IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS 1211 Avenue of the Americas New York, New York 10036, Plaintiff, v. FEDERAL TRADE COMMISSION 600 Pennsylvania Avenue, N.W. Washington, D.C. 20580, Defendant.	)	Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW Plaintiff American Institute of Certified Public Accountants (the "AICPA"), by and through its undersigned attorneys, who files this Complaint for Declaratory and Injunctive Relief against Defendant Federal Trade Commission (the "FTC" or "Commission"), alleging as follows:

NATURE OF THE ACTION

1. The AICPA brings this action on behalf of its membership, nearly 350,000 certified public accountants, to declare unlawful and set aside the FTC's application of its Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") regulation, 72 Fed. Reg. 63,718 (Nov. 9, 2007) (the "Red Flags Rule"), to the AICPA's members.

2. The FTC is exceeding its statutory authority under FACTA by attempting to impose its Red Flags Rule on the AICPA's members, who are already subject to strict confidentiality and privacy requirements under the laws, rules of professional conduct, and other disciplinary rules of the States in which they are licensed to practice. This Court recently rejected the FTC's efforts to impermissibly exceed its Congressionally-granted powers by applying its Red Flags Rule to a similarly situated group of professionals: attorneys engaged in the practice of law. On October 30, 2009, in the related case of *American Bar Association v. FTC*, C.A. No. 09-1636 (RBW), this Court ruled in favor of the American Bar Association ("ABA") and its members, holding that the FTC's determination that attorneys engaged in the practice of law qualify as "creditors" who are subject to the Red Flags Rule exceeded the FTC's statutory mandate (the "October 30 Order").

3. The FTC's expressed intent to enforce the Red Flags Rule against accountants, including the AICPA's members, suffers from the same fatal flaw that this Court identified in its October 30 Order. Like the practice of law, the profession of public accountancy, including licensure, professional standards, and discipline of public accountants, is traditionally governed by the States and may be regulated by the Federal Government only when Congress has made its intention to do so "abundantly clear." *Cf. ABA v. FTC*, 430 F.3d 457 (D.C. Cir. 2005). This Circuit has already rejected the FTC's previous attempts to regulate professions that are traditionally regulated by the States in the absence of a clear statement by Congress granting the FTC such authority. Here, Congress provided no clear statement authorizing the FTC to apply its Red Flags Rule to the AICPA's members. Rather, the relevant provisions of FACTA only grant the FTC the authority to issue red flags regulations that apply to "financial institutions" and

"creditors," as defined in the Equal Credit Opportunity Act of 1974 ("ECOA"), 15 U.S.C. § 1681a(r)(5).

4. In the absence of any express statutory mandate, the FTC impermissibly seeks to impose its Red Flags Rule on the AICPA's members by arbitrarily and capriciously interpreting the term "creditors" to include accountants. However, courts have recognized that Congress did not intend for accountants' fees to fall within the definition of "credit" under ECOA. *See, e.g., Riethman v. Berry*, 287 F.3d 274, 278 (3rd Cir. 2002). Thus, this Court should enjoin the FTC's unlawful enforcement of the Red Flags Rule against the AICPA's members because the FTC is exceeding its statutory authority and, in doing so, is acting arbitrarily and capriciously.

PARTIES

5. Plaintiff AICPA is the largest voluntary professional association for certified public accountants in the United States, representing nearly 350,000 members. AICPA is a not-for-profit corporation organized under the laws of the District of Columbia, with its principal place of business at 1211 Avenue of the Americas, New York, New York 10036. The AICPA's membership spans all fifty States, the District of Columbia, and other jurisdictions and includes sole practitioners and members working for private firms, corporations, nonprofit organizations, and government agencies and in academia. The AICPA's mission is to provide members with the resources, information, and leadership that enable them to provide valuable services in the highest professional manner to benefit the public, employers, and clients.

6. The AICPA works with state bodies that regulate public accountants to develop standards for audits and other accounting services, provide educational guidance to its members, and create and grade the Uniform CPA Exam. The AICPA also works with state regulators in developing licensing requirements, which mandate that all public accountants, including the

AICPA's members, act with integrity, objectivity, and care and maintain client confidences. The AICPA also monitors and enforces compliance with the profession's audit, technical, and ethical standards. In addition, the AICPA works with the National Association of State Boards of Accountancy to develop and publish the Uniform Accountancy Act, which is a model accountancy bill designed to provide state legislatures with a uniform approach to the regulation of the accounting profession.

