IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS,

Plaintiff,

v.

FEDERAL TRADE COMMISSION,

Defendant.

Civil Action No. 09-2116 (RBW)

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

Daniel E. Loeb (D.C. Bar # 386098)
Bernard A. Nigro, Jr. (D.C. Bar #412357)
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
1001 Pennsylvania Avenue, N.W., Suite 800
Washington, DC 20004
Telephone: 202-639-7000
Fax: 202-639-7003
daniel.loeb@friedfrank.com
barry.nigro@friedfrank.com

Of Counsel:
Richard I. Miller
General Counsel
The American Institute of Certified
Public Accountants
1211 Avenue of the Americas
New York, NY 10036-8775
Telephone: 212-596-6200
Fax: 212-596-6213
rmiller@aicpa.org

Counsel for
The American Institute of Certified Public Accountants

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

GLOSSARY vi

PRELIMINARY STATEMENT 1

STATUTORY AND REGULATORY BACKGROUND 2

The Fair And Accurate Credit Transactions Act Of 2003 2

The Proposed Red Flags Rule 3

The Final Red Flags Rule 4

The FTC Delays Enforcing Its Red Flags Rule And Issues Its Original Enforcement Policy 5

The FTC Again Delays Enforcing Its Red Flags Rule And Issues Its Extended Enforcement Policy 6

For The First Time, The FTC Expressly Announces Its Position That Its Red Flags Rule Applies To Accountants 7

This Court Rejects The FTC's Attempts To Apply The Red Flags Rule To Attorneys, And The FTC Further Delays Enforcing The Red Flags Rule 7

PROCEDURAL BACKGROUND 8

STANDARD OF REVIEW 9

ARGUMENT 12

I. Congress Did Not Provide Any "Unmistakably Clear Statement" In FACTA Authorizing The FTC To Apply Its Red Flags Rule To CPAs 12

II. Even If An Unmistakably Clear Congressional Statement Were Not Required, A *Chevron* Analysis Demonstrates That The FTC Exceeded Its Statutory Authority By Applying Its Red Flags Rule To CPAs 15

A. The Language, Purpose, And Legislative History Of FACTA And ECOA Demonstrate That Congress Did Not Intend To Authorize The FTC To Regulate CPAs 16

B. CPAs Are Not "Creditor[s]" Under FACTA Because They Do Not "Regularly Extend" "Credit" Or Grant Clients The "Right" To Defer Payment Of Their Debts 18

CONCLUSION 21

TABLE OF AUTHORITIES

PAGE

CASES

ABA v. FTC,
Civ. Action No. 09-1636, 2009 WL 4289505 (D.D.C. Dec. 1, 2009) .... *passim*

ABA v. FTC,
430 F.3d 457 (D.C. Cir. 2005) 10, 11, 12-13, 14

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 9

Burke v. Gould,
286 F.3d 513 (D.C. Cir. 2002) 9

Carcieri v. Salazar,
129 S. Ct. 1058 (2009) 16

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 10

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984) 10, 11

Christensen v. Harris County,
529 U.S. 576 (2000) 11

City of Abilene v. FCC,
164 F.3d 49 (D.C. Cir. 1999) 12

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 11, 16

Gregory v. Ashcroft,
501 U.S. 452 (1991) 12

Holcomb v. Powell,
433 F.3d 889 (D.C. Cir. 2006) 9

Leis v. Flynt,
439 U.S. 438 (1979) 14

Mick's at Penn. Ave., Inc. v. BOD, Inc.,
389 F.3d 1284 (D.C. Cir. 2004) 21

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 12

Nat'l Cable & Telecomms. Ass'n v. FCC,
567 F.3d 659 (D.C. Cir. 2009) 16

NY State Bar Ass'n v. FTC,
Civ. Action No. 02-810, 2004 WL 964173 (D.D.C. Apr. 30, 2004) 10

NY State Bar Ass'n v. FTC,
276 F. Supp. 2d 110, (D.D.C. 2003) 10, 11, 13, 14

Peel v. Att'y Registration & Disciplinary Comm'n of Ill.,
496 U.S. 91 (1990) 15

Public Citizen Health Research Group v. FDA,
185 F.3d 898 (D.C. Cir. 1999) 9

Riethman v. Berry,
287 F.3d 274 (3d Cir. 2002) 18

Riethman v. Berry,
113 F. Supp. 2d 765 (E.D. Pa. 2000) 19-20

Shaumyan v. Sidetex Co.,
900 F.2d 16 (2d Cir. 1990) 20

Shays v. FEC,
414 F.3d 76 (D.C. Cir. 2005) 11

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 11

United States v. Mead Corp.,
533 U.S. 218 (2001) 11

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 13

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989) 12-13

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const., amend. X 12

Administrative Procedure Act,
5 U.S.C. § 706(2)(A) 11
5 U.S.C. § 706(2)(C) 10

Fair and Accurate Credit Transactions Act of 2003,
Pub. L. No. 108-159, 117 Stat. 1952 2

