c). If the creditor or financial institution has such accounts, it must develop and implement a written identity theft prevention program. 16 C.F.R. § 681.1(d). For attorneys, such a program would identify and detect warning signs that an imposter is using the personal information of someone else to obtain legal services. The program would need to specify measures implemented to prevent identity theft, for example, checking a government-issued ID card for new accounts, customers, or clients. The program would also need to indicate how the entity will respond if a red flag has been detected, such as not billing the victim whose identity was compromised, not reporting the debt on the victim's credit report, ensuring that information relating to the identity thief is not commingled with that of the victim, or reporting incidents of identity theft to law enforcement agencies. The covered entity needs to update its program periodically to guard against current ID theft risks and provide for the continued administration of the program. 16 C.F.R. § 681.1(d), (e).

would only have a minimal compliance burden and, typically, a streamlined program would suffice. *See* 72 Fed. Reg. at 63,742, JA 63. The final Rule became effective on January 1, 2008, and initially required full compliance for all covered entities by November 1, 2008. 72 Fed. Reg. at 63,718, JA 46.

D. <u>Extensions of the Commission's rule enforcement and statements regarding the coverage of attorneys</u>

Owing to confusion among creditors and financial institutions as to coverage or their obligations under the Rule, on October 22, 2008, the Commission issued an Enforcement Policy statement delaying enforcement of the rule as to entities under its jurisdiction for six months, until May 1, 2009. *See* "FTC Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.2." JA 72-73. In this policy statement, the Commission stated that "[t]he ECOA definition of 'credit' includes a right granted to defer payment for any purchase. Thus, any person that provides a product or service for which the consumer pays after delivery is a creditor." *Id*. at 1 n.2, JA 72.

On April 30, 2009, the Commission issued another enforcement policy statement in connection with an additional three-month delay in enforcing the rule, until August 1, 2009. *See* "FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.1." ("Extended Enforcement Policy"). JA 76-78. In announcing this further extension, the Commission stated that "[i]n FACTA, Congress imported the definition of creditor from [the ECOA] for purposes of the [FCRA]. 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." *Id*. at 1 n.3, JA 76 (emphasis added).[14]

On June 11, 2009, the FTC issued compliance guidance for entities under its jurisdiction: "The Red Flags Rule: Frequently Asked Questions ("FAQs")." JA 83-92. In addition to reiterating the breadth of term "creditor," and the inclusion of lawyers if they regularly defer the payment of their legal bills,[15] the FAQs further elaborated on the types of payment plans that would or would not be subject to the Rule. For example, where clients pay a retainer before the provision of services, such as is often required by law firms, this arrangement does not make the law firm a "creditor" for purposes of the Rule, because it is being paid *before* they provide

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[14] The statement further recognized that "[t]his rule applies to all entities that regularly permit deferred payments for goods or services, including entities such as health care providers, *attorneys*, and other professionals, as well as retailers and a wide range of businesses that invoice their customers." *Id*. at 1, JA 76 (emphasis added).

[15] The Commission stated in these FAQs that "[u]nder the Rule, the definition of 'creditor' is broad, and includes businesses or organizations that regularly provide goods or services first and allow consumers to pay later. Examples of groups that may fall within its definition are utilities, health care providers, *lawyers*, accountants, and other professionals, and telecommunications companies." FAQs ¶ B.1, JA 84 (emphasis added; footnote omitted).

services. *See* FAQs, ¶ B.5, JA 85. Similarly, law firms that bring cases on a contingency fee basis are not "creditors" under the Rule, because the firm does not earn its fee unless and until it wins recovery for its client which does not constitute a credit relationship. *See* FAQs, ¶ B.6, JA 85. The FAQs further noted that, even though attorneys who defer billing for their services are "creditors" under the Rule, if they know all their clients individually, making the likelihood that an identity thief could defraud the firm by impersonating a client extremely low, it is unlikely that the Commission would initiate a law enforcement action. *See* FAQs, ¶ E.3, JA 91.[16]

On July 29, 2009, October 30, 2009, and May 28, 2010, the Commission announced further extensions in the enforcement of the Rule, the latest extension until December 31, 2010. The latter two extensions were prompted by the possibility of superseding federal legislation that might limit the scope of businesses covered by the Rule. *See* "FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.1" (July 29, 2009), JA 95-96; "FTC Extended Enforcement Policy: Identity Theft Red Flags Rule" (Oct. 30, 2009), JA 99-100;

[16] In addition to the FAQs, the Commission has provided additional compliance guidance to covered entities through materials posted on its website, including a compliance guide for business, a video explaining the Rule, and a model compliance template, articles, responses to public inquiries, and speeches and training sessions with numerous groups. *See* www.ftc.gov/redflagsrule.

"FTC Extended Enforcement Policy: Identity Theft Red Flags Rule" (May 28, 2010), JA 220-21.[17]

E. The District Court Decision

In a December 1, 2009 Memorandum Opinion, the district court granted summary judgment to the ABA on Count I of its complaint, thereby ruling that *any* application of the Red Flags Rule to practicing attorneys is unauthorized by the FACT Act, regardless of the circumstances or particular credit arrangements. Rec. 21, Op. 1-40, JA 177-216.

The court began its analysis by stating its conclusion that "it was not 'the unambiguously expressed intent of Congress' . . . to bring attorneys within the purview of the FACT Act and thus subject them to regulation by the Commission's Red Flags Rule." Op. 14, JA 190 (citation omitted). In support of this conclusion, the court reasoned that "[t]he selection of 'financial institution' along with 'creditor' as the targets of the legislation implies that the FACT Act was created to

[17] Congress continues to consider amendments to Section 615(e) of the FCRA, 15 U.S.C. § 1681m(e), to exempt certain low-risk entities from coverage. In October 2009, the House of Representatives unanimously passed a bill exempting from compliance with the Red Flags Rule, *inter alia*, certain small businesses, including "a legal practice" "with 20 or fewer employees." *See* H.R. 3763, 111th Cong. (1st Sess. 2009). A similar bill also exempting, *inter alia*, "a legal practice with 20 or fewer employees," is currently pending in the Senate. *See* S. 3416, 111th Cong. (2d Sess. 2010). If Congress passes legislation limiting the scope of the Red Flags Rule with an effective date earlier than December 31, 2010, the Commission will begin enforcement as of that effective date.

apply to entities involved in banking, lending, or financial related business." Op. 14, JA 190. Having thus identified what it called "the targeted population," the court reasoned that such a population "does not correlate with the regulation of attorneys." Op. 16, JA 192. It further observed that the ECOA does "not aim [its] reach expressly to the legal profession," *id.*, that the definitions of the terms "creditor" and "credit" "do not equate to concepts associated with the legal profession," Op. at 18, JA 194, and that Congress did not "make any contemporaneous findings in the ECO Act or the FACT Act . . . that lawyers regularly extend the right to their clients to defer payments." *Id.*

The court distinguished *Heintz v. Jenkins*, 514 U.S. 291 (1995), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), two cases in which attorneys were held subject to other broadly-applicable statutes without being specifically named therein. Upholding the ABA's facial challenge to the Red Flags Rule, the court quoted with approval the ABA's argument that, "[i]n 'ordinary English,' no one would assume that a lawyer engaged in the practice of law is a 'creditor' *simply because the lawyer bills clients for services rendered and does not demand immediate payment*." Op. 28, JA 204 (emphasis added). The court further observed that "credit . . . does not *logically or commonly* apply to attorney billing practices." Op. 29, JA 205 (emphasis added).