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

8. Defendant FTC is an independent agency of the United States with its business address at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The FTC is one of several entities that Congress authorized to enforce and promulgate regulations pursuant to the Fair Credit Reporting Act ("FCRA") and FACTA. The FTC has taken the position that it may enforce the Red Flags Rule, which the FTC and other federal agencies promulgated pursuant to FACTA, against accountants engaged in the professional practice of public accountancy.

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

JURISDICTION AND VENUE

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

11. The relief requested is authorized by: 5 U.S.C. § 702 (Administrative Procedure Act ("APA")); 28 U.S.C. § 1651 (All Writs Act); 28 U.S.C. § 2201 (Declaratory Judgment Act); and 28 U.S.C. § 2202 (further relief). The AICPA has a right to bring this action pursuant to the judicial review provision of the APA, 5 U.S.C. § 702, and the implied nonstatutory review procedure provided by 28 U.S.C. § 1331.

12. Venue lies in this district under 28 U.S.C. § 1391(e).

BACKGROUND AND FACTUAL ALLEGATIONS

Congress Enacts FACTA

13. In late 2003, Congress enacted FACTA. *See* Pub. L. No. 108-159, 117 Stat. 1952 (codified at 15 U.S.C. §§ 1681-1681x (Supp. I 2007)).

14. Through FACTA, Congress intended to improve the accuracy of credit transactions and curb identity theft. Among other things, FACTA entitles each American to receive one free annual credit report and enables consumers to place fraud alerts in their credit files.

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

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

> (A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary; [and]
>
> (B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers[.]
>
> * * *
>
> (2) CRITERIA.
>
> (A) IN GENERAL. In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft. . . .

FACTA § 114(e) (codified at 15 U.S.C. § 1681m(e)).

16. FACTA empowers the FTC to create and enforce identity theft guidelines against "creditor[s]," among others. 15 U.S.C. §§ 1681m(e), 1681s. In doing so, FACTA adopts the definitions of "credit" and "creditor" set forth in ECOA. 15 U.S.C. § 1681a(r)(5).

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

18. 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).

<u>The FTC Issues Its Proposed Red Flags Rule</u>

19. On July 18, 2006, the FTC and other federal executive agencies jointly issued a proposed rule to implement FACTA. *See* Identity Theft Red Flags and Address Discrepancies

Under the Fair and Accurate Credit Transactions Act of 2003, 71 Fed. Reg. 40,786 (July 18, 2006) (the "Proposed Red Flags Rule").

20. Among other things, the Proposed Red Flags Rule required "creditors" to create written identity theft prevention programs tailored specifically to their particular businesses.

21. The Proposed Red Flags Rule provided no indication that the FTC or its sister agencies believed that accountants engaged in the practice of public accountancy fell within the definition of "creditor."

The FTC Issues Its Final Red Flags Rule

22. On November 9, 2007, the FTC and other executive agencies jointly issued a final rule to implement FACTA. *See* 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).

23. In parts relevant to this litigation, the Red Flags Rule, like the Proposed Red Flags Rule, required "creditors" to develop written identity theft prevention programs, providing:

> **§ 681.2 Duties regarding the detection, prevention, and mitigation of identity theft.**
>
> (a) *Scope*. This section applies to financial institutions and creditors that are subject to administrative enforcement of the FCRA by the Federal Trade Commission pursuant to 15 U.S.C. 1681s(a)(1).
>
> (b) *Definitions*. For purposes of this section, and appendix A, the following definitions apply:
>
> (1) *Account* means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household or business purposes. Account includes:
>
> (i) An extension of credit, such as the purchase of property or services involving a deferred payment; and
>
> (ii) A deposit account.
>
> (2) The term *board of directors* includes:

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

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

(3) *Covered account* means:

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

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

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

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

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

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

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

(9) *Red Flag* means a pattern, practice, or specific activity that indicates the possible existence of identity theft.

(10) *Service provider* means a person that provides a service directly to the financial institution or creditor.

(c) *Periodic Identification of Covered Accounts.* Each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As a part of this determination, a financial institution or creditor must conduct a risk assessment to determine whether it offers or

maintains covered accounts described in paragraph (b)(3)(ii) of this section, taking into consideration:

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

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

(3) Its previous experiences with identity theft.

