[ORAL ARGUMENT NOT YET SCHEDULED]

**No. 10-5057**

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

AMERICAN BAR ASSOCIATION,

*Plaintiff-Appellee*,

v.

FEDERAL TRADE COMMISSION,

*Defendant-Appellant*.

On Appeal From The United States District Court
For The District Of Columbia
No.1:09-cv-01636-RBW

# BRIEF OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

All parties and *amici* appearing before the District Court and this Court are listed in the Brief for Appellee, the American Bar Association ("ABA"). The American Institute of Certified Public Accountants ("AICPA"), as *amicus curiae*, hereby submits this brief in support of Appellee ABA.

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* certifies that it is a non-profit voluntary professional organization whose membership consists of certified public accountants.

B. Rulings Under Review

Reference to the ruling at issue appears in the Brief for Appellee ABA.

C. Related Cases

This case has not previously been before this Court. There are no related cases pending in this Court; however, *amicus curiae* is aware of two additional cases challenging the Federal Trade Commission's regulatory enforcement policy at issue in this appeal. The first case involves *amicus curiae*. *See Am. Inst. of Certified Pub. Accountants v. FTC*, No. 1:09-cv-02116-RBW (D.D.C. filed Nov. 10, 2009). The second has been filed by the American Medical Association and related industry groups. *See Am. Med. Ass'n v. FTC*, No. 1:10-cv-0843-RBW

(D.D.C. filed May 21, 2010). Both cases have been administratively closed and held in abeyance pending this Court's ruling in this case.

*/s/* Daniel E. Loeb
Daniel E. Loeb

## CORPORATE DISCLOSURE STATEMENT

The American Institute of Certified Public Accountants ("AICPA") is a national voluntary professional organization of certified public accountants. The AICPA is a non-profit corporation having no parent company. No publicly held company owns a 10 percent or greater ownership interest in the AICPA.

*/s/* Daniel E. Loeb
Daniel E. Loeb

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# GLOSSARY

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|---|---|
| ABA | The American Bar Association |
| AICPA | The American Institute of Certified Public Accountants |
| CPA | Certified Public Accountant |
| FACT Act | Fair and Accurate Credit Transactions Act of 2003 |
| FTC | Federal Trade Commission |
| NASBA | National Association of State Boards of Accountancy |

## STATUTES AND REGULATIONS

All of the pertinent statutes and regulations referenced in this brief are included in the Brief of the Federal Trade Commission and the Brief of the American Bar Association.

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

*Amicus curiae*, the American Institute of Certified Public Accountants ("AICPA"), is the largest voluntary professional association for certified public accountants in the United States, representing nearly 350,000 members. The AICPA's mission is to provide members with the resources, information, and leadership needed to provide accounting services in the highest professional manner to benefit the public, employers, and clients. The AICPA works with state bodies regulating public accountants to develop standards for audits and other accounting services, provides educational guidance to its members, and creates and grades the Uniform Certified Public Accountant ("CPA") Exam.

The AICPA works with the National Association of State Boards of Accountancy ("NASBA"), which in turn works with state regulators in developing ethical and professional standards to mandate that all public accountants, including the AICPA's members, act with integrity, objectivity, and due care and maintain client confidences. These professional and ethical standards are thereafter accepted by the state boards of public accountancy that directly license and regulate public accountants. The AICPA also monitors and enforces compliance with the profession's audit, technical, and ethical standards.

The AICPA has a direct interest in the outcome of this litigation. The AICPA's members, like attorneys, are engaged in a professional practice. Also, like attorneys, certified public accountants typically engage in invoiced billing of their clients, allowing their clients to pay for such services after they are rendered. According to the Federal Trade Commission ("FTC"), because of these billing practices, accountants, like attorneys, are "creditors" under the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), Pub. L. No. 108-159, 117 Stat. 1952, and are therefore subject to the FTC's "Red Flags Rule."

The AICPA fully supports the positions taken by the American Bar Association ("ABA") in its principal brief filed in this case ("ABA Br.") and opposes the FTC's arguments set forth in its principal brief ("FTC Br."). For the reasons already explained by the ABA, professionals such as attorneys and accountants are not "creditor[s]" merely because they permit payment after professional services have been rendered. The AICPA submits this brief of *amicus curiae* in order to further explain that Congress could not have intended the regulation of professionals such as attorneys and accountants under the FACT Act.

