

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN MEDICAL ASSOCIATION,  
515 N. State St., Chicago, IL 60654,  
the AMERICAN OSTEOPATHIC  
ASSOCIATION,  
142 E. Ontario St., Chicago, IL 60611,  
and the MEDICAL SOCIETY FOR THE  
DISTRICT OF COLUMBIA,  
1115 30th St., NW, Washington, DC  
20007,

Plaintiffs,

vs.

FEDERAL TRADE COMMISSION,  
600 Pennsylvania Ave., NW, Washington,  
D.C. 20580,

Defendant.

**Case: 1:10-cv-00843**

**Assigned To : Walton, Reggie B.**

**Assign. Date : 5/21/2010**

**Description: Admin. Agency Review**

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

For their Complaint for Declaratory and Injunctive Relief against defendant Federal Trade Commission (the "FTC" or "Commission"), plaintiffs American Medical Association ("AMA"), American Osteopathic Association ("AOA"), and Medical Society for the District of Columbia ("MSDC") (collectively, the "Medical Associations"), by and through their attorneys, Sidley Austin LLP, allege as follows:

**NATURE OF THE ACTION**

1. This action is brought by the AMA, AOA, and MSDC, on behalf of themselves and their members, to declare unlawful and set aside the FTC's application of its regulation, commonly known as the "Red Flags Rule," 16 C.F.R. § 681.2, to the physician members of the Associations.

2. The Red Flags Rule (“the Rule”) requires “financial institutions” and other “creditors” to develop and implement a written plan to prevent and detect identity theft. The FTC has taken the position that physicians are “creditors” of patients if the physicians don’t receive payment in full at the time of providing care to the patients. The FTC has announced that physicians must comply with the Red Flags Rule by June 1, 2010. See ¶¶ 44-51, *infra*.

3. In applying the Red Flags Rule to physicians who do not require payment in full at the time of providing care to patients, the FTC is exceeding its statutory authority and acting arbitrarily and capriciously. In so doing, the FTC has also failed to follow the notice and comment process required by the Administrative Procedure Act, 5 U.S.C. § 553.

4. Timely judicial relief is required to stop the FTC’s unlawful enforcement of the Red Flags Rule against members of the Medical Associations.

#### **PARTIES**

5. Plaintiff AMA is the largest national professional association of physicians, residents, and medical students. Through state and specialty medical societies, and other physician groups, seated in the AMA’s House of Delegates, substantially all physicians in the United States participate in developing AMA policy. AMA’s mission is to promote the art and science of medicine and the betterment of public health. The AMA’s physician members practice in every medical specialty and in every state. A not-for-profit corporation organized under the laws of Illinois, the AMA’s headquarters are at 515 N. State Street, Chicago, IL 60654.

6. Among the basic purposes of the AMA is to safeguard the patient-physician relationship, which is fundamental to quality patient care. The AMA promulgates rules of ethical conduct for the medical profession. These rules are published in the *Code of Medical Ethics*. They require physicians to maintain strict patient confidentiality and privacy of information disclosed by and to patients. The AMA seeks to protect members from undue

government interference in their medical practices and in the conduct of their offices. The AMA also opposes government regulation of physicians that burdens the provision of health care but does not lead to an improvement in such care.

7. Plaintiff AOA is a national professional association representing more than 67,000 doctors of osteopathic medicine ("DOs"). The AOA's mission is to advance the philosophy and practice of osteopathic medicine by promoting excellence in education, research, and the delivery of quality, cost-effective healthcare within a distinct, unified profession. The AOA is a not-for-profit corporation organized under the laws of the state of Illinois. Its headquarters are at 142 East Ontario Street, Chicago, IL 60611.

8. AOA has established ethical and professional standards for osteopathic physicians. These standards are published in its official *Code of Ethics*. They require that DOs maintain patient information in strict confidence. The AOA seeks to protect its members from undue government interference in their medical practices and in the conduct of their offices.