Finally, the court held that, even assuming that Congress had left the issue unresolved, the Commission's interpretation of the FACT Act as reaching attorneys in some circumstances was unreasonable and undeserving of any deference under the second step of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) Op. 15, 31, JA 191, 207.

At the conclusion of its opinion, the district court stated that "the Red Flags Rule cannot be properly applied to attorneys in the overly broad manner in which the Commission seeks to enforce it." Op. 40, JA 216. The relief it granted, however, was in no way limited to any particular manner of enforcement. On the contrary, the court simply granted the ABA's motion for summary judgment as to Count I, in which it had claimed that *any* application of the Red Flags Rule to practicing attorneys was in excess of the Commission's statutory authority. Rec. 22 (Amended Order), JA 217; *cf*. Complaint, Rec. 1, ¶¶ 56-60, JA 22-23. The court confirmed the breadth of its ruling in its final Judgment, which enjoined the Commission "from enforcing the requirements of the Commission's Red Flags Rule, 16 C.F. R. § 681.1, against lawyers engaged in the practice of law." Rec. 24, JA 218.

STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment *de novo* applying the same legal standard that the district court employed in the first instance. *See*, *e.g.*, *Gilvin v. Fire*, 259 F.3d 749, 756 (D.C. Cir. 2001).

SUMMARY OF ARGUMENT

The district court's ruling improperly grants a blanket exemption to all attorneys from the Red Flags Rule protections, even where an attorney engages in financial arrangements with her client that would unquestionably constitute a grant of credit if done by any other service provider. The plain language of the FACT Act mandates that *any* service provider who defers the payment of a bill – including lawyers – is subject to the Red Flags Rule. Congress intended the important FACT Act identity theft provisions to cover both traditional financial institutions and *any* entity that provides credit. Not only does the statute provide no exception for lawyers, but its legislative history indicates that Congress intentionally chose a broad definition for "credit," and subjecting lawyers who extend credit is entirely consistent with the statutory purposes. The cases interpreting the statutory term "creditor" consistently adopt a case-by-case analysis to determine if a right has been granted to defer payment – a position entirely consistent with that of the Commission. (Part A., *infra*.)

This case is thus governed by a well-established line of Supreme Court precedents which recognize that attorneys are subject to federal laws of general applicability when their activities fall within the plain statutory terms and there is no applicable exemption. There is no principled distinction between subjecting attorneys to these activity-based statutes and doing likewise under the ECOA and FACT Act. (Part B, *infra.*)

Further, the instant case is distinguished from this Court's decision in *ABA v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), because here lawyers who defer payments fall naturally within the statutory term "creditor," in contrast to the awkwardness of placing lawyers within the GLBA's constrained term "financial institution," which required resort to a detailed multi-tiered regulatory scheme to determine if they are covered. Further, under the ECOA (unlike the GLBA) there is a long-standing administrative interpretation that the statutory term "creditor" includes lawyers who defer payments. Moreover, covering attorneys who defer payments to the Red Flags Rule does not intrude into existing state regulation of the attorney-client relationship. (Part C, *infra*.)

Even if there were any statutory ambiguity whether lawyers are covered, the court below should have deferred to the long-standing and consistent administrative interpretation of the ECOA term "credit" to include lawyers when they defer the payment of a bill. The district court entirely ignored Supreme Court precedent that such interpretations by the agency charged with the statute's implementation are "authoritative" and "dispositive." Further, because Congress amended the ECOA multiple times since the administrative interpretation subjecting lawyers to the ECOA, and never sought to exempt lawyers, it should be deemed to have acquiesced in that interpretation. (Part D, *infra*.)

Finally, the district court had concerns that monthly invoice billing – a regular practice of attorneys – should not be considered deferred payment giving rise to a credit relationship. However, concerns about particular billing arrangements can only be raised in an as-applied challenge in a future enforcement case. The ABA's suit is a facial challenge to the Rule which cannot succeed if there is a "plainly legitimate sweep" of circumstances in which the Rule may apply. In fact, there are many legitimate applications of the Rule to lawyers that plainly involve the extension of credit – such as when the attorney allows the client to pay a bill over the course of many months or charges interest on payments. Regardless of whether the Rule may ultimately be held to apply to those situations of concern to the court below, premature speculation about such matters, in the absence of a factual record, provides no support for that court's ruling. (Part E., *infra*.)

ARGUMENT

The Commission's application of the Red Flags Rule to attorneys who allow their clients to defer payment for legal services is based on the plain language of the FACT Act and the ECOA. The statutory language includes a functional definition of creditor that mandates that *any* entity – regardless of the business in which it engages – that provides goods or services and regularly permits its customers or clients to pay later, is subject to the identity theft provisions of the Red Flags Rule. Lawyers are no different from any other service provider in this regard. In granting lawyers a blanket exemption from the Rule, the district court ignored not only the clear statutory language, but also the congressional goals of the Red Flags provisions, Supreme Court precedent subjecting lawyers to generally applicable statutes, and the authoritative FRB interpretation of the ECOA terms that Congress chose to incorporate into the FACT Act.

A. <u>Subjecting attorneys who defer payments for their legal bills to the protections of the Red Flags Rule is mandated by the plain language in the FACT Act and the ECOA and is consistent with the statutory purposes</u>

The starting point in construing the meaning of a statute is the language of the statute itself. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). As noted above, the FACT Act requires the Commission and the federal banking regulators to issue joint regulations and guidelines to impose important identity theft protections to be implemented by both "financial institutions" *and* "creditors." *See* 15 U.S.C. § 1681m(e). In defining the entities covered by the statute, Congress intended to paint with a very broad brush.

The FACT Act's definition of "financial institutions" is based mainly on the entity's status as a bank, savings and loan association, or similar institution. *See* 15 U.S.C. § 1681a(t). For the term "creditor," Congress chose to incorporate the broad functional definition from the ECOA. *See* 15 U.S.C. § 1681a(r)(5). The ECOA defines "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). "Credit," in turn, 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). The definition of "creditor" under the ECOA is therefore based on a business's billing arrangements, not the nature of the underlying goods or services it supplies.

The definitional section of the FACT Act thus reflects Congress's determination that to protect against the harm caused by identity theft throughout the economy (which is not limited to any one industry or sphere), it would employ a two-tiered definition of the scope of entities subject to the statute to include both a sectoral component (*i.e.*, "financial institutions") *and* a functional component (*i.e.*, "creditor"). Congress also could have, but did not, place limits on the identity of the creditor, the amount or type of credit, or the number of customers who receive credit, to define the scope of "creditors" subject to the statute. Congress also declined to exempt any industry or profession, including lawyers, from the scope of entities covered.[18]

Courts have consistently read the plain language of the ECOA – on which the FCRA's definition is based – as establishing that any entity that provides to a customer or client the right to defer the payment of a debt, or to defer payment after the purchase of goods or services, extends "credit" and is therefore subject to the Act. *See, e.g., Mays v. Buckeye Rural Elec. Coop., Inc.,* 277 F.3d 873, 876, 878-79 (6th Cir. 2002) (nonprofit electrical utility cooperative extended credit and is therefore subject to the ECOA); *Mick v. Level Propane Gases, Inc.,* 183 F. Supp.

