



M A S S A C H U S E T T S B A R A S S O C I A T I O N

July 16, 2009

The Honorable Jonathan D. Leibowitz
Chairman
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington DC 20580

Dear Chairman Leibowitz:

I write in regard to the so-called Red Flags Rule promulgated by the Federal Trade Commission (FTC) under the Fair and Accurate Credit Transactions Act of (FACT Act) 2003 and scheduled to go into effect on August 1, 2009. Specifically, I write in opposition to the inclusion of lawyers and law firms in the Red Flags Rule. The Massachusetts Bar Association agrees with the concerns stated by the American Bar Association and is in full support of their efforts regarding this matter.

While we applaud the efforts of Congress and the FTC in protecting consumers from the devastating effects of identity theft, we do not believe that lawyers are creditors nor should they be included in the Red Flags Rule. Further, based on the legislative history of the FACT Act, we do not believe it was the intent of Congress to regulate lawyers. The FACT Act was intended to regulate banks and financial institutions and other businesses that extend credit to consumers.

In *Shaumyan v. Sidetex Co., Inc.*, 900 F.2d 16 (2d Cir. 1990), the court determined that progressive payments made contemporaneously with work performed were not a deferral of payments that could be classified as "credit." Lawyers, in day to day practice, bill for services while they are being rendered or upon completion. Those transactions cannot be fairly considered a "credit transaction".

An attorney's compliance with the Red Flags Rule would not reduce the risk of identity theft. To date, we understand the FTC itself has not identified a single instance where an incident of identity theft has arisen in a law practice context.

The burden imposed on an attorney's compliance with the Red Flags Rules would require additional language inserted into client agreements and could turn relatively simple legal matters into more complicated transactions. Additionally, law firms, many of which are small firms and solo practices, would have to develop identity theft programs despite the

fact that clients are already protected by extremely stringent, court administered, ethical rules and rules of professional responsibility.

For the reasons stated above we respectfully urge you to reconsider the FTC's position in applying the Red Flags Rule to lawyers providing legal services to clients. Thank you for your consideration of our views.

Sincerely,

A handwritten signature in blue ink that reads "Edward W. McIntyre". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Edward W. McIntyre
President

Cc: The Honorable Edward. M. Kennedy
The Honorable John F. Kerry
The Honorable Michael E. Capuano
The Honorable William D. Delahunt
The Honorable Barney Frank
The Honorable Stephen F. Lynch
The Honorable Edward J. Markey
The Honorable James P. McGovern
The Honorable Richard E. Neal
The Honorable John W. Olver
The Honorable John F. Tierney
The Honorable Nicola S. Tsongas