15 U.S.C. § 1681a(r)(5) 3, 18-19

15 U.S.C. § 1681m(e)(1)(A) 16

15 U.S.C. § 1681m(e)(1)(B) 3

15 U.S.C. § 1681m(e)(2)(B) 17

15 U.S.C. § 1681m(h)(8)(B) 3

15 U.S.C. § 1691(a) 3

15 U.S.C. § 1691a(d) 3, 19

15 U.S.C. § 1691a(e) 3, 19, 21

16 C.F.R. § 681.1(b)(3)(i) 4, 17

16 C.F.R. § 681.1(b)(3)(ii) 5, 17

16 C.F.R. § 681.1(b)(4) 4

16 C.F.R. § 681.1(b)(5) 4

RULE

Federal Rule of Civil Procedure 56(c) 9

MISCELLANEOUS

DAN L. GOLDWASSER, ET AL., ACCOUNTANTS' LIABILITY (2009) 14-15

Fair Credit Reporting Affiliate Marketing Regulations; Identity Theft Red Flags and
Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003,
74 Fed. Reg. 22,639 (May 14, 2009) 4

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) 4, 5

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) 3

GLOSSARY

ABA	American Bar Association
AICPA	The American Institute of Certified Public Accountants
APA	Administrative Procedure Act
ECOA	Equal Credit Opportunity Act
FACTA	Fair and Accurate Credit Transactions Act of 2003
FTC	Federal Trade Commission
GLBA	Gramm-Leach-Bliley Act

Plaintiff, the American Institute of Certified Public Accountants (the "AICPA"), respectfully submits this Memorandum of Points and Authorities in Support of its Motion for Partial Summary Judgment.

PRELIMINARY STATEMENT

This case arises from the Federal Trade Commission's ("FTC") attempt to apply the identity theft "Red Flags Rule" that it promulgated pursuant to the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") to certified public accountants engaged in the practice of public accountancy ("CPAs"), even though Congress did not authorize the FTC to regulate such professionals under FACTA.

There is no doubt that the facts and legal analysis to be applied in this case will seem familiar to this Court. Barely one month ago, on December 1, 2009, in the related case of *ABA v. FTC*, Civ. Action No. 09-1636 (RBW), 2009 WL 4289505 (D.D.C. Dec. 1, 2009) ("*ABA v. FTC II*"), this Court held that the FTC exceeded its statutory authority in applying its Red Flags Rule to attorneys engaged in the practice of law. In its opinion, this Court held that:

- Because the States have traditionally regulated the legal profession, including the licensure and discipline of attorneys, the FTC cannot regulate that profession absent an unmistakably clear Congressional statement granting such authority. *See id.* at *6. Congress provided no such unmistakably clear statement when it enacted FACTA. *See id.*

- Even if an unmistakably clear Congressional statement were not required, the language, purpose, and legislative history of FACTA demonstrate that Congress did not authorize the FTC to regulate attorneys as "creditor[s]" under that statute. *See id.* at *13.

- Attorneys are not "creditor[s]" under FACTA because they do not "regularly extend" to clients the right to defer payment of their debts. This Court held that "[s]imply because a lawyer or law firm fails to demand payment immediately upon rendering a service does not make the lawyer or law firm a creditor or amount to the granting of a 'right' to defer payment." *Id.*

For precisely the same reasons, the FTC has exceeded its statutory authority under FACTA in attempting to apply its Red Flags Rule to a similarly situated group of professionals – CPAs:

- Like with attorneys, the States have traditionally exercised principal licensing and disciplinary regulatory authority over CPAs. Thus, absent an unmistakably clear statement of intent from Congress, the FTC can no more regulate CPAs than it can regulate attorneys. Congress provided no such statement – much less an unmistakably clear statement – in FACTA or the Equal Credit Opportunity Act of 1974 ("ECOA"), which Congress referenced in identifying the entities subject to FACTA.

- The language, purpose, and legislative history of FACTA clearly demonstrate that Congress did not intend for that statute to apply to CPAs. Thus, the FTC lacks the authority to regulate CPAs as "creditor[s]" under FACTA.

- CPAs are not "creditor[s]" under FACTA because they do not "regularly" grant their clients the "right" to defer payments for accounting services. Indeed, as this Court recognized in *ABA v. FTC II*, billing clients after services are rendered, without more, does not constitute the extension of "credit" under FACTA. *See ABA v. FTC II*, 2009 WL 4289505, at *13.

Thus, as it did in *ABA v. FTC II* with respect to attorneys, this Court should enter an order enjoining the FTC from enforcing its Red Flags Rule against CPAs.

<u>STATUTORY AND REGULATORY BACKGROUND</u>

Much of the statutory and regulatory background relevant to this action is set forth in detail in this Court's decision in *ABA v. FTC II*. *Id.* at *1-*5. Nevertheless, in order to provide this Court with a complete and stand-alone record with respect to this Motion, the significant facts with respect to this action are set forth below.