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[18] Congress certainly knows how to exempt certain entities from the coverage of a statute of general applicability. *See, e.g.,* 15 U.S.C. § 6809(3) (listing three types of entities expressly exempt from coverage under the Gramm-Leach-Bliley Act). Here, neither the FACT Act nor the ECOA exempts from coverage lawyers who defer billing or otherwise extend "credit." Further, there is a "heavy presumption against implicit exemptions" from federal laws, particularly those protecting consumers. *See Jefferson County Pharm. Ass'n. v. Abbott Labs.,* 460 U.S. 150, 157-58 (1983) (citations omitted); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 787 (1975).

2d 1014, 1019 (S.D. Ohio 2000) (propane gas supplier is a "creditor" for purposes of the ECOA because it provides "deferred payment for propane services"); *Williams v. AT&T Wireless Servs. Inc.*, 5 F. Supp. 2d 1142, 1145-47 (W.D. Wash. 1998) (application for cellular phone service is a "credit" transaction for purposes of ECOA because "the consumer incurs debt as he uses the services and is billed for the services on a periodic basis"); *In re Brazil*, 21 BR 333, 334 (Bank. N.D. Ohio 1982) (public gas utility "is a creditor as it regularly provides gas to its customers, prior to being paid therefore."); *see also Barney v. Holzer Clinic*, 110 F.3d 1207, 1209-10 (6th Cir. 1997) (holding that, while plaintiffs were not applicants for credit under facts of case, the deferral of payment characterizes a "credit transaction" under the ECOA). The fact that these cases did not involve lawyers, *see* Op. 21-22, JA 197-98, is irrelevant; the consistent principle is that *any* service provider that defers payment for services (including as part of an ongoing relationship) is a creditor under the ECOA. There is nothing that distinguishes lawyers from utilities or the other creditors in this regard.[19]

Cases that have concluded that a particular transaction did not involve "credit"

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[19] *See also* Theodore Eisenberg, 1-5 Debtor-Creditor Law § 5.02 (Matthew Bender & Co., Inc., 2008) ("Because credit under the ECOA involves any simple deferral of payment, even if there are no finance charges or installments, the ECOA applies to many transactions where the consumer pays after receiving the goods or services, such as doctor and hospital bills, bills from repair persons and other workers, and even a local store where a customer runs up a tab.").

similarly applied the ECOA definition to determine if there was a right to defer debt or payments, and concluded there was not if the payments were made substantially contemporaneously with the services. *See, e.g.*, *Laramore v. Ritchie Realty Mgmt. Co.*, 397 F.3d 544, 547-48 and n.3 (7th Cir. 2005) (typical residential lease is not a credit transaction because it involves the "contemporaneous exchange of consideration"); *Shaumyan v. Sidetex Co. Inc.*, 900 F.2d 16, 18-19 (2d Cir. 1990) ("incremental" payments made in connection with home improvement contract did not constitute a "credit transaction" under the ECOA because they were made "substantially contemporaneous with [the company's] performance under contract"); *Liberty Leasing Co. v. Machamer*, 6 F. Supp. 2d 714, 717 (S.D. Ohio 1998) (equipment lease was not a credit transaction under the ECOA because it provided for contemporaneous exchange of consideration for use of equipment). All of these cases focused on the plains terms "credit" and "creditor" under the ECOA and none suggested that the ECOA contains any industry-based exemptions. Clearly, whether an entity extends "credit" is fact-specific and must be determined on a case-by-case basis.

Indeed, the FACT Act's legislative history clearly shows that Congress intentionally chose the broad ECOA definitions for "credit" and "creditor" for purposes of the FCRA, having rejected narrower definitions in earlier bills targeted to more "traditional" financial firms in the credit industry.[20] As a consequence of the broad coverage mandated by the statutory language, many individuals and entities that are not traditional financial service providers are "creditors" under the FACT Act.

Thus, the district court erred when it concluded that the FACT Act did not apply to attorneys on the theory that certain terms and concepts used in the Act, such as "account holder" or "customer," *see*, *e.g.*, 15 U.S.C. § 1681m, denote a credit-related context and therefore show that Congress did not intend to include lawyers as "creditors." Op. 16-17, JA 192-93. There is nothing incongruous or inconsistent about applying these terms to lawyers or other professionals in the context of their billing arrangements with their clients. *See, e.g.*, The American Heritage Dictionary 281 (2d College ed. 1982) ("client" is defined as, *inter alia*, "[a] customer or patron."). Indeed, it is difficult to see how a lawyer who regularly

[20] Earlier versions of the Red Flags legislation imposed the requirements on a substantially narrower group of entities than the "financial institutions" and "creditors" incorporated from the ECOA. For example, the House bill proposed amending the FCRA to require "insured depository institutions" to establish procedures to identify possible instances of identity theft. *See* H.R. Rep. No. 108-263, at 42 (2003), H.R. 2622 § 206. Similarly, a version of the Senate bill proposed amending the FCRA to incorporate the narrower definitions of "credit" and "creditor" from Section 103 of the Truth in Lending Act. *See* S. 1753, 108th Cong. §§ 111(u) and 114 (1st Sess. 2003). The conference report (H.R. Rep. No. 108-396, at 4 (2003) (Conf. Rep.), *as reprinted in* 2003 U.S.C.C.A.N. 1753), made clear that the definitions of "credit" and "creditor" would be incorporated from Section 702 of the ECOA.

permits her clients to pay their legal bills 60 or 120 days after providing the legal services is not granting a "right" to her clients "to defer payment of debt," or "to purchase . . . services and defer payment therefor." 15 U.S.C. § 1691a(d). *See* The American Heritage Dictionary 375 (2d College ed. 1982) ("defer" is defined as "[to] put off until a future time; postpone").[21]

Indeed, not only is this result mandated by faithful compliance with the statutory text, but it is entirely consistent with the broad antidiscrimination purpose of the ECOA to eradicate discrimination in all credit-related situations. The district court's conclusions that attorneys can never be subject to the Red Flags Rule regardless of their billing arrangements would necessarily mean that lawyers (and presumably other service providers that may not be thought of as traditional creditors) would not be subject to ECOA and could discriminate with impunity in their billing practices. For example, an attorney could permit white men to pay

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[21] The court's concern that the Commission never mentioned during the rulemaking that lawyers were subject to the Rule so that covering lawyers "came out-of-the-blue," Op. 37, JA 213, is misplaced. The Commission consistently opined that *any* service provider that defers payment is covered; it would be entirely unrealistic for the agency to name the literally thousands of types of service providers that could fall under the Rule. Further, that the Rule's definition of "creditor" under 16 C.F.R. § 681.1(b)(5) does not mention lawyers while it does expressly include "lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies," is irrelevant where the list is merely illustrative and not exhaustive. *See, e.g., Puerto Rico Maritime Shipping Auth. v. ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981).

their legal bills six months after services had been provided, but could require immediate payments from African-American women. Congress could not have intended such a result.