9. Plaintiff MSDC is part of the federation of state, county, and specialty medical societies that constitute the American Medical Association. MSDC has approximately 2,000 physician members, most of whom practice in the District of Columbia and surrounding counties. MSDC seeks to promote the well-being of physicians in metropolitan Washington, D.C. and their patients, to establish high standards of character and professionalism, and to safeguard the integrity of the physician-patient relationship. MSDC seeks to protect its members from undue government interference in their medical practices and in the conduct of their offices. A not-for-profit corporation founded in 1817 and chartered by an Act of Congress in 1819, MSDC has its headquarters at 1115 30th Street, NW, Washington, DC 20007.

10. The AMA and MSDC appear herein in their personal capacities and also as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts in accordance with AMA policies and objectives. The member organizations of the Litigation Center, in addition to the AMA and MSDC, are: Medical Association of the State of Alabama, Alaska State Medical Association, Arizona Medical Association, Arkansas Medical Society, California Medical Association, Colorado Medical Society, Connecticut State Medical Society, Medical Society of Delaware, Florida Medical Association, Medical Association of Georgia, Hawaii Medical Association, Idaho Medical Association, Illinois State Medical Society, Indiana State Medical Association, Iowa Medical Society, Kansas Medical Society, Kentucky Medical Association, Louisiana State Medical Society; Maine Medical Association, MedChi, the Maryland State Medical Society, Massachusetts Medical Society, Michigan State Medical Society, Minnesota Medical Association, Mississippi State Medical Association, Missouri State Medical Association, Montana Medical Association, Nebraska Medical Association, Nevada State Medical Association, New Hampshire Medical Society, Medical Society of New Jersey, New Mexico Medical Society, Medical Society of the State of New York, North Carolina Medical Society, North Dakota Medical Association, Ohio State Medical Association, Oklahoma State Medical Association, Oregon Medical Association, Pennsylvania Medical Society, Rhode Island Medical Society, South Carolina Medical Association, South Dakota State Medical Association, Tennessee Medical Association, Texas Medical Association, Utah Medical Association, Vermont State Medical Society, Medical Society of Virginia, Washington State Medical Association, West Virginia State Medical Association, Wisconsin Medical Society, and

Wyoming Medical Society. Members of the Litigation Center other than the AMA are referred to hereafter as "State Medical Societies."

11. AMA, AOA, and MSDC each have been injured by being required to incur the costs of advising members on compliance with the Red Flags Rule even though the Rule is not lawfully applied to such members. Moreover, each association has standing to pursue this action on behalf of its respective members under the test enunciated in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977). Specifically, the members of each organization would have standing to sue in their own right. The interests at stake in this case are germane to the organizational purposes of each of the associations. Moreover, neither the claims asserted nor the relief requested requires the participation of individual members of the associations.

12. Defendant FTC is an independent agency of the United States. See 15 U.S.C. § 41 et seq. It promulgated the Red Flags Rule pursuant to the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), 15 U.S.C. § 1681 et seq. The FTC's headquarters are at 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

13. 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**

14. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

15. The relief requested by the Medical Associations is authorized by 5 U.S.C. § 702 (Administrative Procedure Act); 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 Medical Associations

have a right to bring this action pursuant to the judicial-review provision of the Administrative Procedure Act, 5 U.S.C. § 702, and the implied nonstatutory review procedure provided by 28 U.S.C. § 1331.

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

### **BACKGROUND AND FACTUAL ALLEGATIONS**

#### **The Fair and Accurate Credit Transactions Act of 2003**

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

18. FACTA includes a number of measures intended to improve the accuracy of credit transactions and to curb identity theft, including entitling each American to one free annual credit report and enabling consumers to place fraud alerts in their credit files.

19. Section 114 of FACTA, 15 U.S.C. § 1681m, directs the FTC and other federal agencies to issue guidelines and regulations regarding identity theft. It states, 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 . . .

See 15 U.S.C. § 1681m(e).

20. The FTC is authorized to create and enforce identity theft regulations and guidelines with respect to “financial institutions” and “creditors.” The FTC purports to apply the Red Flags Rule to physicians on the theory that physicians are “creditors” within the meaning of FACTA if they don’t receive payment from patients at the time that the physician provides care to the patient. Thus, a physician who permits a patient to pay for a medical service after the care has been provided is, in the view of the FTC, a “creditor” within the meaning of FACTA.