(d) *Establishment of an Identity Theft Prevention Program.*—

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

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

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

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

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

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

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

(1) Obtain approval of the initial written Program from either its board of directors or an appropriate committee of the board of directors;

(2) Involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the

oversight, development, implementation and administration of the Program;

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

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

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

Red Flags Rule, 72 Fed. Reg. at 63,772 (codified at 16 C.F.R. § 681.1 (2009)) (emphasis added).

24. The Red Flags Rule provided no indication that the FTC or its sister agencies believed that public accountants, including the AICPA's members, fall within the definition of "creditor" under ECOA.

25. Likewise, the FTC's public releases regarding the Red Flags Rule did not identify accountants or other professionals as being covered by that rule. For example, a June 2008 FTC Business Alert, which identified persons and entities that qualify as "creditors" and thus are required to comply with the Red Flags Rule, did not list accountants or other professionals. Rather, that Alert simply stated:

Who must comply with the Red Flags Rules?

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

* * *

A creditor is any entity that regularly extends, renews, or continues credit; any entity that regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who is involved in the decision to extend, renew, or continue credit. Accepting credit cards as a form of payment does not in and of itself make an entity a creditor. ***Creditors include finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies.*** Where non-profit and government entities defer payment for goods or services, they, too, are to be considered creditors. Most creditors, except for those regulated by the Federal bank regulatory agencies and

> the [National Credit Union Administration], come under the jurisdiction of the FTC.

FTC Business Alert, New 'Red Flag' Requirements for Financial Institutions and Creditors Will Help Fight Identity Theft (June 2008) (emphasis added).

26. The Red Flags Rule had an effective date of January 1, 2008 and a "mandatory compliance date" of November 1, 2008. Red Flags Rule, 72 Fed. Reg. at 63,718.

The FTC Issues Its Original Enforcement Policy

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

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

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

Id.

29. On October 22, 2008, the FTC also published on its Web site a two-page document entitled "FTC Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.2" (the "Enforcement Policy").

30. Neither the FTC's October 22, 2008 press release nor its Enforcement Policy indicated that the FTC believed that public accountants, including the AICPA's members, fell within the definition of "creditor" for purposes of the Red Flags Rule.

The FTC Issues Its Extended Enforcement Policy

31. On April 30, 2009, the FTC issued a press release informing the public that it was further extending the beginning enforcement date for the Red Flags Rule until August 1, 2009. *See* Press Release, FTC Will Grant Three-Month Delay of Enforcement of 'Red Flags' Rule Requiring Creditors and Financial Institutions to Adopt Identity Theft Prevention Programs (Apr. 30, 2009).

32. In the press release, the FTC's Chairman noted an "ongoing debate" concerning the scope of FACTA. *Id.*

33. On that same day, the FTC published on its Web site a three-page document entitled "FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.1" (the "Extended Enforcement Policy").

34. In its Extended Enforcement Policy, for the first time, the FTC publicly announced its position that "health care providers, attorneys and other professionals" are "creditors" under ECOA and, thus, are subject to the Red Flags Rule. However, the FTC did not identify any of the groups of "other professionals" that it asserted were subject to that rule.

35. In a footnote to the Extended Enforcement Policy, the FTC explained the basis for its position that certain "professionals" qualify as "creditors" under both ECOA and FACTA:

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

Id. (emphasis added).

The FTC Announces that the Red Flags Rule Applies to Accountants

36. Three days before the Extended Enforcement Policy was scheduled to take effect, the FTC issued a press release announcing that it was further delaying its enforcement of the Red Flags Rule until November 1, 2009. *See* Press Release, FTC Announces Expanded Business Education Campaign on 'Red Flags' Rule (July 29, 2009) ("July 29 Press Release").

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

38. The July 29 Press Release explained that many covered entities, particularly small businesses and entities with a low risk of identity theft, remained uncertain about their obligations under the Red Flags Rule. The FTC purported to respond to those concerns by citing a recently-released agency document entitled "The Red Flags Rule: Frequently Asked Questions" ("FAQs"). In its FAQs, for the first time, the FTC asserted that ***accountants***, including the AICPA's members, "***may***" qualify as "creditors" under ECOA and, accordingly, may be subject to the Red Flags Rule. FAQs ¶ B.1 ("Examples of groups that ***may*** fall within this definition [of 'creditor'] are utilities companies, health care providers, lawyers, ***accountants***, and other professionals.") (emphasis added).