The cases relied upon by the ABA and by the district court, *see, e.g.*, Op. 24-25, JA 200-01, provide no support that any group is categorically exempt from the ECOA or the FACT Act. For example, in *Riethman v. Berry*, 287 F.3d 274 (3d Cir. 2002), the Third Circuit found that, based on the facts in that case, the defendant lawyers were not "creditors" under the ECOA, because "the express terms of their fee arrangements plainly manifest their right to prompt and full payments," and therefore there was no right to make deferred payment. *Id.* at 277-78. The court also concluded that, because the fee arrangements at issue did not extend credit, the failure of the lawyers to enforce them strictly "was not the continuance of existing credit." *Id*. at 279. However, the Court did not foreclose subjecting attorneys to the ECOA if they did defer the payment of legal bills, expressly acknowledging that "[w]e do not suggest that lawyers are *ipso facto* exempt from the statute." *Id.* at 278.[22] Other cases relied upon by the court below, Op. 29-30, JA 205-06, and the ABA below similarly found no creditor relationship

[22] *Riethman* also failed to acknowledge the official FRB staff commentary for Regulation B which, as discussed below, expressly subjects professionals, such as lawyers and doctors, to the ECOA if they "defer payment for services."

based on the facts of those cases, but did not suggest any industry-wide exemption.[23] Rather, the case law construing the ECOA simply reflects that a determination whether a particular billing arrangement constitutes the extension of "credit" must be determined on a case-by-case basis.

Neither the statutory language or purposes of the FACT Act or ECOA, nor the supporting case law, provide support for a blanket exemption for lawyers. By incorporating the ECOA's broad definition of "creditor" and "credit" into the FACT Act (in addition to covering traditional "financial institutions"), Congress clearly intended to sweep in all entities that deferred billing to their clients or customers, including lawyers.

B. <u>This case is governed by a long line of Supreme Court precedent that lawyers are subject to statutes of general applicability</u>

As shown above, the FACT Act – a statute of general applicability that includes an activity-based definition of "creditor" – covers attorneys as it would any entity that extends "credit." In this regard, this case is governed by a long line of authority holding that lawyers are subject to statutes of general applicability –

[23] *See, e.g., Mick's at Pa. Ave., v. BOD, Inc.*, 389 F.3d. 1284, 1289 (D.C. Cir. 2004) (holding sublessor of restaurant premises did not violate the ECOA because there was no evidence that sublessor "'regularly' extends or arranges credit . . . ," but not suggesting that any group is categorically exempt from the ECOA); *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 408 (6th Cir. 1998) (offer to settle a case by an attorney did not constitute an offer of credit to subject attorney to the ECOA, but not suggesting that attorneys can never be subject to the ECOA).

including those involving credit-related activities – if their conduct falls within the statutory terms. For example, in *Heintz v. Jenkins*, 514 U.S. 291 (1995), a unanimous Supreme Court held that lawyers are subject to the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1692a, when their activities fall within the statutory terms. Applying the plain statutory definition of "debt collector" under the Act, the Court held that the FDCPA applies to the litigating activities of lawyers because "[i]n ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts." 514 U.S. at 294; *see also* 514 U.S. at 297 (". . . litigating, at first blush, seems simply one way of collecting a debt.").[24] The *Heintz* court refused to imply an exception for lawyers' debt collecting activities from the FDCPA, holding that "nothing either in the Act or elsewhere indicat[es] that Congress intended to authorize the FTC to create this exception from the Act's coverage . . . [that] falls outside the range of reasonable interpretations of the Act's express language." 514 U.S. at 298. The holding in *Heintz* is particularly illustrative because it construed the FDCPA which is – like the FCRA and ECOA – part of the same comprehensive umbrella statute, the

[24] The Court also relied, as an independent ground, on the fact that the statute had contained an express exception for attorneys involved in debt collection litigation which had been repealed. 514 U.S. at 294-95.

CCPA. These different titles of the CCPA should be construed similarly "as a whole and not as separate unrelated parts." *Brothers v. First Leasing*, 724 F.2d 789, 794-95 (9th Cir. 1984).[25]

The Supreme Court similarly has subjected lawyers and lawyer associations to other federal laws protecting consumers. For example, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court held that a minimum-fee schedule for lawyers for title examinations published by a county bar association and enforced by the state bar amounted to illegal price-fixing under the Sherman Act, 15 U.S.C. § 1. The Court rejected the argument that the practice of law was categorically exempt from the Sherman Act as a "learned profession" due to the existence of state bar regulation, noting that

> whether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anticompetitive practices with impunity. We cannot find support for the proposition that Congress intended any such sweeping conclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . .

421 U.S. at 787 (citation omitted). The district court failed to adequately

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[25] Lower courts have repeatedly applied similar reasoning to find that lawyers are subject to credit-related statutes encompassed in the CCPA, including the FCRA and TILA, if their activities fell within the scope of the law. *See, e.g.*, *Duncan v. Handmaker*, 149 F.3d 424 (6th Cir. 1998) (FCRA); *Chester v. Purvis*, 260 F. Supp. 2d 711 (S.D. Ill. 2003) (FCRA); *Jenkins v. Landmark Mortgage Corp. of Virginia*, 696 F. Supp. 1089 (W.D. Va. 1988) (TILA); *Dougherty v. Hoolihan, Neils, and Boland, Ltd.*, 531 F. Supp. 717 (D. Minn. 1982) (TILA).

distinguish *Goldfarb*, conclusorily finding that the FACT Act's term "credit" is narrower than the Sherman Act's term "commerce," and would not encompass attorney billing practices. *See* Op. 28-29, JA 204-05.

More recently, the Supreme Court has reiterated the principle that lawyers are subject to federal law when their activities fall within the law's coverage. In *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S.Ct. 1324, 1331-33 (2010), a unanimous Supreme Court affirmed that attorneys who provide bankruptcy assistance to debtors are debt relief agencies within the meaning of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCA"). The Court focused on the statutory text, 11 U.S.C. § 101(12A), which defined a "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person," a consumer debtor, in return for payment. 130 S.Ct. at 1332. In so doing, the Court rejected arguments – like those made here – that attorneys are not covered by the BAPCA because they are not explicitly included within the statutory definition (as are other entities), and that subjecting attorneys would impermissibly intrude in an area of traditional state regulation. 130 S.Ct. at 1332-33.

Courts have likewise subjected attorneys to a wide variety of federal statutes even where the term "attorneys" is not expressly covered under the statutory terms.