Similar to the ABA, the AICPA filed a complaint challenging the FTC's application of its Red Flags Rule authority to accountants. That litigation, which concerns issues virtually identical to those before the Court in this case, is styled *The American Institute of Certified Public Accountants v. FTC*, No.1:09-cv-02116-RBW (D.D.C. filed Nov. 10, 2009), and has been administratively closed and held in abeyance pending the outcome of this appeal.[2] If the FTC's position is adopted by this Court, the AICPA is concerned that such a ruling would have a direct and negative impact upon the AICPA's members, as well as the AICPA's pending litigation. All parties have consented to the filing of this brief, and the filing therefore is authorized under Fed. R. App. P. 29(a).

## SUMMARY OF ARGUMENT

Application of the Red Flags Rule to professionals is contrary to Congress's intent under the FACT Act. Professionals do not have "customers" and do not maintain customer "accounts" in the sense that Congress intended in enacting the FACT Act.[3] Consequently, the concerns motivating the Red Flags Rule – to limit and mitigate the risk of fraudulent actors opening new "accounts" and stealing funds

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[2] In the litigation, the AICPA has argued, *inter alia*, that, like the profession of law, the profession of public accountancy is traditionally governed by the states. Because of this traditional state role, as with attorneys, the FTC may regulate public accountants only when Congress grants such authority by means of an unmistakably clear statement to do so. Congress has not made its intent to regulate the profession of public accountancy unmistakably clear in the FACT Act. Consequently, the FTC's attempt to apply the Red Flags Rule to public accountants is unlawful and exceeds the FTC's statutory authority.

[3] The "customers" intended to be protected by Congress under the FACT Act are ordinarily strangers to the creditor or financial institution, in that these "customers" may utilize services or draw upon accounts without any personal interaction with the creditor or financial institution, thereby creating a risk of identity theft. Conversely, the nature of the professional services normally offered by attorneys and accountants to clients requires direct, personal interaction with such clients.

from some existing "account" – are foreign to these professionals. The fact that professionals such as lawyers and accountants submit invoices after services have been rendered does not make these professionals "creditor[s]."

## ARGUMENT

### I. IN ENACTING THE FACT ACT, CONGRESS NEVER INTENDED THE REGULATION OF PROFESSIONALS SUCH AS LAWYERS AND ACCOUNTANTS

In the FACT Act, Congress defined "identity theft" as "a fraud committed using the identifying information of another person, subject to such further definition as the [FTC] may prescribe by regulation." 15 U.S.C. § 1681a(q)(3). Section 114 of the legislation clarified that the FTC must issue regulations regarding "identity theft with respect to *account holders* at, or *customers of*, [creditors and financial institutions]." 15 U.S.C. § 1681m(e)(1)(A) (emphasis added); *see also* 15 U.S.C. § 1681m(e)(1)(B) (The FTC shall "prescribe regulations requiring each *financial institution* and each *creditor* to establish reasonable policies and procedures for implementing the guidelines . . . to identify possible risk to account holders or customers or to the safety and soundness of the institution or customers.").

The Preamble to the FTC's Red Flags Rule thus states that the purpose of the Rule is to require financial institutions and creditors to develop and implement policies to "detect, prevent, and mitigate identity theft *in connection with the* *opening of certain accounts or certain existing accounts*." *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) (emphasis added); *see also* 16 C.F.R. § 681.1(b)(8) (referencing 16 C.F.R. § 603.2(a)) (defining "identity theft" as "a fraud committed or attempted using the identifying information of another person without authority").

"Identity theft" prevention therefore means something different from data protection. It concerns preventing the fraudulent *opening of an account* and, additionally, preventing identity thieves from *withdrawing funds* from an *existing account* through false pretenses. Confirming this understanding, the FTC's "How-To Guide For Business" describes the purpose of the Red Flags Rule as follows:

> The Red Flags Rule picks up where data security leaves off. It seeks to prevent identity theft by ensuring that your business or organization is on the lookout for the signs that a crook is using someone else's information, typically to get products or services from you with no intention of paying. That's why it's important to fight the battle against identity theft on two fronts: First, by implementing data security practices that make it harder for crooks to get access to the personal information they use to open or access accounts, and second, by paying attention to the red flags that suggest fraud may be afoot.

FTC, Fighting Fraud with the Red Flags Rule: A How-To Guide for Business 6 (Mar. 2009), http://www.ftc.gov/bcp/edu/pubs/business/idtheft/bus23.pdf.

The FTC cannot reconcile this definition of "Red Flags" with its application of the Red Flags Rule to professionals such as lawyers and accountants. Indeed, the FTC's approach begs the question – how exactly does one steal professional legal, accounting or auditing services?