The FTC Violated the United States Constitution and the APA by Extending the Red Flags Rule to Cover Accountants

39. The FTC exceeded its statutory authority and violated the United States Constitution and the APA by extending its Red Flags Rule to regulate accountants, including the AICPA's members.

40. First, the FTC has overstepped the Constitutional limitations on its authority because the power to license, discipline, and establish professional standards for accountants has traditionally resided with the States, rather than with the Federal Government, and Congress did not provide a clear statement in FACTA expressly granting such powers to the FTC. FACTA is a typical consumer protection statute. Thus, Congress's authority to enact FACTA derives from the Commerce Clause and is subject to the standard limitations on Congress's power to regulate interstate commerce, including the Tenth Amendment and the law of this Circuit.

41. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The United States Court of Appeals for the District of Columbia Circuit has held that a federal law "may not be interpreted to reach into areas of State sovereignty unless the language of the federal law compels the intrusion." *ABA v. FTC*, 430 F.3d at 471 (citing *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999)). The D.C. Circuit has further held that, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *ABA*, 430 F.3d at 471-72 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)).

42. The States have the power to govern the profession of public accounting, including licensure, professional standards, and discipline of public accountants, absent a clear

Congressional statement in the language of a statute providing otherwise. In those limited instances in which Congress has seen fit to grant federal agencies and self-regulatory organizations the specific power to regulate public accountants in some manner, it has done so only through statutes providing a clear statement of Congressional intent. Nowhere in FACTA or ECOA has Congress expressed such a clear intent to regulate the accounting profession. Accordingly, as in the case of the legal profession, the FTC has overstepped its statutory authority and disturbed this "constitutional balance" by seeking to regulate the practice of accounting despite the absence of any Congressionally-granted authority to do so.

43. Second, like attorneys, accountants are not "creditors" and do not extend "credit," as ECOA defines those terms. In order for an entity or individual to qualify as a "creditor" under ECOA, it must "***regularly***" extend, renew, or continue credit; or "***regularly***" arrange for the extension, renewal, or continuation of credit; or be any assignee of an original creditor who participates in the decision to extend, renew, or continue credit. 15 U.S.C. § 1691a(e) (emphasis added). In addition, ECOA defines "credit" as "the ***right*** granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." 15 U.S.C. § 1691a(d) (emphasis added).

44. Accountants do not qualify as "creditors" under ECOA because they do not "regularly" extend a "right" to their customers to defer payment of their fees. Accountants do not "regularly extend" credit merely by providing services to clients in advance of billing for those services. Similarly, the fact that an accountant's client may not timely or completely pay its bill and that the accountant may voluntarily choose to delay collection and to continue to perform work for that client does not transform the accountant or his or her firm into "creditors" who "regularly extend credit." Nor do accountants' compensation structures grant clients the

"right" to defer payment in the same way that creditors provide "credit" to debtors. Indeed, the Third Circuit recently recognized that accountants' fees do not fall within the definition of "credit" under ECOA. *See Riethman*, 287 F.3d at 278 (stating that, "[i]n view of the statutory purpose underlying the ECOA, it seems implausible that Congress intended to cover not only banks and other financial institutions but also all professions" and rejecting plaintiffs' broad interpretation of "credit" under ECOA, which "would embrace doctors' fees, dentists' fees, ***accountants' fees***, psychologists' fees, and virtually all other professional fees") (emphasis added).

45. The FTC's interpretation of the term "creditor" under ECOA – and thus FACTA – to include accountants engaged in the practice of accounting is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA.

The FTC's Prosecutorial Discretion to Enforce the Red Flags Rule Does Not Cure the Constitutional Defects

46. The FTC's assertion that it may exercise "prosecutorial discretion" with respect to enforcing its Red Flags Rule does not cure the fact that the agency has exceeded its statutory authority under FACTA.

47. In its July 29 Press Release, the FTC explained that it could "seek both monetary civil penalties and injunctive relief for violations of the Red Flags Rule. Where the complaint seeks civil penalties, the U.S. Department of Justice typically files the lawsuit in federal court, on behalf of the FTC. Currently, the law sets $3,500 as the maximum civil penalty per violation. Each instance in which the company has violated the Rule is a separate violation." FAQs ¶ E.4.

48. In an effort to ameliorate concerns of many covered entities, including small businesses and entities with a low risk of identity theft, regarding their obligations under the Red

Flags Rule, the FTC's July 29 Press Release explained that it has prosecutorial discretion regarding when to enforce that rule:

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

July 29 Press Release.