See, e.g., *Wyatt v. Cole*, 504 U.S. 158 (1992) (federal civil rights law); *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (federal antidiscrimination law); *Crowe v. Henry*, 43 F.3d 198 (5th Cir.1995) (Racketeer Influenced and Corrupt Organizations Act); *Kline v. First W. Gov't Sec. Inc.*, 24 F.3d 480 (3d Cir. 1994) (federal securities laws); *Foley, Hoag & Eliot*, 29 NLRB 456 (1977) (federal collective bargaining law); *see generally* Restatement (Third) of the Law Governing Lawyers § 56 (2000). This is particularly true where the statutes cover "any person" – the same broad term used in the ECOA's (and the FACT Act's) definition of "creditor." *See* 15 U.S.C. § 1691a(e); 15 U.S.C. § 1681a(r)(5).

Here, lawyers' coverage under the FACT Act when they extend credit falls naturally within the statutory language, and cannot be distinguished from the plethora of cases holding that lawyers are subject to federal laws of general applicability.

C. This Court's decision in *ABA-GLBA* – based on different statutory language and regulatory regime – is not controlling

Both the ABA and the district court relied on this Court's decision in *ABA v. FTC*, 430 F.3d 457 (D.C. Cir. 2005) ("*ABA-GLBA*") to conclude that lawyers were not subject to the Red Flags Rule. In *ABA-GLBA*, the ABA and the New York State Bar Association challenged the Commission's characterization of attorneys as "financial institutions" under the privacy provisions of the Gramm-Leach-Bliley

Act (“GLBA”), 15 U.S.C. § 6801, *et seq*. The GLBA required “financial institutions” to send out privacy notices regarding their policies to disclose and protect their customers’ nonpublic personal information (“NPI”), and to provide the customer the choice to “opt out” of the disclosure of NPI. *See id*., §§ 6803, 6802(b). The GLBA defined “financial institution” as “any institution the business of which is engaging in financial activities as described in section 1843(k) of Title 12 [Section 4(k) of the Bank Holding Company Act of 1956 (“BHCA”)], *id.* § 6809(3)(A), and the relevant financial activities were listed in a very detailed regulation, known as “Regulation Y,” 12 C.F.R. § 225.28 (2000), issued by the FRB. Several federal agencies issued joint rules implementing these GLBA provisions. *See* 16 C.F.R. pt. 313 (FTC’s rule).

This Court affirmed the district court’s holding that attorneys were not subject to the GLBA privacy provisions. The Court was troubled by the complexity of determining the activities that subjected attorneys to the GLBA based on “layers of incorporated statutory and regulatory language describing financial institutions,” as well as by the awkwardness of defining a law firm or an attorney (particularly a solo practitioner) as a “financial institution” under the GLBA. 430 F.3d at 469-70. The Court further held that “[i]t is undisputed that the regulation of the practice of law is traditionally the province of the states. Federal law 'may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion.'" 430 F.3d at 471 (citation omitted). With this background, this Court found notable that Congress had not expressly included lawyers within the GLBA. For several reasons, the *ABA-GLBA* case does not control here.

First, the FACT Act language at issue here contains key textual differences from the GLBA language at issue in *ABA-GLBA*. In *ABA-GLBA*, the dispute revolved entirely around the term "financial institution." The Commission had attempted to give that term a broad, activity-based reading, under which it could encompass any entity that was significantly engaged in financial activities. But this Court rejected that reading of the language. *See* 430 F.3d at 470-71. Instead, the Court insisted that the term "financial institution" provided "an exceptionally poor fit" for any notion that Congress had intended to subject lawyers and law firms to the authority of "the Federal Trade Commission and other 'federal functional regulators' . . . ." *Id.* at 470. The Court concluded that it was simply too much of a "stretch," on multiple levels of analysis, to equate law firms with "financial institutions." *Id.* at 471.

In the present case, by contrast, Congress went to great lengths to ensure that the text it enacted would achieve expansive coverage. The FACT Act instructs the

FTC and the other agencies to make Red Flags regulations applicable to "each financial institution *and* each creditor" within the agencies' respective spheres. 15 U.S.C. § 1681m(e)(1)(A), (B) (emphasis added). As the quoted language reflects, there are two distinct aspects of the statute's coverage. The first – "financial institutions" – is largely limited to particular types of entities, in keeping with both this Court's ruling in *ABA-GLBA* and with the statutory definition in 15 U.S.C. § 1681a(t) (referring to certain banks, savings and loan associations, and related institutions based primarily on their status as such). But Congress added a second term – "creditor" – to extend the statute's coverage to anyone who regularly engages in a particular activity, *i.e.*, the extension of credit. Under the ECOA's definition (as well as in common parlance), the extension of "credit" is an activity that any type of person may engage in depending on the financial relationships they enter into. Just as banks are creditors to their borrowers, so a "Mom and Pop" corner store may be to its customers, a utility may be to its consumers, a doctor may be to his patients – and lawyers may be to their clients.

Here the FACT Act and the Red Flags Rule adopted the broad and straightforward definition of "creditor" from the ECOA that covers "any person who regularly extends, renews or continues credit . . .," and contains no exceptions. 15 U.S.C. § 1691a(e). Lawyers – like any other service provider – who regularly defer the payment for their legal services fall naturally within the scope of that definition. Nothing in this Court's ruling in *ABA-GLBA* suggests that the broad terms "creditor" and "credit" in the FACT Act should not be given their natural meanings, or that lawyers or any other group of potential creditors can categorically be excluded.

Further, unlike the situation addressed in *ABA-GLBA*, here there is no incorporation of a particularly detailed regulatory scheme to determine if a lawyer is covered. *See* 430 F.3d at 460. Rather, a lawyer who regularly permits her clients to defer paying their legal bills "extends . . . credit" under the straightforward meaning of those terms. The term "creditor" is quite naturally applied to lawyers in many circumstances – *e.g.*, when he files an action against a client for nonpayment of fees, or files a claim for fees owed by a bankrupt client. Acknowledging that a lawyer can *sometimes* be a creditor is not a matter of hiding an elephant (or even a more modest sized creature) in a mousehole. *See* 430 F.3d at 469.

Moreover, the Commission's position here is based on a long-standing administrative interpretation of the underlying terms of a sort that was not before the *ABA-GLBA* Court. As discussed below, here the federal functional regulator over the ECOA – from which the FACT Act's definition of "creditor" derived –

has announced consistently for 25 years that lawyers who defer the payment of bills are "creditors." There was no analogous administrative interpretation of the BHCA or Regulation Y that expressly included lawyers within the regulatory scheme.

Finally, the Red Flags Rule – designed to protect the non-client victim of identity theft – simply does not intrude or conflict with existing state regulation of the attorney-client relationship or otherwise intrude into a core state function. In *ABA-GLBA*, the district court compared the GLBA's privacy protections (including its privacy notices) to state bar rules and the ABA's Model Rule and Model Code that it found "already provide greater protection with respect to the dissemination of clients' personal information," and concluded that "these state and local regulatory schemes . . . already provide protection against disclosure of clients' personal information to third parties by attorneys." *ABA v. FTC*, 276 F. Supp. 2d 110, 122-23, 129-31 (D.D.C. 2004). This Court similarly found that the states have traditionally regulated the practice of law. *ABA-GLBA*, 430 F.3d at 472. The courts' holdings were thus based in part on their conclusion that the GLBA's privacy protections intruded into a core area already regulated by state bar regimes and added little to state law client confidentiality protections.