- Identity thieves do not open new "accounts" with lawyers and accountants using stolen identities. Commencing a relationship under false pretenses with a lawyer or accountant likely would be the *last thing* that an identity thief would want to do. Establishing an attorney-client or accountant-client relationship under a false identity would not provide the identity thief with any possibility for pecuniary or material gain, as would the opening of an American Express account. Rather, it would only risk exposure of the fraud.

- Identity thieves do not "interfere" with already existing attorney-client and accountant-client relationships by fraudulently pretending to be clients. Lawyers and public accountants have *relationships* with their clients and are bound by professional duties of confidentiality to those clients.[4] Any identity thief surely would recognize that he may be exposing his fraud by meeting with those professionals *with whom the victim already has an existing relationship* and with whom the victim has

[4] *Compare* Model Rules of Prof'l Conduct R. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.") *with* AICPA Code of Prof'l Conduct R. 301 ("A member in public practice shall not disclose any confidential client information without the specific consent of the client.").

shared confidences. In this respect, attorneys and accountants must actually have knowledge regarding the identity of their clients in order competently to render professional services.[5] Moreover, as a practical matter, the identity thief intended to be thwarted by this regulation would gain *nothing* by pretending to be the victim/client.

- Finally, clients do not maintain "accounts" with their lawyers and accountants. An attorney-client or accountant-client relationship is not comparable in any respect to a bank or department store *account*, or even an account for cable television or utility services, where an identity thief may reap some pecuniary or material gain by pretending to be the account holder and then making a withdrawal or purchase on the account, or otherwise utilizing the services provided under that account.

As the district court correctly pointed out, the "targeted population" of the FACT Act, account holders and customers, "does not correlate with the regulation

[5] *Compare* Model Rules of Prof'l Conduct R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.") *with* AICPA Principles of Prof'l Conduct § 56 – art. V ("Due care requires a member to discharge professional responsibilities with competence and diligence. . . . Diligence imposes the responsibility to render services promptly and carefully, to be thorough, and to observe applicable technical and ethical standards.") *and* AICPA Code of Prof'l Conduct R. 201 A (requiring that members "[u]ndertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence").

of attorneys." *ABA v. FTC*, 671 F. Supp. 2d 64, 75 (D.D.C. 2009). The district court plainly was correct in noting that identity theft in the context of the profession of law is a "theoretical problem." *Id.* at 85. This same conclusion applies with respect to other professionals, including accountants.

The FACT Act's language underscores that Congress could not possibly have intended that the FTC regulate "Red Flags" in the context of professional relationships. *See generally id.* at 74-76; ABA Br. at 32. Through the FACT Act, Congress sought further to regulate *credit transactions* – hence the name of the legislation, the "Fair and Accurate *Credit Transactions* Act of 2003." Congress thus provided the FTC with the authority to regulate "financial institutions" and "creditors" with the intent to protect from fraud existing and future credit "accounts." As explained in detail in the ABA's principal brief and in the district court's decision below, professionals such as attorneys and accountants manifestly do not engage in credit transactions or offer credit accounts. *See* ABA Br. at 32; *ABA v. FTC*, 671 F. Supp. 2d at 74 (concluding that the FACT Act was not "created as a means of eliminating all types of identity theft, but rather to eliminate a specific kind of identity theft: identity theft in the credit industry").

## II. THE BILLING PRACTICES OF PROFESSIONALS DO NOT MAKE THEM "CREDITORS" FOR PURPOSES OF REGULATION UNDER THE RED FLAGS RULE

The FTC has maintained in its *post-regulatory* pronouncements (i.e., after it had finalized and issued its Red Flags Rule) that attorneys and other professionals, such as accountants, are "creditor[s]" who extend "credit" for purposes of the FACT Act because they may bill their clients for professional services after such services have been rendered and allow these clients to pay for such services on a monthly basis.

Like attorneys, accountants are not "creditor[s]" who extend "credit." The AICPA will not burden this Court in re-arguing what has already been made clear, both by the ABA, ABA Br. at 41-46, and the district court. *See ABA v. FTC*, 671 F. Supp. 2d at 80-82 (concluding that "[s]imply because a lawyer or law firm fails to demand payment immediately upon rendering a service does not make that lawyer or law firm a creditor or amount to the granting of a 'right' to defer payment"). Rather, the AICPA here points out that the FTC's position that deferred billing *ipso facto* makes someone a "creditor" who issues "credit" for purposes of coverage under the Red Flags Rule is arbitrary and illogical. The FTC's position, if allowed to stand, would give the FTC boundless authority to regulate a universe of businesses and professionals that Congress never intended to be regulated under the FACT Act.