21. FACTA, at 15 U.S.C. § 1681a(r)(5), adopts the definitions of “credit” and “creditor” contained in the Equal Credit Opportunity Act (“ECOA”). *See* 15 U.S.C. § 1691a.

22. “Credit” is defined in the ECOA as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.” 15 U.S.C. § 1691a(d).

23. “Creditor” is defined in the ECOA 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).

#### **The Proposed Red Flags Rule**

24. On July 18, 2006, the FTC and several other executive agencies jointly issued a proposed rule to begin implementation of 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”).

25. Among other things, the Proposed Red Flags Rule required creditors to create written identity theft prevention programs tailored specifically to a particular creditor's business.

26. The Proposed Red Flags Rule provided no indication that the FTC or its sister agencies deemed physicians to fall within the statutory definition of "creditor."

### **The Final Red Flags Rule**

27. On November 9, 2007, the FTC and several 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) (the "Final Red Flags Rule").

28. The Final Red Flags Rule, like the Proposed Red Flags Rule, required "creditors" to develop written identity theft prevention programs. It states in pertinent part:

#### **§ 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:

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

n(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.

Final Red Flags Rule, 72 Fed. Reg. at 63,772, 16 C.F.R. § 681.2.

29. The Final Red Flags Rule provided no indication that the FTC intended to apply the Rule to physicians. The only mention of health care services came in the preamble in the Federal Register, which provided that “creditors in the health care field may be at risk of medical identity theft (i.e., identity theft for the purpose of obtaining medical services) and, therefore, must identify Red Flags that reflect this risk.” Id. at 63,727. Nowhere in the preamble, let alone the Rule itself, did the FTC indicate that it considered physicians to be “creditors” for purposes of the Final Red Flags Rule.

30. The FTC's public releases regarding the Final Red Flags Rule did not indicate that physicians are “creditors” when they don't require payment at the time of providing care to the patient. For example, a June 2008 FTC Business Alert did not list physicians as among those covered. It 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). Notably, neither physicians nor any other health care professionals were included in the list of "creditors."

31. In a September 2008 press release in the form of an "Article for Business," the FTC described the entities covered by the Final Red Flags Rule as including "finance companies, automobile dealers, mortgage brokers, utilities, and telecommunications companies." The Article ends with a cryptic question: "Have questions about how health care providers can comply with the Rule? Email [RedFlags@ftc.gov](mailto:RedFlags@ftc.gov)." The Article does not explain why or when physicians might be "creditors" under FACTA or the Final Red Flags Rule.

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

#### **The FTC's Original Enforcement Policy**

33. On October 22, 2008, the FTC issued a press release 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).

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

[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.

35. Also on October 22, 2008, the FTC published on its website a two-page document entitled "FTC Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.2" (the "Enforcement Policy").

36. Neither the October 22, 2008 press release nor the Enforcement Policy provided any indication that physicians who don't demand immediate payment for their services would be subject to the Rule

37. In March of 2009, FTC published on its website a guide to compliance with the Red Flags Rule entitled "Fighting Fraud with the Red Flags Rule: A How-To Guide for Businesses." The compliance guide provides in relevant part:

The definition of "creditor" is broad and includes business or organizations that regularly defer payment for goods or services or provide goods or services and bill customers later. Utility companies, health care providers, and telecommunications companies are among the entities that may fall within this definition, depending on how and when they collect payment for their services.

Id. at 9-10. While the FTC mentioned "health care providers" in the context of "utility companies" and "telecommunications companies," it gave no indication that physician practices -- as opposed to hospitals or managed care organizations -- would be considered "creditors."

#### **The FTC's Extended Enforcement Policy**

38. On April 30, 2009, the FTC issued a press release informing the public that it was extending the Red Flags Rule enforcement deadline 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).