<u>The Fair And Accurate Credit Transactions Act Of 2003</u>

In 2003, Congress enacted FACTA, which established measures intended to prevent and combat identity theft. *See* Pub. L. No. 108-159, 117 Stat. 1952 (codified at 15 U.S.C. §§ 1681-1681x). Through FACTA, Congress granted the FTC and certain other federal agencies the authority to "prescribe regulations requiring each financial institution and each ***creditor*** to

establish reasonable policies and procedures for implementing" the agencies' identity theft prevention guidelines, *see* 15 U.S.C. § 1681m(e)(1)(B), and empowered those agencies to enforce their regulations through injunctions and civil money penalties, *see* 15 U.S.C. § 1681m(h)(8)(B).

To identify those entities intended to be regulated under FACTA, Congress incorporated by reference the definitions of "creditor" and "credit" set forth in ECOA, *see* 15 U.S.C. § 1681a(r)(5), which prohibits creditors from discriminating against credit "applicant[s]" on certain bases. 15 U.S.C. § 1691(a).[1] 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). ECOA also 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). At no point in FACTA or ECOA did Congress suggest that CPAs, including the AICPA's members, might be "creditor[s]" under those statutes merely because they may bill clients on a monthly or other periodic basis after rendering accounting services.

The Proposed Red Flags Rule

On July 18, 2006, the FTC 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"). The FTC's Proposed Red Flags Rule provided that each "creditor" would be required to develop and

[1] Under ECOA, it is "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction: (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under this chapter." 15 U.S.C. § 1691(a).

implement a written identity theft prevention program tailored specifically to such creditor's business. The Proposed Red Flags Rule did not provide that CPAs might somehow be deemed to be "creditor[s]" under FACTA and ECOA and, thus, may be subject to the FTC's Rule.

The Final Red Flags Rule

On November 9, 2007, the FTC issued a final Red Flags Rule requiring "[e]ach financial institution or creditor that offers or maintains one or more covered accounts" to "develop and implement a written [Identity Theft Prevention] 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." Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 72 Fed. Reg. 63,718, 63,724 (Nov. 9, 2007) (the "Red Flags Rule") (codified at 16 C.F.R. § 681.1).[2]

Like the Proposed Red Flags Rule, the final Red Flags Rule incorporates by reference the definitions of "credit" and "creditor" set forth in ECOA, but it also goes one step further, explaining that "creditor[s]" under that Rule include "lenders such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, and telecommunications companies." 16 C.F.R. §§ 681.1(b)(4), (b)(5). The Red Flags Rule also defines "covered account" as: (i) "[a]n ***account*** that a financial institution or creditor offers or maintains, ***primarily for personal, family, or household purposes***, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account," 16 C.F.R. § 681.1(b)(3)(i) (emphasis added); or (ii) "[a]ny other ***account*** that the financial institution or

---

2 The provision of the Red Flags Rule at issue in this case was originally codified at 16 C.F.R. § 681.2. *See* Red Flags Rule, 72 Fed. Reg. at 63,772. In May 2009, that provision was re-designated as 16 C.F.R. § 681.1. *See* Fair Credit Reporting Affiliate Marketing Regulations; Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, 74 Fed. Reg. 22,639, 22,645 (May 14, 2009). All citations to the Red Flags Rule used herein are to the current codification of that Rule.

creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks." 16 C.F.R. § 681.1(b)(3)(ii) (emphasis added).

Neither the Red Flags Rule nor any other statement by the FTC relating to that Rule asserts that CPAs, including the AICPA's members, might fall within the definition of "creditor" under FACTA or ECOA. Nor, at that time, did the FTC assert that CPAs' billing practices, including billing clients after services are rendered and/or on a monthly basis, might constitute "covered accounts" under the Red Flags Rule.

The final Red Flags Rule also originally provided that it would become effective on January 1, 2008, and that all financial institutions and creditors would be required to comply with that Rule by November 1, 2008. *See* Red Flags Rule, 72 Fed. Reg. at 63,718.

<u>The FTC Delays Enforcing Its Red Flags Rule And Issues Its Original Enforcement Policy</u>

On October 22, 2008, the FTC announced that it was suspending enforcement of its Red Flags Rule until May 1, 2009, due to confusion regarding the scope and reach of that Rule. Press Release, FTC Will Grant Six-Month Delay of Enforcement of 'Red Flags' Rule Requiring Creditors and Financial Institutions to Have Identity Theft Prevention Programs (Oct. 22, 2008).[3] The FTC also asserted that "[s]ome examples of creditors are finance companies, automobile dealers, mortgage brokers, utility companies, telecommunications companies, and non-profit and government entities that defer payment for goods or services." *Id.* On that same day, the FTC published a document entitled "FTC Enforcement Policy: Identity Theft Red Flags Rule, 16

---

3 Available at http://www.ftc.gov/opa/2008/10/redflags.shtm (last visited Jan. 6, 2010).

CFR 681.2" (the "Original Enforcement Policy").[4] Neither the FTC's October 22, 2008 press release nor its Original Enforcement Policy asserted that CPAs, including the AICPA's members, might be "creditor[s]" under the FTC's Red Flags Rule.