In contrast, the ABA failed here to point to any comprehensive set of state bar rules specifically designed to protect non-client victims from identity theft as do Section 114 of the FACT Act, 15 U.S.C. § 1681m(e), and the Red Flags Rule. While the district court (without the benefit of briefing) concluded that state bar rules adequately protect the non-client victim in these circumstances, Op. 36 n. 12, JA 212, the general bar rules cited by the district court (focused on representation of a real client) do not impose the sort of specific protections afforded by the Red Flags Rule to protect the non-client victim, including a written program to detect, identify and mitigate the risks of identity theft.[26] Further, subjecting attorneys to the Red Flags Rule is based on the attorney's billing arrangement with clients – essentially an accounting function – and not on some essential element of the

[26] There in fact have been a number of reported instances in which attorneys have failed to verify the identity of imposter clients which have facilitated fraudulent property transfers or disbursement of funds, and which have resulted in lawsuits and grievance proceedings against the attorney by the innocent non-client victim. *See, e.g.*, *Christiano v. Bonesteel*, 1991 WL 162160, 4 Conn. L. Rptr. 757 (Conn. Super. Ct. 1991) (attorney failed to verify identity of imposter client spouse in connection with promissory note); *Trapasso v. Lopez*, 1995 WL 17215792 (Mass. Land Ct. 2005) (attorney failed to verify identity of imposter client spouse before witnessing and notarizing deed of property transfer); *see also The Connecticut Law Tribune, "Confirming Clients' Identities"* (May 10, 2010) (available at http://www.ctlawtribune.com/ getarticle.aspx?ID=37073); *The Connecticut Law Tribune, "Imposter Clients Land Attorneys in Hot Water"* (Sept. 18, 2009) (available at www.law.com/jsp/ law/sfb/ lawArticleFriendlySFB.jsp?id=12024338882687) (describing two such fraudulent property conveyances by imposter clients, finding that property conveyance transactions are "ripe" for imposter client claims, and concluding that evidence of identity theft in legal services "is easy to find.").

lawyer-client relationship, such as the protection of clients' personal information at issue in the *ABA-GLBA* case.

In the instant case, the Commission is not intruding into the states' prerogative to regulate "the practice of law" or into any other essential core state function, but is simply following the statutory mandate to apply the Red Flag Rule's protections to those instances which make the attorney-client relationship most susceptible to identity theft, *e.g.*, when the client is not required to pay immediately for the legal services rendered. Concerns about improper federal intrusion into an area traditionally regulated by the states that animated this Court's decision in the *ABA-GLBA* case are simply not present here.

D. <u>If this Court were to conclude there was any statutory ambiguity it should defer to the authoritative administrative interpretation of the statutory language</u>

Even assuming that there is some ambiguity on the face of the statute – a position the Commission disputes – authoritative administrative interpretations underscore the correctness of the Commission's position that lawyers are covered under the FACT Act. The district court erred in not deferring to a long-standing official staff interpretation by the FRB – the agency charged with implementing the ECOA – that lawyers who defer debt are "creditors" for purposes of the ECOA. As the Supreme Court has deemed such FRB staff interpretations to be authoritative, the Commission reasonably relied on such an interpretation in construing the FACT Act.

As explained above, the FRB and its staff have exercised their broad authority under the ECOA to define the terms "credit" and "creditor" as used in that statute. The FRB staff commentary to Regulation B emphasizes that the terms "credit" and "creditor" under the ECOA are to be construed broadly so as to include all entities that defer payments, even in the normal course of a traditional billing process. *See, e.g.*, 12 C.F.R. pt. 202, Supp. I, § 202.1, ¶ 1(a) (recognizing that the term "credit" under the ECOA, applies "to all credit – commercial as well as personal – without regard to the nature or type of the credit or the creditor," and encompasses any "deferral of the payment of a debt"); 12 C.F.R. pt. 202, Supp. I, § 202.2(j) (the scope of credit transactions covered under Regulation B is broader than those covered in other sections of the CCPA).

Nearly 25 years ago, FRB staff first announced in an official staff commentary, in providing examples of service providers who provide "incidental credit" under 12 C.F.R. 202.3(c), that lawyers should be included as extending credit if they "defer the payment of a [legal] bill." *See* 12 C.F.R. pt. 202, Supp. I, 50 Fed. Reg. 48,018, 48,049 (Nov. 20, 1985), 1985 WL 126616. The FRB has consistently and publicly kept to this position.

The current version of the FRB's Official Staff Commentary states that:

> [i]f a service provider (such as a hospital, doctor, *lawyer*, or merchant) allows the client or customer to defer the payment of a bill, this deferral of debt is credit for purposes of the regulation, even though there is no finance charge and no agreement for payment in installments.

12 C.F.R. pt. 202, Supp. I, § 202.3, ¶ 3(c) (emphasis added).

As the agency with governing authority over the ECOA, the FRB's interpretation of that statute should be afforded substantial deference. *Chevron,* 467 U.S. at 844. For the same reasons, the FRB staff interpretations of Regulation B should be given substantial deference. *Nevarez v. O'Connor Chevrolet, Inc*., 303 F. Supp. 2d 927, 938 (N.D. Ill. 2004).

In fact, the Supreme Court has specifically held that FRB staff opinions construing one of its statutes or implementing regulations, "[u]nless demonstrably irrational . . . should be dispositive." *Ford Motor Credit Co., v. Milhollin,* 444 U.S. 555, 565 (1980). In upholding a ruling based substantially on an FRB official staff interpretation, the Court elaborated:

> [J]udges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational. Finally . . . deference to the Federal Reserve is compelled by necessity; a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views.

444 U.S. at 568. *Milhollin* further pointed out that a TILA provision providing a

good faith defense to creditors relying on the FRB staff interpretation "signals an unmistakable Congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative." 444 U.S. at 567-68. These principles apply equally to the ECOA, which, like the TILA, is part of the CCPA and contains a provision parallel to the one at issue in *Milhollin*. The district court, however, failed to recognize or even cite to the important *Milhollin* case.

Further, Congress has amended the ECOA several times since the FRB staff first announced that lawyers were subject to the ECOA under certain circumstances.[27] Congress not only reenacted the ECOA subsequent to the FRB staff's authoritative interpretation of "creditor," but adopted the ECOA definition directly into the FACT Act itself. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . [and] where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated

[27] *See* Pub. L. No. 104-208, 110 Stat. 3009-420 (Sept. 30, 1996) (adding 15 U.S.C. § 1691c-1); Pub. L. No. 104-88, 109 Stat. 948 (Dec. 29, 1995) (revising 15 U.S.C. § 1691c); Pub. L. No. 102-550, 106 Stat. 4082 (Oct. 28, 1992) (revising 15 U.S.C. § 1691c); Pub. L. No. 102-242, 105 Stat. 2306 (Dec. 19, 1991) (revising 15 U.S.C. §§ 1691, 1691e); Pub. L. No. 101-73, 103 Stat. 439 (Aug. 9, 1989) (revising 15 U.S.C. § 1691c); Pub. L. No. 100-533, 102 Stat. 2692 (Oct. 25, 1988) (revised 15 U.S.C. § 1691b).