39. In the press release, the FTC Chairman noted an "ongoing debate" concerning the scope of FACTA. Id.

40. Also on April 30, 2009, the FTC published on its website a three-page document entitled "FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 CFR 681.1" (the "Extended Enforcement Policy").

41. In a footnote to the Extended Enforcement Policy, the FTC officially indicated for the first time that physicians who don't require payment at the time of providing care for the patient are "creditors" under FACTA as follows:

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. At 1 n.3 (emphasis added).

42. The FTC further elaborated its position in a May 2009 article published on FTC's website entitled "The 'Red Flags' Rule: What Health Care Providers Need to Know About Complying with New Requirements for Fighting Identity Theft." The article stated:

Health care providers may be subject to the Rule if they are "creditors." Although you may not think of your practice as a "creditor" in the traditional sense of a bank or mortgage company, the law defines "creditor" to include any entity that regularly defers payments for goods or services or arranges for the extension of credit. For example, you are a creditor if you regularly bill patients after the completion of services, including for the remainder of medical fees not reimbursed by insurance. Similarly, health care providers who regularly allow patients to set up payment plans after services have been rendered are creditors under the Rule. Health care providers are also considered creditors if they help

patients get credit from other sources — for example, if they distribute and process applications for credit accounts tailored to the health care industry.

### **The FTC's July 29, 2009 Last-Minute Delay**

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

44. On the same day, the FTC also published on its website a two-page document entitled "FTC Extended Enforcement Policy: Identity Theft Red Flags Rule, 16 C.F.R. 681.1." In all material respects except for the enforcement deadline, this version of the FTC's enforcement policy was identical to the Extended Enforcement Policy published in April 2009, including language in a footnote explaining that "creditors under the ECOA include professionals, such as ... health care providers, who bill their clients after services are rendered."

45. According to the July 29 Press Release, the 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."

46. 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. The FTC sought to ameliorate those concerns by citing an agency document entitled "The Red Flags Rule: Frequently Asked Questions" ("FAQs"). According to the FTC's Press Release:

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.

47. The FAQs explained what "creditor[s]" must do to comply with FACTA even if there exists a low risk of identity theft. The FAQs state in relevant part:

**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.

....

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.

48. These FAQs do not bind the FTC in its enforcement of the Red Flags Rule. The prosecutorial discretion exercised by FTC staff likewise does not bind state government agencies who are authorized to enforce FACTA, see 15 U.S.C. § 1681s(c). The FAQs did, however, confirm that the FTC deems physicians to be "creditors" under FACTA if they do not collect payment at the time they provide medical services.

49. With respect to penalties, the FAQs explain that the FTC can "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.

### **The FTC Once Again Extends the Enforcement Deadline**

50. On October 30, 2009, just two days before the Red Flags Rule was set to go into effect, FTC notified the public that, "[a]t the request of Members of Congress, the [FTC] is delaying enforcement of the 'Red Flags' Rule until June 1, 2010, for financial institutions and creditors subject to enforcement by the FTC." See Press Release, FTC Extends Enforcement Deadline for Identity Theft Red Flags Rule.

51. Also on October 30, 2009, the FTC posted on its website a two-page document entitled "FTC Extended Enforcement Policy: Identity Theft Red Flags Rule (the "Extended Enforcement Policy"). In the Extended Enforcement Policy, the FTC repeated with slight variation the statements in its earlier Policy Statements:

In FACTA, Congress imported the definition of creditor from the Equal Credit Opportunity Act ("ECOA") for purposes of the Fair Credit Reporting Act. 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, merchants, and service providers that regularly provide a product or service for which the consumer pays after delivery.

#### **Physicians Who Don't Require Immediate Payment When They Care For Patients Do Not Fit within FACTA's Definition of "Creditor"**

52. Under FACTA's definition of "creditor" as imported from the ECOA, a "creditor" must "regularly extend[], renew[], or continue[] credit" -- defined 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)-(e). Congress authorized the FTC to require "creditors" to implement individualized identity theft prevention programs — what the FTC now calls a "Red Flags" policy — in order to "identify

possible risks to account holders or customers or to the safety and soundness of the institution or customers.”