The FTC Again Delays Enforcing Its Red Flags Rule And Issues Its Extended Enforcement Policy

On April 30, 2009, the FTC again delayed the deadline by which creditors were required to comply with its Red Flags Rule – this time, until August 1, 2009 – due to an "ongoing debate" regarding the scope of FACTA. Press Release, FTC Will Grant Three-Month Delay of Enforcement of 'Red Flags' Rule Requiring Creditors and Financial Institutions to Adopt Identity Theft Prevention Programs (Apr. 30, 2009).[5] On that same day, the FTC announced – for the ***first*** time – that "health care providers, attorneys ***and other professionals***" "***who bill their clients after services are rendered***" are creditors subject to the Red Flags Rule. FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.1, at 1 n.3 (the "Extended Enforcement Policy") (emphasis added).[6] In a footnote to its Extended Enforcement Policy, the FTC explained the basis for its new position:

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

---

[4] Available at http://www.ftc.gov/os/2008/10/081022idtheftredflagsrule.pdf (last visited Jan. 6, 2010).

[5] Available at http://www.ftc.gov/opa/2009/04/redflagsrule.shtm (last visited Jan. 6, 2010).

[6] Available at http://www.ftc.gov/os/2009/04/P095406redflagsextendedenforcement.pdf (last visited Jan. 6, 2010).

Extended Enforcement Policy at 1 n.3. The FTC provided no findings supporting its position that professionals who bill clients after services are rendered or on a monthly basis are "creditor[s]" under FACTA or that such billing practices have any relationship whatsoever to the risk of identity theft.

For The First Time, The FTC Expressly Announces Its Position That Its Red Flags Rule Applies To Accountants

On July 29, 2009, the FTC announced that it was further extending the deadline for creditors to comply with its Red Flags Rule until November 1, 2009 based on continued confusion regarding the entities subject to that Rule. *See* Press Release, FTC Announces Expanded Business Education Campaign on 'Red Flags' Rule (July 29, 2009).[7] The FTC also referenced a recently-published FTC document entitled "The Red Flags Rule: Frequently Asked Questions" (the "FAQs"),[8] in which the FTC expressly asserted – again, for the ***first*** time – that accountants "may" qualify as "creditor[s]" under ECOA and, thus, may be subject to the Red Flags Rule. *See* FAQs § B.1 ("Under the [Red Flags] Rule, the definition of 'creditor' is broad, and includes businesses or organizations that regularly provide goods or services first and allow customers to pay later. Examples of groups that may fall within this definition are utilities, health care providers, lawyers, ***accountants***, and other professionals, and telecommunications companies.") (emphasis added).

This Court Rejects The FTC's Attempts To Apply The Red Flags Rule To Attorneys, And The FTC Further Delays Enforcing The Red Flags Rule

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, a group of professionals which is

---

7 Available at http://www.ftc.gov/opa/2009/07/redflag.shtm (last visited Jan. 6, 2010).

8 Available at http://www.ftc.gov/bcp/edu/microsites/redflagsrule/faqs.shtm (last visited Jan. 6, 2010).

indistinguishable from CPAs in any way relevant to the issues here. The ABA's complaint also sought a declaratory judgment to establish attorneys' rights and duties under the Red Flags Rule (Count III).

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

On October 30, 2009, the day after this Court ruled in favor of the ABA, the FTC issued a press release announcing that, at the request of Congress, it would further delay enforcement of its Red Flags Rule until June 1, 2010. *See* Press Release, FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule (Oct. 30, 2009).[9]

On December 1, 2009, this Court issued a detailed memorandum opinion regarding its October 29 Order. *ABA v. FTC II*, 2009 WL 4289505. In its opinion, this Court held that the FTC exceeded its statutory authority under FACTA by attempting to regulate attorneys engaged in the practice of law as "creditor[s]" under its Red Flags Rule. *Id.* at *18. On December 28, 2009, this Court entered judgment in favor of the ABA.

PROCEDURAL BACKGROUND

On November 12, 2009, the AICPA filed a Complaint for Declaratory and Injunctive Relief against the FTC on behalf of the AICPA's nearly 350,000 members challenging the FTC's position that CPAs fall within the definition of "creditor[s]" subject to the FTC's Red Flags Rule.

---

[9] http://www.ftc.gov/opa/2009/10/redflags.shtm (last visited Jan. 6, 2010).

In its Complaint, the AICPA alleges that the FTC exceeded its statutory authority under FACTA, Compl. ¶¶ 61-65 (Count I), and acted arbitrarily and capriciously and not in accordance with law, Compl. ¶¶ 68-71 (Count II), by applying its Red Flags Rule to CPAs, including the AICPA's members. The AICPA's Complaint also seeks corresponding declaratory relief under 28 U.S.C. § 2201. Compl. ¶¶ 72-74 (Count III). Among other things, the Complaint seeks a declaration that applying the FTC's Red Flags Rule to CPAs is unlawful and an order permanently enjoining the FTC from applying that Rule to CPAs. Compl. ¶ 23.