law, at least insofar as it affects the new statute." *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Curran*, 456 U.S. 353, 382 n.66 (1982) (citations omitted); *accord Doris Day Animal League v. Veneman*, 315 F.3d 297, 300 (D.C. Cir. 2003) (relying in part on multiple statutory reenactments subsequent to administrative regulation to uphold validity of regulation while noting that "[o]ne line of Supreme Court cases" supports the legislative reenactment doctrine); *but see Koszola v. FDIC*, 393 F.3d 1294, 1299 (D.C. Cir. 2005) (refusing to apply doctrine where no indication that Congress ever considered the administrative interpretation). Thus, this Court may presume that the Congress that specifically incorporated the broad ECOA definition of "credit" and "creditor" into the FACT Act knew of and accepted the broad administrative and judicial interpretations of the ECOA and Regulation B. The district court's rejection of the congressional acquiescence argument because the FRB's interpretations "were made in a context totally unrelated to identity theft," Op. 24, JA 200, is misplaced, because while Regulation B's antidiscrimination focus is obviously different from the FACT Act's identity theft concerns, the fact remains that Congress intentionally incorporated the broad definition of "creditor" from the ECOA into the FACT Act provisions designed to confront identity theft.

E. The district court's concerns regarding monthly invoice billings or other particular billing arrangements are irrelevant in this facial challenge

Finally, in granting the ABA's motion, the district court relied heavily on its view that monthly invoice billing, a commonly used practice in the legal field, should not be considered a deferral of payment, in part because of the ostensibly unpredictable and ongoing nature of legal services. Op. 32-34, JA 208-10. The Commission disputes that view, and has stated that monthly invoice billing does indeed involve deferred payment that gives rise to a creditor relationship. Extended Enforcement Policy at 1 n.3, JA 76. But the district court's real error was relying on such fact-based considerations in the present *facial* challenge to the Red Flags Rule, in which there was no record either of Commission enforcement or of any of the myriad ways in which lawyers may arrange their billing and collection activities.[28] The court compounded its error, moreover, by using its conclusion that *some* attorneys should be excluded from the Rule's coverage because of their billing practices as a basis for a blanket injunction shielding *all*

[28] Plainly, a facial challenge is the only sort that the ABA could even attempt at this point. The Commission has not yet enforced the Rule, nor determined the precise circumstances under which it would undertake enforcement. And, as explained below, any application of the Rule to attorneys would necessarily involve factual questions regarding their particular billing and collection practices. Accordingly, any as-applied challenge at this time would be unripe. *See, e.g., Munsell v. Department of Agriculture*, 509 F.3d 572, 585-86 (D.C. Cir. 2007); *see generally Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

attorneys from the Rule. The proper forum for a judicial determination of the applicability of the Rule to particular billing practices is in the context of an as-applied challenge to the Rule, where a court can consider a factual record and can tailor relief (if any) to the particular billing practices and enforcement policies at issue.

The Supreme Court has instructed that facial challenges to regulations, like facial challenges to statutes, must meet stringent standards. *Reno v. Flores*, 507 U.S. 292, 300-01 (1993). Such standards apply equally to challenges based on constitutionality and those based on arguments about the scope of statutory authority. *Id.* Although the precise standard for facial challenges remains "a matter of dispute," *United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010), the Court has pointed out that "all agree" that a facial challenge must fail where the provision at issue has a "plainly legitimate sweep." *See Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citing *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in the judgments (citation omitted))); *see also General Elec. Co., v. Jackson*, __ F.3d. __, 2010 WL 2572955, * 4 (D.C. Cir. June 29, 2010) (discussing standards in *Stevens*). The ABA thus faced a "heavy burden" in its facial challenge to show that the Rule is invalid "in all its applications" to attorneys. *See Crawford v. Marion County*

Election Bd., 553 U.S. 181, 202 (2008) (applying the *Glucksberg* standard). Regardless of any question as to the precise standard that controls,[29] the present Rule must be upheld against the ABA's facial challenge because there are clearly legitimate applications of the Rule to attorneys.

Regardless of whether certain types of attorney billing arrangements are ultimately determined not to create a "credit" relationship, there are unquestionably circumstances in which the Rule is properly applied to lawyers. The answer

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[29] In the court below, the Commission invoked the somewhat more stringent, "no-set-of-circumstances" test articulated in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). The district court rejected that argument, based on this Court's ruling in *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1407-08 (D.C. Cir. 1998). Op. 12 n. 8, JA 188. As a subsequent panel of this Court has noted, however, the *National Mining* ruling appears to be at odds with *Flores*, in which the Supreme Court applied the *Salerno* standard to a statutory challenge to an agency regulation. *See Amfac Resorts, L.L.C. v. U.S. Dep't. of the Interior*, 282 F.3d 818, 825-28 (D.C. Cir. 2002), *rev'd on other grounds, sub nom. Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003). There is no need for the Court to resolve the issue here, however, any more than there was in *Amfac*. As the *Amfac* panel emphasized, the *National Mining* panel "dealt only with the no-set-of-circumstances formulation of *Salerno*," leaving subsequent panels free to follow other Supreme Court formulations. 282 F.3d at 827. Particularly in light of the language quoted above from the intervening *Washington State Grange* ruling, it is clear that a facial challenge must be denied where, as here, the regulation has a "plainly legitimate sweep."

The district court's further observation that "attorneys as a whole should not be left to wonder about the applicability of the Red Flags Rule" to them based on a client's ability to make immediate payments, Op. 12 n.8, JA 188, misses the point, because whether a lawyer "regularly" extends credit depends on the attorney's general billing practices, not whether a particular client is able to pay its bill immediately.

depends on the nature of particular billing practices.

At one end of the spectrum, the Commission has acknowledged that certain billing arrangements simply do not constitute credit and would not subject the attorney to the Red Flags Rule. For example, a client that pays a retainer to the attorney *before* the provision of legal services, even where the funds are deposited in a client trust fund and withdrawn upon the completion of legal services, does not constitute the deferral of payment to constitute credit for purposes of the Rule. *See* FAQs, ¶ B.5, JA 85. Similarly, attorneys who work on a contingency basis are not deemed "creditors" under the Rule, because the fee is only paid if the lawyer wins a recovery for its client (that is presumably paid by the opposing party) so there is no extension of credit. *See* FAQs, ¶ B.6, JA 85. Other fee arrangements, such as flat fees and fees for future availability that become the attorney's property upon payment, *see, e.g.*, ABA Model Rule 1.5, comment [4]; Restatement of Law (Third) Governing Lawyers § 38, cmnt [g], would also not be deemed "credit" for purposes of the Red Flags Rule.