49. Likewise, the FTC's FAQs emphasized its "prosecutorial discretion":

> **I'm a creditor with consumer or household accounts, but I think it's very unlikely that an identity thief will try to defraud me. Do I still have to prepare an Identity Theft Prevention Program?**
>
> The Red Flags Rule requires all creditors with covered accounts to prepare an Identity Theft Prevention Program ("Program"). At the same time, the Commission staff recognizes that your risk of identity theft may be so low that, ***as a matter of prosecutorial discretion,*** Commission staff would be unlikely to recommend bringing a law enforcement action under the following circumstances:
>
> - You know your clients individually. For example, some medical practices and law firms are familiar with everyone who walks into the office. In such circumstances, the likelihood that an identity thief can defraud a business by impersonating someone else is extremely low.
>
> - You provide services to customers in or around their home, such as by operating a lawn care or a home cleaning business. For these types of businesses, the risk of identity theft is extremely low because identity thieves generally do not want people to know where they live.
>
> - You are involved in a type of business where identity theft is rare. For example, if there are no reports in the news, trade press, or among people in your line of business about identity theft and your business itself has not experienced incidents of identity theft, it is unlikely that identity thieves are targeting your sector.
>
> Of course, from time to time you need to consider whether your identity theft risk has changed, warranting a different approach with respect to the Rule.

FAQs ¶ E.3 (emphasis added).

50. The FTC's July 29 Press Release and its FAQs, which are couched in vague and conditional language, have no legal or binding effect on the FTC or its staff and are essentially meaningless. In addition, the prosecutorial discretion exercised by the FTC's staff would not bind state government agencies that are authorized to enforce FACTA, *see* 15 U.S.C. § 1681s(c), nor would it preclude private parties from arguing that FACTA and the Red Flags Rule should be interpreted as creating an implied right of action. *See* FAQs ¶ E.1 (asserting that, under FACTA, "there is no private right of action. Only certain federal and state government agencies can enforce the Rule, but consumers can file a complaint with the FTC about a company's Program.") (footnote omitted). Thus, the FTC's assertion that it may exercise prosecutorial discretion in applying FACTA does not cure the FTC's unauthorized effort to extend its Red Flags Rule to cover accountants, including the AICPA's members.

This Court Rejects the FTC's Attempt to Apply the Red Flags Rule to Attorneys and the FTC Further Delays Enforcing that Rule

51. On August 27, 2009, the ABA filed a complaint in this Court alleging that the FTC exceeded its statutory authority (Count I) and acted arbitrarily and capriciously (Count II) in extending its Red Flags Rule to cover attorneys engaged in the practice of law. The ABA also seeks a declaratory judgment clarifying attorneys' rights and duties under the Red Flags Rule (Count III).

52. On September 23, 2009, the ABA filed a Motion for Partial Summary Judgment on Count I of its Complaint (the "ABA's Motion"), arguing that the FTC violated 5 U.S.C. § 706(2)(C) by exceeding its statutory authority under FACTA in applying the Red Flags Rule to attorneys engaged in the practice of law.

53. On October 29, 2009, this Court held a hearing on the ABA's Motion and, on October 30, 2009, entered an Order granting that Motion and enjoining the FTC from enforcing its Red Flags Rule against attorneys engaged in the practice of law.

54. On October 30, 2009, the FTC issued a press release announcing that, at the request of Congress, it would delay enforcement of the Red Flags Rule until June 1, 2010. *See* Press Release, FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule (Oct. 30, 2009).

55. This Court's analysis in determining that the FTC exceeded its statutory authority with regard to attorneys engaged in the practice of law should apply with equal force to members of the AICPA, who, like attorneys, are traditionally regulated by the States. As with lawyers, the FTC's effort to regulate the practice of accounting absent a clear statement by Congress granting the FTC that power disrupts the balance of federalism. In addition, like attorneys, accountants do not "regularly" extend to clients the "right" to make deferred payments for services rendered and thus do not qualify as "creditors" under ECOA and FACTA.

The FTC's Red Flags Rule and Extended Enforcement Policy Have Caused and Will Continue to Cause Irreparable Harm to the AICPA's Members

56. The FTC's Red Flags Rule and its Extended Enforcement Policy, which constitute "final agency action" within the meaning of 5 U.S.C. § 704, have caused and will continue to cause irreparable harm to the AICPA's members.