The AICPA now seeks summary judgment on Count I of its Complaint because there are no material facts in dispute and the Court has already decided all of the legal issues relevant to this case.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). The Court must also draw "all justifiable inferences" in the non-moving party's favor and accept the non-moving party's evidence as true. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, the non-moving party cannot rely on "mere allegations or denials," *Burke v. Gould*, 286 F.3d 513, 517 (D.C. Cir. 2002), because "conclusory allegations unsupported by factual data will not create a triable issue of fact," *Pub. Citizen Health Research Group v. FDA*, 185 F.3d 898, 908 (D.C. Cir. 1999) (internal citation and quotation marks omitted). If the Court concludes that "the nonmoving party has failed to make a sufficient showing on an essential element of [its] case

with respect to which [it] has the burden of proof," then the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

With respect to Count I of the AICPA's Complaint, which challenges the FTC's effort to apply its Red Flags Rule to CPAs, the Administrative Procedure Act ("APA") provides that courts shall hold unlawful and set aside any such agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Where, as here, an agency attempts to regulate a profession that traditionally has been and continues to be regulated by the States, Congress must provide an unmistakably clear statement of its intent to empower the agency to regulate that profession. *See ABA v. FTC*, 430 F.3d 457, 471-72 (D.C. Cir. 2005) ("*ABA v. FTC I*"), *aff'g NY State Bar Ass'n v. FTC*, Civ. Action No. 02-810 (RBW), 2004 WL 964173 (D.D.C. Apr. 30, 2004); *ABA v. FTC II*, 2009 WL 4289505, at *6. As set forth below, the FTC cannot point to any such unmistakably clear statement in FACTA.

But, even if unmistakably clear language were not required, in determining whether the FTC exceeded its Congressionally-granted authority under FACTA, this Court would be required to undertake the two-step inquiry established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See NY State Bar Ass'n v. FTC*, 276 F. Supp. 2d 110, 115 (D.D.C. 2003) (Walton, J.); *ABA v. FTC II*, 2009 WL 4289505, at *5-*6.

Under a *Chevron* analysis, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43 (footnote omitted). When undertaking such analysis, the Court should employ traditional tools of statutory interpretation, including "examination of the statute's text, legislative history, and structure[,] as well as its purpose."

Shays v. FEC, 414 F.3d 76, 105 (D.C. Cir. 2005). In addition, the Court "should not confine itself to examining a particular statutory provision in isolation" because "[t]he meaning . . . of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Here, Congress's intent is clear: FACTA does not apply to CPAs.

Nevertheless, even if this Court were to conclude that "the statute is silent or ambiguous with respect to the specific issue," it must undertake step two of the *Chevron* analysis, in which the Court determines whether "the agency's [action] is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The "existence of ambiguity[, however,] is not enough *per se* to warrant deference to the agency's interpretation. The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." *ABA v. FTC I*, 430 F.3d at 469. Furthermore, because, in this case, this Court is reviewing an agency policy statement, i.e., the FTC's FAQs, and not agency action taken after formal adjudication or notice-and-comment rulemaking, the FTC's position that accountants are "creditor[s]" subject to its Red Flags Rule is not entitled to *Chevron*-style deference. *See NY State Bar Ass'n*, 276 F. Supp. 2d at 115-16 (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000)). Instead, the FTC's statement purporting to interpret FACTA is "'entitled to respect' under the Supreme Court's decision in [*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)] but only to the extent that [the] interpretation[] ha[s] the 'power to persuade.'" *NY State Bar Ass'n*, 276 F. Supp. 2d at 116 (quoting *Christensen*, 529 U.S. at 587).[10] Again, as described below, CPAs simply are not "creditor[s]" within the meaning of FACTA.

[10] The APA also provides that a reviewing court shall hold unlawful and set aside any agency action found to be arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). Such an action is arbitrary and capricious if the agency has

ARGUMENT

I. Congress Did Not Provide Any "Unmistakably Clear Statement" In FACTA Authorizing The FTC To Apply Its Red Flags Rule To CPAs

Because Congress did not provide an "unmistakably clear statement" in FACTA authorizing the FTC to regulate CPAs, the FTC exceeded its statutory authority by attempting to apply its Red Flags Rule to CPAs, who are traditionally regulated by the States. Thus, any application of the FTC's Red Flags Rule to CPAs is unlawful under the APA.

FACTA is a consumer protection statute, which is subject to the standard limitations on Congress's power to regulate interstate commerce, including the Tenth Amendment to the U.S. Constitution. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (stating that, "[a]s long as [Congress] is acting within the powers granted it under the Constitution, [it] may impose its will on the states"). 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." U.S. CONST. amend. X. In addressing the implications of the Tenth Amendment, the U.S. Court of Appeals for the D.C. Circuit has clarified 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 I*, 430 F.3d at 471 (citing *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999)) (emphasis added). Furthermore, "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 v. FTC I*, 430 F.3d

---

"relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Because the FTC has not yet filed the administrative record in this matter, at this time, the AICPA does not seek summary judgment on Count II of its Complaint, which asserts that the FTC's application of its Red Flags Rule to CPAs is arbitrary and capricious.

at 471-72 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)) (emphasis added).