At the other end of the spectrum, lawyers can and do enter into billing arrangements that clearly permit the deferral of payment as to constitute "credit." For example, if an attorney allows the client to pay off a $24,000 legal bill by paying $1000 per month for two years, there is little doubt that the attorney's billing arrangement with his client allows a sufficient deferral of payment to constitute a "credit" relationship. Many of these credit relationships involve installment payments and the imposition of interest or finance charges for outstanding bills. *See, e.g.*, *Dougherty v. Hoolihan, Neils, and Boldan, Ltd.*, 531 F. Supp. 717, 721 (D. Minn. 1982) (legal fee agreements can constitute "consumer credit transactions" under the TILA); *Katz & Lange, Ltd. v. Bugen,* 356 N.W.2d. 733 (Minn. Ct. App. 1984) (Minnesota law permits 6% interest charged by attorney on unpaid legal bills unless parties agree otherwise, but 12% interest charged was usurious); *Ault v. General Prop. Mgmt. Co.*, 683 P.2d 988 (Okl. Ct. App. 1984) (Uniform Consumer Credit Code applies to credit sales of legal services by an attorney who regularly extends credit, but finding that under facts of case lawyer did not "regularly" extend such credit).[30]

[30] *See also* New York City Bar, Op. 2000-2 (Oct. 2002) (lawyer may charge interest on unpaid legal fees where amount charged is reasonable and client consents) (available at http://www.abcny.org/Publications/reports/show_html.php?rid=133); D.C. Bar Ethics, Op. 310 (Nov. 2001) (lawyer may charge reasonable interest for future work when client fails to pay legal fees even where not provided for in fee agreement) (available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion310.cfm); Minnesota Office of Lawyers Professional Responsibility, Op. 16 (Mar. 1993) (interest and late charges on attorneys fees permissible if billing practices comply with state usury and federal truth-in-lending requirements) (available at http://www.mncourts.gov/lprb/93bbarts/bb050693.html); John Yilek, "Interest and Late Charges: How to Charge Clients," Bench & Bar of Minnesota (Mar. 1991) (lawyers who extend credit to clients who do not promptly pay legal bills must

(continued...)

Indeed, the ABA's counsel, at the court's motion hearing, admitted that if attorneys allowed their clients to pay for their legal services over time, such an arrangement would amount to the extension of credit. Tr. 36, JA 136. The district court agreed that, in that situation, lawyers would be subject to the Red Flags Rule, but had concerns that monthly invoice billings or the failure to make immediate payments after legal services were provided would also amount to credit. Tr. 49, 51-53, 57-59, JA 149, 151-53, 157-59, *see also* Op. 28-29, JA 204-05. The court was also troubled by what it perceived as the ongoing nature of legal services that do not constitute a "a distinct service" so that a monthly bill reflects not the completion of services, but "an interim submission" for services. Op. 34, JA 210. As noted above, however, courts have regularly characterized utilities and other entities that bill after the provision of certain services to be creditors even when those providers continue to provide services on an ongoing basis.

In any event, whatever concerns the court had about particular billing arrangements do not support the ABA's facial challenge, and do not justify the sweeping relief ordered. In the event that the Commission institutes future

[30](...continued)
comply with various state and federal laws) (available at http://www.mncourts.gov/lprb/91bbarts/yilekbb0391.html); California State Bar Formal Op. 1980-53 (attorney can charge interest on overdue legal bills provided client gives informed consent) (available at http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=DULF9Vtd1uE%3D&tabid=842).

enforcement actions against attorneys based on Red Flags Rule violations, such attorneys will be free to argue that their particular billing arrangements did not trigger coverage. But the existence of a range of billing arrangements such as those discussed above shows that, regardless of how the situations that concerned the court below are ultimately adjudicated, there will remain a “plainly legitimate sweep” for the Rule, and a facial challenge must be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

/s/ Michael D. Bergman
MICHAEL D. BERGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3184; Fax: (202) 326-2477
mbergman@ftc.gov

July 21, 2010

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(c) and Circuit Rule 32(a), the attached Brief for Appellant Federal Trade Commission was prepared using 14-point Times New Roman, a proportionally-spaced typeface. The Brief contains 12,565 words, as measured by the word-processing system used to prepare the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a).

Date: July 21, 2010

s/ Michael D. Bergman
Michael D. Bergman
Attorney for Appellant
Federal Trade Commission

STATUTORY AND REGULATORY ADDENDUM

PAGE

15 USCS § 1681m(e)

*** CURRENT THROUGH PL 111-201, APPROVED 7/7/2010 ***

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
CREDIT REPORTING AGENCIES

Go to the United States Code Service Archive Directory

15 USCS § 1681m(e)

§ 1681m. Requirements on users of consumer reports

* * *

(e) Red flag guidelines and regulations required.

(1) Guidelines. The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 621 [15 USCS § 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;

(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; and

(C) prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures--

(i) notifies the cardholder of the request at the former address of the cardholder and provides to the cardholder a means of promptly reporting incorrect address changes;

(ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or

(iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(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.

(B) Inactive accounts. In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall 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.

(3) Consistency with verification requirements. Guidelines established pursuant to paragraph (1) shall not be inconsistent with the policies and procedures required under section 5318(l) of title 31, United States Code.

15 USCS § 1681a(r)(5)

UNITED STATES CODE SERVICE

*** CURRENT THROUGH PL 111-201, APPROVED 7/7/2010 ***

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
CREDIT REPORTING AGENCIES

Go to the United States Code Service Archive Directory

15 USCS § 1681a(r)(5)

§ 1681a. Definitions; rules of construction

* * *

(r) Credit and debit related terms.

* * *

(5) Credit and creditor. The terms "credit" and "creditor" have the same meanings as in section 702 of the Equal Credit Opportunity Act [15 USCS § 1691a].

15 USCS § 1691a(d) & (e)

UNITED STATES CODE SERVICE

*** CURRENT THROUGH PL 111-201, APPROVED 7/7/2010 ***

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
EQUAL CREDIT OPPORTUNITY

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15 USCS § 1691a(d) & (e)

§ 1691a. Definitions; rules of construction

* * *

(d) The term "credit" means 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.

(e) The term "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.

16 CFR 681.1

LEXISNEXIS' CODE OF FEDERAL REGULATIONS

*** THIS SECTION IS CURRENT THROUGH THE JULY 15, 2010 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 16 -- COMMERCIAL PRACTICES
CHAPTER I -- FEDERAL TRADE COMMISSION
SUBCHAPTER F -- FAIR CREDIT REPORTING ACT
PART 681 -- IDENTITY THEFT RULES

Go to the CFR Archive Directory

16 CFR 681.1

§ 681.1 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.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Fed. R. App. P. 25(a), D.C. Cir. Rule 25(a), 31(b), on July 21, 2010, I electronically filed one true and correct copy of the foregoing Brief of Appellant Federal Trade Commission (including the Addendum) on the Clerk of the Court for the United States Court of Appeals for District of Columbia Circuit using the Court's Case Management/Electronic Case Files (CM/ECF) system, and will file eight paper copies of the foregoing document on the Clerk.

I also certify that, pursuant to D.C. Cir. Rule 25(c), I served the foregoing document by operation of the Court's CM/ECF system on all parties who have consented to electronic service as registered users of the Court's CM/ECF system as indicated on the Notice of Docket Activity, and by mail to anyone unable to accept electronic filing as indicated on the Notice of Docket Activity.

s/ Michael D. Bergman
MICHAEL D. BERGMAN
Attorney for Appellant
Federal Trade Commission