57. The AICPA's members are "adversely affected or aggrieved" within the meaning of 5 U.S.C. § 702 by the requirements set forth in the Red Flags Rule, as applied to the AICPA's members in the Extended Enforcement Policy and the FAQs.

58. Compliance with the Red Flags Rule imposes significant burdens upon the AICPA's members, particularly sole practitioners and those practicing in small accounting firms, who comprise the majority of public accountants in the United States.

59. Compliance with the Red Flags Rule in the first instance requires development of a plan to detect "red flags." These plans must be developed on an individualized basis, depending on the business practice and operations of each public accountant. Once a plan is developed, it must be implemented and maintained. "Red flags" must be detected, and appropriate responsive action must be taken. This is likely to create a substantial drain on the financial resources of public accountants, particularly those whose support systems are limited and are already devoted to serving their clients. The time required to comply with the Red Flags Rule also will detract from the attention that public accountants are able to give to their clients' matters.

60. The requirements imposed by the Red Flags Rule, as applied to the AICPA's members by the Extended Enforcement Policy, are contrary to law. Included within the AICPA's membership are a significant number of public accountants who will be required to comply with the Red Flags Rule absent timely judicial relief. Many of the AICPA's members have already begun to dedicate significant resources to prepare for this eventuality. Because of the Federal Government's sovereign immunity, the AICPA's members will be unable to obtain money damages from the FTC in the event that the FTC's interpretation of the Red Flags Rule is found to be unlawful. As such, the financial injuries that the AICPA's members have suffered and will continue to suffer as a result of the Red Flags Rule cannot be remedied at law and are irreparable.

CAUSES OF ACTION

COUNT I

The FTC's Extended Enforcement Policy and FAQs Violate the Clear Statement Doctrine and Exceed the FTC's Statutory Authority

61. The AICPA repeats and realleges its allegations in paragraphs 1-60 as though set forth fully herein.

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

63. By applying the Red Flags Rule to accountants engaged in the practice of public accountancy, including the AICPA's members, the FTC has exceeded its statutory mandate from Congress.

64. Specifically, by purporting to regulate accountants engaged in the practice of public accountancy, the FTC has intruded upon an area of traditional state regulation.

65. In enacting FACTA, Congress did not directly and plainly grant the FTC the authority to regulate public accountants, including the AICPA's members.

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

67. The Court therefore should set aside the FTC's FAQs and its Extended Enforcement Policy to the extent the FTC purports to apply the Red Flags Rule to accountants engaged in the practice of public accountancy, including the AICPA's members.

COUNT II

Application of the Red Flags Rule to Members of the AICPA Engaged in the Practice of Public Accountancy is Arbitrary, Capricious, and Contrary to Law

68. The AICPA repeats and realleges its allegations in paragraphs 1-60 above as though set forth fully herein.

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

70. The FTC has acted arbitrarily, capriciously, and contrary to law by failing to articulate, among other things, a rational connection between the practice of public accountancy and identity theft; why it considers the manner in which public accountants bill their clients to be an extension of credit under FACTA or ECOA; or any legally supportable basis for applying the Red Flags Rule to accountants engaged in the practice of public accountancy, including the AICPA's members.

71. The FTC abused its discretion and acted arbitrarily, capriciously, and otherwise not in accordance with law in applying the Red Flags Rule to accountants engaged in the practice of public accountancy, including the AICPA's members. Thus, the FTC's application of the Red Flags Rule to public accountants must be set aside.

COUNT III

The AICPA's Members Are Entitled to a Judgment Declaring Their Legal Rights and Duties Under the Red Flags Rule

72. The AICPA repeats and realleges its allegations in paragraphs 1-60 as though set forth fully herein.

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

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

REQUEST FOR RELIEF

WHEREFORE, the AICPA respectfully requests that this Court:

A. Enter judgment in the AICPA's favor;

B. Declare the application of the Red Flags Rule to accountants engaged in the practice of public accountancy, including the AICPA's members, unlawful and void;

C. Permanently enjoin the FTC, its agents, servants, employees, successors, and assigns from implementing the Red Flags Rule in any manner that includes accountants engaged in the practice of public accountancy;

D. Award the AICPA its costs and reasonable attorneys' fees incurred in this action pursuant to 28 U.S.C. § 2412; and

E. Grant the AICPA such other relief as the Court deems just and proper.

Dated: November 10, 2009

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
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By _____

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