This dispute is not the FTC's first attempt to exceed its statutory authority in an effort to regulate professionals who are traditionally regulated by the States. For example, in 2002, the FTC attempted to regulate a similarly situated group of professionals – attorneys engaged in the practice of law – as "financial institution[s]" under the privacy regulations that it promulgated pursuant to the Gramm-Leach-Bliley Act ("GLBA"). Finding that the FTC had exceeded its statutory authority under the GLBA, this Court held that Congress did not intend to authorize the FTC to regulate attorneys, whose licensure, discipline, and ethical obligations were governed by state law, through a subtle and non-explicit grant of authority. *See NY State Bar Ass'n*, 276 F. Supp. 2d at 136 (characterizing the FTC's position that Congress had subtly delegated to the FTC the authority under GLBA to regulate the ethical conduct of attorneys in the face of traditional state regulation as "hid[ing an] elephant [ ] in a mousehole") (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)) (internal quotations omitted). This Court noted that, if Congress had intended to regulate attorneys, it would have made that intent explicit in the language of the GLBA. *NY State Bar Ass'n*, 276 F. Supp. 2d at 136. The fact that Congress chose not to do so demonstrated that the FTC exceeded its statutory authority in applying its privacy regulations to attorneys. *Id.* The U.S. Court of Appeals for the D.C. Circuit affirmed this Court's ruling, holding that the FTC's interpretation of the term "financial institution" under the GLBA as including attorneys was unreasonable because the "regulation of the practice of law is traditionally the province of the states." *ABA v. FTC I*, 430 F.3d at 471. The court explained that "it is not reasonable for an agency to decide if Congress has chosen such a course of action in language that is, even charitably viewed, at most ambiguous." *Id.* at 472.

More recently, in *ABA v. FTC II*, a case indistinguishable from this one in any relevant way, this Court held that the FTC exceeded its statutory authority under FACTA in applying the ***same Red Flags Rule at issue here*** to attorneys because Congress had not stated its intention to regulate such professionals through "unmistakably clear" language in FACTA. 2009 WL 4289505, at *6. This Court noted that, "[p]lainly, neither [FACTA] nor [ECOA] contains an 'unmistakably clear' grant of statutory authority allowing the [FTC]'s venture into the regulation of the practice of law." *Id.* (quoting *ABA v. FTC I*, 430 F.3d at 471-72). Thus, the Court would not infer that Congress had "transgressed into a traditional area of state regulation predicated on nothing more than silence and conjecture" under FACTA and ECOA. *ABA v. FTC II*, 2009 WL 4289505, at *17. This Court also held that it was "confident . . . that if Congress . . . intended to regulate attorneys and their invoiced billing practices . . . [i]t would have used the appropriate terminology to denote that intent and not hidden it in a statute expressly targeted at the credit industry." *Id.* at *8.

As with the legal profession, the profession of public accounting is traditionally governed by the States, rather than the Federal Government. In *New York State Bar Association v. FTC*, this Court found that the States traditionally regulated attorneys because the States governed the requirements for licensing and admission to the profession, the standards of professional and ethical conduct, and the process by which such professionals were disciplined. *See* 276 F. Supp. 2d at 128 (citing *Leis v. Flynt*, 439 U.S. 438, 442 (1979)). The licensing, ethical obligations, and discipline of CPAs similarly are all governed primarily by state law and overseen by state regulators and associations. *See* Plaintiff's Statement of Material Facts Not in Dispute ¶ 29; *see also, e.g.*, DAN L. GOLDWASSER, ET AL., ACCOUNTANTS' LIABILITY § 2.2 (2009) ("Like virtually all recognized professions, the accounting profession ***is governed by the***

states which, through their accountancy acts, are empowered to ***license and discipline*** members of the accounting profession."); *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 113-14 (1990) (Marshall, J., concurring) (recognizing that the States have a "practice" of licensing and certifying public accountants). Because the States have traditionally governed the profession of public accounting, as with attorneys, the FTC may regulate CPAs only where Congress grants such authority through unmistakably clear statutory language.

Nowhere in FACTA did Congress express an "unmistakably clear" intent to regulate CPAs. Neither FACTA nor ECOA, which supplies the definition of "creditor" used in the Red Flags Rule, addresses the profession of public accountancy or suggests that such professionals are "creditor[s]" subject to the FTC's Red Flags Rule. The FTC's only basis for attempting to apply its Red Flags Rule to CPAs as "creditor[s]" is the FTC's notion that they "regularly permit deferred payments" for their services. Extended Enforcement Policy at 1 n.3. However, in *ABA v. FTC II*, this Court rejected this reasoning and found that Congress did not provide a clear statement of its intent for the FTC to govern attorneys as "creditor[s]" under FACTA. 2009 WL 4289505, at *6. Thus, because Congress has not provided any unmistakably clear statement authorizing the FTC to regulate the profession of public accountancy, any application of the Red Flags Rule to CPAs is unlawful and exceeds the FTC's statutory authority under FACTA.

II. Even If An Unmistakably Clear Congressional Statement Were Not Required, A *Chevron* Analysis Demonstrates That The FTC Exceeded Its Statutory Authority By Applying Its Red Flags Rule To CPAs

Even if an unmistakably clear Congressional statement were not required in order for the FTC to regulate CPAs under its Red Flags Rule, the requisite *Chevron* analysis demonstrates that the FTC has exceeded its statutory authority because (i) the language, purpose, and legislative history of FACTA and ECOA show that Congress did not intend to authorize the FTC to regulate

CPAs under FACTA and (ii) CPAs are not "creditor[s]" and, thus, are not subject to regulation by the FTC under FACTA.