53. Physicians are not commonly referred to as “creditors.” Nor are patients ordinarily thought of as “account holders” or “customers.” Rather, in keeping with the legislation’s title, “The Fair and Accurate Credit Transactions Act,” these terms are used to refer to entities whose business is providing credit and to customers of such entities.

54. Physicians do not fit within the definition of “creditor” incorporated into FACTA. The practice of not demanding payment at the time care is provided serves several purposes. It gives a benefit to patients who are often under stress when receiving care. It underscores that the physician has a fiduciary relationship with the patient and thereby furthers the patient-physician relationship. Where the patient is insured, the practice enables the insurer to determine what portion of the bill is covered and what amount should be billed to the patient. Because the amount that the patient will owe the physician is not certain at the time that services are provided, the physician does not defer payment of a “debt” by billing after the patient is treated. In many cases, a physician is not entitled to bill patients immediately upon providing services under contracts with health insurance carriers.

55. Physicians also provide emergency medical care to patients whose identifying information may be unknown to them and who may even be unconscious. In some emergency situations, which may occur for certain physicians on a regular basis, there is no practical way for the physician to bill for his or her services at the time of those services. Further, it would violate the norms of human decency, not to mention principles of ethical conduct addressed in paragraph 56, for a physician to demand payment at the time of service in

such situations. Indeed, federal law requires a physician to provide services to a patient in an emergency condition without regard to the patient's ability to pay. See 42 U.S.C. § 1395dd.

56. Further, the FTC's attempt to impose a duty upon physicians to investigate each patient's identity in advance of treatment conflicts with basic precepts concerning the patient-physician relationship and physicians' ethical responsibilities to safeguard that relationship. "From ancient times, physicians have recognized that the health and well-being of patients depends upon a collaborative effort between physician and patient.... The patient-physician relationship is of greatest benefit to patients when they bring medical problems to the attention of their physicians in a timely fashion, provide information about their medical condition to the best of their ability, and work with their physicians in a mutually respectful alliance." AMA, Ethical Opinion 10.01 ("Fundamental Elements of the Patient-Physician Relationship"). Because the success of diagnosis and treatment depends on patients' willingness to divulge often private and highly sensitive information to their physicians, the patient-physician relationship "is based on trust and gives rise to physicians' ethical obligations to place patients' welfare above their own self-interest and above obligations to other groups, and to advocate for their patients' welfare." AMA, Ethical Opinion 10.015 ("The Patient-Physician Relationship"); see also AOA, *Code of Ethics* § 3 ("A physician-patient relationship must be founded on mutual trust, cooperation, and respect."); *id.* § 1 ("The physician shall keep in confidence whatever he/she may learn about a patient in the discharge of professional duties. The physician shall divulge information only when required by law or when authorized by the patient."). Contrary to these obligations, the FTC requires physicians to approach each new patient with skepticism concerning his or her identity. As a result, the FTC's Extended

Enforcement Policy compromises physicians' ability to gain new patients' trust, which is essential to the well-being of patients.

57. Had Congress intended for the FTC to apply FACTA to physicians, it would have made that intention express in FACTA. "[T]he structure and limitations of federalism" allow "the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." Gonzalez v. Oregon, 546 U.S. 243, 270 (2006). Thus, "when Congress wants to regulate medical practice in the given scheme, it does so by explicit language in the statute." Id. at 272 (quotation marks & citations omitted); cf. Am. Bar Ass'n v. Fed. Trade Comm'n, 430 F.3d 457, 471 (D.C. Cir. 2005) ("[T]he regulation of the practice of law is traditionally the province of the states.... [I]f 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." (quotation marks omitted)).

58. Indeed, where Congress has sought to regulate the practice of physicians with respect to privacy and confidentiality of patients, it has done so expressly. For example, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. Law. 104-191, 110 Stat. 1936, authorizes the Secretary of Health and Human Services ("HHS") to promulgate rules to implement HIPAA's requirement that health care providers who utilize electronic billing and payment methods ("covered entities") protect against "reasonably anticipated threats or hazards to the security or integrity of the information" and "protect against unauthorized uses or disclosures of the information." Id. § 1173(d)(2) (codified at 42 U.S.C. § 1320d-2); see id. § 1173(d) (codified at 42 U.S.C. 1320d-1) (directing HHS to promulgate regulations implementing each of HIPAA's standards).