The FTC appears to contend that *any* gap in time between the rendering of professional services and the submission of an invoice makes an individual or entity a "creditor" under the FACT Act. FTC Br. at 25-28. According to the FTC, "the definition of 'creditor' is broad, and includes businesses or organizations that regularly provide goods or services first and allow consumers to pay later." FTC Br. at 12 n.15 (quoting The Red Flags Rule: Frequently Asked Questions ¶ B.1) ("FAQs"). To cite but one example, the FTC's logic necessarily leads to the conclusion that restaurants are also "creditor[s]" because they present a bill after the food has been served and consumed. Yet restaurants which perform services and later bill for such services clearly are not "creditor[s]" for purposes of the Red Flags Rule.

Perhaps recognizing the folly of imposing the Red Flags Rule on restaurants, the FTC assigns significance to the fact that professionals typically bill monthly, and thus "later" than, for example, restaurants. The FTC apparently contends that it has regulatory authority in the context of *monthly* billing arrangements because, in a monthly billing arrangement, payments will not be made "substantially contemporaneously with the services." FTC Br. at 24; *see also ABA v. FTC*, 671 F. Supp. 2d at 84-85 (observing that the FTC's "monthly time period seems to have been plucked out of thin air" and questioning "what would stop the [FTC] from arbitrarily concluding in the future that another period of time, like bi-weekly or weekly, should be employed" as the measure of deferred billing and payment).

This distinction is arbitrary and overlooks the nature of compensation for professional services. The rendering of professional legal and accounting services cannot be so easily parsed. Professional services – for example, a large litigation involving expert accounting services or a financial audit of a sizable business – can last for months, or even years. Monthly invoicing for services rendered over the previous month thus does not necessarily or even typically represent the "end" of the professional task or relationship, but merely a convenient point in time for both the professional and the client to request and remit payment for such tasks before the entirety of the scope of professional services has been completed. *See ABA v. FTC*, 671 F. Supp. 2d at 84 (noting that the FTC's approach "fails to take into account the nature of the relationship that exists between attorneys and their clients" in that such relationships may "exist over an extended period of time, during which services may be provided on a continuous basis that [could] last for days, weeks and even months or longer"). Daily or weekly invoicing would serve only to inconvenience all parties involved. Viewed in this context, the clients of both attorneys and public accountants are, in fact, being billed "substantially contemporaneously with the services."

In short, professionals who bill their clients monthly after services are rendered are not "creditor[s]," nor do they otherwise issue "credit" to these clients. As the district court correctly observed, these concepts "do not equate to concepts associated with the legal profession" or, for that matter, other professions, including public accountancy. *Id.* at 75-76.

## CONCLUSION

For the above reasons and those set forth in the brief of ABA in this case, the decision below should be affirmed.

Date: September 7, 2010

Respectfully submitted,

*/s/* Daniel E. Loeb

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), Cir. R. 32(a), and Fed. R. App. P. 29(d), the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Fed. R. of App. P. 32(a)(7)(B)(iii), this brief contains 2,696 words. This certificate was prepared in reliance upon the word-count function of the word processing system (Microsoft Word 2007) used to prepare this brief.

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and that the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

*/s/* Daniel E. Loeb
Daniel E. Loeb

## CERTIFICATE OF COMPLIANCE WITH D.C. CIRCUIT RULE 29(d)

Pursuant to Cir. R. 29(d), the undersigned certifies that counsel for the AICPA has conferred with counsel for other *amici curiae*, and has determined that submission of a single brief for all *amici* is not practicable in this case. In particular, the other *amici* plan on addressing issues unique to the professions of law and medicine. All parties have agreed that separate *amicus curiae* briefs are required in this case due to the disparate nature of the interests represented and the unique nature of each *amicus* argument.

*/s/* Daniel E. Loeb
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## CERTIFICATE OF SERVICE

In accordance with Fed. R. of App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that eight copies of the foregoing Brief of American Institute of Certified Public Accountants as *Amicus Curiae* in Support of Plaintiff-Appellee were hand-delivered and one copy was filed using the Court's Electronic Case Filing System this 7th day of September 2010 and that I have effected service upon counsel listed in the Service Preference Report via email through the Court's Electronic Case filing system.

*/s/* Daniel E. Loeb
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