A. The Language, Purpose, And Legislative History Of FACTA And ECOA Demonstrate That Congress Did Not Intend To Authorize The FTC To Regulate CPAs

In determining whether Congress has expressed an intent to govern CPAs under FACTA, this Court should consider the language, purpose, and legislative history of that statute. *See Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009) (reviewing the text, structure, and legislative history of a statute, as well as the primary purpose for its enactment, in analyzing *Chevron* step one); *see also Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009) (examining the "natural reading of [the statutory term in question] within the context of the [statute]"); *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 132 (noting that a court "should not confine itself to examining a particular statutory provision in isolation" and that "[t]he meaning . . . of certain words or phrases may only become evident when placed in context"). In *ABA v. FTC II*, this Court considered these factors and found that the language, purpose, and legislative history of FACTA and ECOA demonstrated that Congress did not intend for those laws to authorize the FTC to regulate attorneys engaged in the practice of law. 2009 WL 4289505, at *7-*8. The same conclusion applies to CPAs.

Through FACTA, Congress directed the FTC and other agencies to establish guidelines for use by "***creditor[s]***" and "***financial institution[s]***" to prevent "identity theft with respect to ***account holders at, or customers of, such entities***." 15 U.S.C. § 1681m(e)(1)(A) (emphasis added). Congress instructed the FTC, *inter alia*, to "consider including reasonable guidelines providing that when a ***transaction*** occurs with respect to a ***credit or deposit account*** that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies and procedures that provide for notice to be given to a ***consumer*** in a manner reasonably

designed to reduce the likelihood of identity theft with respect to such ***account***." 15 U.S.C. § 1681m(e)(2)(B) (emphasis added). The FTC itself acknowledged these limits on the scope of its authority under FACTA in defining "covered account[s]," with respect to which "creditor[s]" must maintain identity theft prevention programs, as (i) "[a]n ***account*** . . . maintain[ed], ***primarily for personal, family, or household purposes***, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account," 16 C.F.R. § 681.1(b)(3)(i) (emphasis added), or (ii) "[a]ny other ***account*** that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to ***customers*** or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks," 16 C.F.R. § 681.1(b)(3)(ii) (emphasis added).

As these provisions demonstrate, the plain language of FACTA makes clear that Congress did not authorize the FTC to regulate CPAs. In the related case of *ABA v. FTC II*, this Court found that the concepts of "customer[s]," "transaction[s]," "account holder[s]," "creditor[s]," "deposit account[s]," and "consumer[s]," which define the scope of the FTC's regulatory authority under FACTA, are foreign to the legal profession, and confirm that Congress did not intend for FACTA to authorize the FTC to regulate such professionals. 2009 WL 4289505, at *7. Likewise, those terms do not describe the activities of public accountants or their business relationships. Like attorneys, CPAs serve the needs of clients, to whom they hold ethical and professional obligations established by state law, and neither engage in transactions with deposit account holders or consumers nor maintain accounts for "customers" that are "primarily for personal, family, or household purposes." *Id.* at *3; *cf. id.* at *7 (concluding that

the concepts discussed under FACTA did not fall squarely "within the universe of terms used to describe participants in the legal profession[,] . . . the types of activities conducted by attorneys[,] []or the types of relationships that attorneys have with their clients").

The purpose and legislative history of both FACTA and ECOA also demonstrate that Congress did not intend for those statutes to apply to CPAs. Indeed, this Court has previously recognized that Congress enacted ECOA in order to protect credit applicants from discrimination, and enacted FACTA in order to protect credit account holders and customers from identity theft. *ABA v. FTC II*, 2009 WL 4289505, at *1-*2. Furthermore, as with the legal profession, the legislative history of FACTA and ECOA does not ***mention*** public accountants. *Cf. Riethman v. Berry*, 287 F.3d 274, 278 (3d Cir. 2002) (noting that plaintiffs failed to identify any language in ECOA's legislative history suggesting that Congress was "thinking about payment of legal fees when it enacted ECOA"); *see ABA v. FTC II*, 2009 WL 4289505, at *8 (noting that "the [FTC] had not identified anything in the legislative history" where Congress had addressed the legal profession under FACTA). Thus, the plain language, purpose, and legislative history of FACTA and ECOA demonstrate that Congress did not intend to authorize the FTC to regulate CPAs under FACTA and, thus, the FTC exceeded its statutory authority in applying its Red Flags Rule to such professionals.

B. CPAs Are Not "Creditor[s]" Under FACTA Because They Do Not "Regularly Extend" "Credit" Or Grant Clients The "Right" To Defer Payment Of Their Debts

The FTC also exceeded its statutory authority in applying its Red Flags Rule to CPAs because they are not "creditor[s]" as defined in FACTA and ECOA.