59. Pursuant to this statutory mandate, HHS has promulgated regulations creating a web of physical, administrative, and technical security requirements that physicians and other health care providers must follow to safeguard the security and integrity of their patient records. See 45 C.F.R. Part 164. Among other things, HHS's HIPAA regulations require that covered entities "implement procedures to regularly review records of information system activity, such as audit logs, access reports, and security incident tracking reports." 45 C.F.R. § 164.308(a)(1)(ii)(D). The HIPAA regulations also require covered entities to "[i]dentify and respond to suspected or known security incidents; mitigate, to the extent practicable, harmful effects of security incidents that are known to the covered entity; and document security incidents and their outcomes." Id. § 164.308(a)(6)(ii).

60. Recently, Congress enacted legislation specifically intended to protect against identity theft in the health care context. Specifically, the Health Information Technology for Economic and Clinical Health (HITECH) Act, which was signed into law as part of the American Recovery and Reinvestment Act of 2009, requires HIPAA-covered health care providers to notify HHS and affected patients of any unauthorized access, use, or disclosure of protected health information that has not been encrypted or otherwise rendered unreadable in ways set forth in HHS guidelines. Pub. L. 111-5, § 13402, 123 Stat. 115, 260 (codified as 42 U.S.C. § 17932).

61. Among other things, HITECH requires that covered health care providers include in their notices to affected individuals descriptions of "what happened," "the types of unsecured protected health information that were involved in the breach," "[t]he steps individuals should take to protect themselves from potential harm resulting from the breach," and

“what the covered entity involved is doing to investigate the breach, to mitigate losses, and to protect against any further breaches.” Id. § 13402(f) (codified as 42 U.S.C. § 17932(f)).

62. Significantly, Congress authorized HHS to promulgate interim rules putting the breach notification requirements into effect for health care providers covered by HIPAA. Id. § 13402(j). In a separate section, Congress empowered the FTC to implement a similar breach notification rule to certain vendors of personal health records and online applications that interact with such records, some of which do not qualify as “covered entities” subject to HIPAA security and privacy requirements. Id. § 13407 (codified as 42 U.S.C. § 17937). Congress was explicit, however, that FTC’s authority did not extend to regulation of HIPAA-covered entities. Id.

#### **Recent Developments**

63. In American Bar Association v. FTC, 671 F. Supp. 2d 64 (D.D.C. 2009), the United States District Court for the District of Columbia (Walton, J.) on November 29, 2009 held that the Red Flags Rule had not properly been applied to attorneys. In granting summary judgment to the ABA in its case seeking to invalidate extension of the Rule to the legal profession, the District Court explained:

[T]he “hallmark of credit” under the ECO Act is the right of one party to make deferred payment. Simply 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.

Given the plain-meaning and statutorily assigned definitions of the terms interpreted by the Commission, the aim of the legislation, and the ill-adapted application of these terms to the legal profession, it becomes clear that the intent of Congress is unambiguous: it did not grant the Commission the broad authority to exercise regulatory control over attorneys pursuant to the FACT Act, and accordingly the Red Flags Rule similarly cannot be properly promulgated in such a broad manner.

Id. at 82 (emphasis original; citations and alteration omitted). The decision is currently on appeal to the D.C. Circuit. See ABA v. FTC, No. 10-5057 (D.C. Cir. filed Mar. 24, 2010).

64. On January 27, 2010, AMA and AOA, together with the American Dental Association and the American Veterinary Medical Association, wrote a letter to the Honorable Jon Leibowitz, Chairman of the FTC, asking that the Red Flags Rule “not be applied” to licensed health care professionals (“LHCPs”) “until at least ninety days after final resolution of the ABA litigation” and seeking a commitment that “if the final resolution of the ABA litigation is that the Rule will not be applied to attorneys, the Commission will not apply the rule to LHCPs either.”

