



January 27, 2010

The Honorable Jon Leibowitz  
Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Re: Red Flags Rule

Dear Chairman Leibowitz:

We are writing to you and to each member of the Federal Trade Commission in our capacities as President or Chief Executive Officer of the American Dental Association, the American Medical Association, the American Osteopathic Association, and the American Veterinary Medical Association. Together, our four organizations represent hundreds of thousands of licensed health care professionals (LHCPs) who would be subject to the Commission's Red Flags Rule (the Rule), 16 C.F.R. § 681, if the Rule is extended to LHCPs who accept payment after their services have been rendered. We are writing to request that the Commission make clear that, in light of the decision in American Bar Association v. FTC (D.D.C. No. 09-1636 (RBW)) (the ABA litigation), the Rule will not be applied to such professionals.

Specifically, we request that the Commission take two actions:

1. Announce that the Rule will not be applied against LHCPs until at least ninety days after final resolution of the ABA litigation; and
2. Commit 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.

In this letter, we will briefly set forth the basis for this request.

Our associations have previously expressed the view individually that application of the Rule to health care professionals would exceed the scope of the Commission's authority under the enabling statute -- the Fair and Accurate Credit Transactions Act of 2003 (the FACT Act). In our previous communications, we have also explained why such application would increase the costs of health care and would impose burdens on our members -- with little, if any, benefit to the public. Nevertheless, although it has postponed the effective date, the Commission has never disavowed the position that the Rule will be applied to LHCPs.

We now submit that application of the Rule to LHCPs has, at the very least, been called into serious question by the decision in the ABA litigation. As you know, the federal district Court for the District of

Columbia on November 30, 2009 in that case enjoined application of the Rule to attorneys. In a thorough and thoughtful opinion, the court held that application of the Rule to attorneys “is both plainly erroneous and inconsistent with the purpose underlying enactment of the FACT Act” (Opinion, at 40). It stated that in applying the Rule to attorneys, the Commission “not only seeks to extends its regulatory power beyond that authorized by Congress, but it also untimely and arbitrarily selects monthly invoice billing as the activity it seeks to regulate.” Id.

We have carefully reviewed the decision in the ABA litigation. While acknowledging that there may be minor differences between lawyers and LHCPs for purposes of the applicability of the Rule, we believe that the dispositive considerations underlying that decision apply equally to LHCPs. Apart from technical legal analysis, moreover, we see no basis for concluding that Congress intended to have the Rule apply to LHCPs but not to lawyers. Indeed, implementation of the Rule with respect to LHCPs but not to lawyers would be manifestly unfair and anomalous. For these reasons, we are asking the Commission to take the steps described above.

In making this request, we recognize that the Commission has delayed enforcement of the Rule. However, as long as it appears that the Rule will be applied to LHCPs once it becomes effective, our members still have to incur the costs of preparing to comply. Further, our associations are called upon to answer questions about the Rule. Thus, a mere postponement of the effective date through a date certain is inadequate. Rather, what is called for is a commitment not to apply the Rule to LHCPs if it is not applied to lawyers.

We hope that you and the other Commissioners will agree to this request. If you or any Commissioners would like to discuss this issue, however, we would be pleased to meet with you and/or your colleagues. Any Commissioner who might be interested in arranging a meeting regarding application of the Rule to our members should contact Jack Bierig at 312-853-7614 (jbierig@sidley.com). For now, we thank you and the other Commissioners for your consideration of this request.

Sincerely,

Michael D. Maves, MD, MBA  
Executive Vice President, CEO  
American Medical Association

W. Ron DeHaven, DVM, MBA  
Chief Executive Officer  
American Veterinary Medical Association

John B. Crosby, JD  
Executive Director  
American Osteopathic Association

Ronald L. Tankersley, DDS  
President  
American Dental Association

cc: The Honorable Pamela Jones Harbour  
The Honorable William E. Kovacic  
The Honorable J. Thomas Rosch