As discussed above, FACTA incorporates the definition of "creditor" set forth in ECOA. *See* 15 U.S.C. § 1681a(r)(5). 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). "Inherently important then to this definition is the term credit, which is defined to 'mean[ ] 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.'" *ABA v. FTC II*, 2009 WL 4289505, at *8 (quoting 15 U.S.C. § 1691a(d)) (emphasis added by the court).

In its Extended Enforcement Policy and FAQs, the FTC adopts an impermissibly expansive interpretation of "creditor," asserting that the term "covers all entities that regularly permit deferred payments for goods or services," Extended Enforcement Policy at 1 n.3, including "professionals . . . who bill their clients after services are rendered," such as accountants, *Id.* However, in *ABA v. FTC II*, this Court rejected the FTC's same expansive interpretation of "creditor" as a basis for applying its Red Flags Rule to a similarly situated group of professionals – attorneys engaged in the practice of law. *See* 2009 WL 4289505, at *13. For the same reasons, the FTC has exceeded its authority under FACTA in applying its Red Flags Rule to CPAs.

First, the fact that CPAs may provide professional services to clients prior to receiving payment, bill clients on a monthly basis, or allow clients additional time to pay outstanding bills does not constitute the extension of "credit" under FACTA or ECOA unless clients also have the "***right***" to defer payment for such services. *See ABA v. FTC II*, 2009 WL 4289505, at *13. As this Court recognized in *ABA v. FTC II*, "the 'hallmark of 'credit' under [ECOA] is the *right* of one party to make deferred payment.'" *Id.* (quoting *Riethman*, 287 F.3d at 277) (emphasis added by the court); *see also Riethman v. Berry*, 113 F. Supp. 2d 765, 768 (E.D. Pa. 2000) ("[I]t is insufficient to trigger [ECOA] coverage to show that a debtor failed to pay a debt or that a

creditor voluntarily chose to delay collection and continue to perform work on behalf of the debtor. The key element which must be shown is whether, under the agreement between the debtor and creditor, the debtor has a right to defer payment of existing debt or to incur future debt and defer payment at its sole discretion."). Thus, the failure "to demand payment immediately upon rendering a service does not make" a professional "a creditor or amount to the granting of a 'right' to defer payment." Indeed, the Second Circuit has similarly rejected

> the proposition that '[e]very contract for labor, not paid for in advance, is necessarily a contract upon credit, because the labor, when once performed, cannot be recalled.' If this proposition were strictly applied . . . countless transactions in which compensation for services is not instantaneous would be characterized as credit transactions. Such indiscriminate application of [ECOA] is not appropriate.

Shaumyan v. Sidetex Co., 900 F.2d 16, 18-19 (2d Cir. 1990) (finding that a home improvement contract providing for payments by homeowners over time was not a "credit transaction" under ECOA because the homeowners did not have "a ***right*** to defer payment for a monetary debt, property or services," but, rather, were required "to make incremental payments as the work progressed") (emphasis added). Accordingly, the FTC has no basis for interpreting "creditor" under FACTA and ECOA to encompass "all entities that regularly ***permit*** deferred payments for goods or services," including "professionals . . . who bill their clients after services are rendered." Extended Enforcement Policy at 1 n.3 (emphasis added). Thus, the FTC exceeded its statutory authority under FACTA in applying its Red Flags Rule to CPAs.

Second, even if CPAs occasionally extended "credit" to their clients, they still would not be "creditor[s]" under FACTA and ECOA. As this Court stated in *ABA v. FTC II*, "[c]reditor status under [ECOA] attaches only to a '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.'" 2009 WL 4289505, at *11 (quoting 15 U.S.C. § 1691a(e)) (emphasis added). Because the FTC has made no finding that CPAs "regularly" extend credit, its application of the Red Flags Rule to such professionals exceeded its authority under FACTA. *See Mick's at Pennsylvania Ave., Inc. v. BOD, Inc.*, 389 F.3d 1284, 1289 (D.C. Cir. 2004) (finding that restaurants were not subject to ECOA as creditors where "[t]here [was] no evidence that . . . [they] 'regularly' extend[ed] or arrange[d] credit").

CONCLUSION

For all of the foregoing reasons, the AICPA respectfully requests that the Court enter an order (i) granting the AICPA summary judgment on Count I of its Complaint, (ii) declaring that the FTC exceeded its statutory authority under FACTA in applying its Red Flags Rule to CPAs, and (iii) enjoining the FTC from enforcing its Red Flags Rule against CPAs.

Dated: January 7, 2010

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP

By: By: *_/s/ Daniel E. Loeb_*

Daniel E. Loeb (D.C. Bar # 386098)
Bernard A. Nigro, Jr. (D.C. Bar #412357)
1001 Pennsylvania Avenue, N.W., Suite 800
Washington, DC 20004
Telephone: 202-639-7000
Fax: 202-639-7003
daniel.loeb@friedfrank.com
barry.nigro@friedfrank.com

Of Counsel:
Richard I. Miller
General Counsel
The American Institute of Certified
Public Accountants
1211 Avenue of the Americas
New York, NY 10036-8775
Telephone: 212-596-6200
Fax: 212-596-6213
rmiller@aicpa.org

Counsel for
The American Institute of Certified Public Accountants