65. On March 25, 2010, Chairman Leibowitz wrote a response to Michael Maves, M.D., Executive Vice president of the AMA, stating that the Commission had considered the requests set forth in the January 27 letter “and determined that we cannot accommodate them.” The Chairman noted that “the ABA litigation involved only the question of whether attorneys are covered under the Rule, and it is unclear whether any decision in that litigation would necessarily be dispositive as to other groups of professionals.”

66. Thus, in the view of the FTC, any physician who does not require payment at the time of providing medical services to patients is required to comply with the Red Flags Rule beginning on June 1, 2010. See ¶¶ 50-51, supra.

**The Application of the Red Flags Rule to Physicians Is Harming and Will Continue to Harm the Medical Associations, the State Medical Societies, and Their Members**

67. Members of the Medical Associations and the State Medical Societies 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 physicians by the Extended Enforcement Policy.

68. Compliance with the Red Flags Rule imposes significant burdens on physicians, particularly sole practitioners and those practicing in small groups.

69. Compliance with the Red Flags Rule requires physicians to develop a plan to detect "red flags." This cannot always be done on a "cookie-cutter" basis. A plan for a physician who serves in a rural area in which patients are well-known will be different from one for a physician in a large group in an urban area. Once a plan is developed, it has to be implemented and maintained. "Red flags" must be detected and appropriate responses must be made. The development of a plan creates a substantial drain on the financial resources of physicians, particularly those whose support systems are limited. Correspondingly, the time required to comply with the Red Flags Rule will necessarily detract from the attention physicians are able to give their patients.

70. The Medical Associations and the State Medical Societies themselves are harmed because they are being called upon to expend resources in giving guidance to their members about a Rule that is not properly being applied to such members.

71. The Red Flags Rule and the Extended Enforcement Policy constitute "final agency action" within the meaning of 5 U.S.C. § 704.

72. The injuries suffered by the Medical Associations and their members, as well as by the Medical Societies and their members, from application of the Red Flags Rule to physicians cannot be remedied at law and are irreparable.

## CAUSES OF ACTION

### COUNT I:

#### **The FTC Acted Beyond Its Authority In Applying The Red Flags Rule To Physicians Who Do Not Require Payment At The Time of Providing Care To The Patient**

73. The Medical Associations repeat and reallege paragraphs 1-72 as if set forth fully herein.

74. 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."

75. By applying the Red Flags Rule to physicians who do not require payment at the time of providing care, the FTC has exceeded its statutory authorization from Congress under FACTA.

76. FACTA cannot reasonably be read to include physicians as "creditors" or patients as "account holders" or "customers." Nothing in the text of FACTA or its legislative history suggests that Congress intended the FTC to regulate physicians under that statute.

77. The FTC's belief that Congress impliedly intended physicians to fall within FACTA's definition of "creditors" is contradicted by the principle that when Congress intends to regulate the practice of medicine, it does so expressly. See Oregon, 546 U.S. at 270-71.

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

79. This Court should, therefore, declare the Red Flags Rule unlawful as applied to the physician members of the Medical Associations and the State Medical Societies,

even if they do not require payment at the time they provide care to patients, and should enjoin such application of the Rule.

**COUNT II:**

**Application Of The Red Flags Rule To Physicians Is Arbitrary,  
Capricious, And Contrary To Law**

80. The Medical Associations repeat and reallege paragraphs 1-72 as if set forth fully herein.

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

82. The FTC has acted arbitrarily, capriciously, and contrary to law by failing to articulate a rational connection between the practice of medicine and identity theft; an explanation of how the manner in which physicians bill their patients can be considered an extension of credit under FACTA; or any legally supportable basis for application of the Red Flags Rule to physicians.

83. Because application of the Red Flags Rule to physicians is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, it must be set aside.

84. This Court should, therefore, declare the Red Flags Rule unlawful as applied to the physician members of the Medical Associations and the State Medical Societies, even if they do not require payment at the time they provide care to patients, and should enjoin such application of the Rule.

### COUNT III

#### **The Red Flags Rule Was Not Applied To Physicians In Accordance With Notice-and-Comment Rulemaking Procedures of the Administrative Procedure Act. Its Application To Physicians Is Therefore Unlawful.**

85. The Medical Associations repeat and reallege paragraphs 1-72 as if set forth fully herein.

86. Pursuant to 5 U.S.C. § 706(2)(D), a reviewing court shall hold unlawful and set aside agency action found to have been taken "without observance of procedure required by law." The procedures required for promulgating a rule are set forth in 5 U.S.C. § 553. They include the publication of notice of a proposed rule and the opportunity for public comment.

87. The extension of the Red Flags Rule to physicians is a substantive rule that was not anticipated by the public, a fact demonstrated by the FTC's repeated extensions of the Rule's effective date citing "confusion" among those whom the FTC contends are subject to the Rule.

88. The possibility that the FTC would apply FACTA to physicians was not suggested or reasonably inferable from the FTC's notice of proposed rulemaking. Nor was the FTC's interpretation of FACTA as applying to physicians apparent from the Final Red Flags Rule. Only later, in press releases and the publication of the Extended Enforcement Policy, did the FTC publically announce that it intended the Rule to apply to physicians.

89. The FTC did not follow the notice-and-comment requirements of 5 U.S.C. § 553. As a result, the Medical Associations, the State Medical Societies, and their member physicians did not have reasonable notice of, or opportunity to comment on, the FTC's interpretation of FACTA as applying to physicians.

90. This Court should, therefore, hold unlawful and set aside pursuant to 5 U.S.C. § 706(2)(D) the Red Flags Rule to the extent it purports to apply to physician members of

the Medical Associations and the State Medical Societies, even if they do not require payment at the time they provide care to patients, and should enjoin such application of the Rule.

#### **COUNT IV:**

#### **The Medical Associations, the State Medical Societies, And Their Members Are Entitled To a Judgment Declaring Their Legal Rights and Duties Under the Red Flags Rule**

91. The Medical Associations repeat and reallege paragraphs 1-72 as if set forth fully herein.

92. There is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of the Medical Associations, the State Medical Societies, and their members with respect to the FTC's application of the Red Flags Rule to warrant relief under 28 U.S.C. § 2201.

93. The harm to the Medical Associations, the State Medical Societies, and their members as a direct and indirect result of the FTC's conduct is sufficiently real and imminent to warrant the issuance of a declaratory judgment clarifying the legal relations of the parties.

94. This Court should, therefore, enter a declaratory judgment finding that the Red Flags Rule is unlawful and void as applied to the physician members of the Medical Associations and the State Medical Societies, even if they do not require payment at the time they provide care to patients, and should enjoin such application of the Rule.

#### **REQUEST FOR RELIEF**

WHEREFORE, the Medical Associations respectfully requests that this Court:

A. Declare the Red Flags Rule unlawful and void as applied to the physician members of the Medical Associations and the State Medical Societies, even if they do not require payment at the time they provide care to patients;

B. Permanently enjoin the FTC and its agents, servants, employees, and successors from implementing the Red Flags Rule in any manner that includes physician members of the Medical Associations and the State Medical Societies who do not require payment at the time they provide care to patients;

C. Award the Medical Associations their costs and reasonable attorneys' fees incurred in this action pursuant to 28 U.S.C. §2412; and

D. Grant the Medical Associations such other relief as the Court deems just and proper.

SIDLEY AUSTIN LLP

By: 

Frank R. Volpe (D.C. Bar # 458791)  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005-1401  
(202) 736-8000

Jack R. Bierig (*pro hac vice* motion forthcoming)  
Ben J. Keith (*pro hac vice* motion forthcoming)  
SIDLEY AUSTIN LLP  
One South Dearborn St.  
Chicago, Illinois 60603  
(312) 853-7000

*Attorneys For Plaintiffs the American Medical  
Association, the American Osteopathic  
Association, and the Medical Society for the  
District of Columbia*

Dated: May 21, 2010