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## *Passage of legislation is ABA victory*

### **Congress clears legislation to exempt lawyers from FTC Red Flags Rule**

The ABA scored a victory Dec. 7 when the House cleared legislation by voice vote clarifying that lawyers are not “creditors” under the Fair and Accurate Credit Transactions Act of 2003 (FACTA) and therefore do not have to comply with Red Flags identity theft provisions in the law.

The Red Flags Rule, established by the Federal Trade Commission and scheduled to go into effect Jan. 1 after several delays, requires businesses defined as creditors under the rule to develop programs identifying, detecting and responding to the warning signs, or Red Flags, of identify theft. The FTC defined creditors as all entities, including law firms and lawyers, that regularly provide services or goods before seeking payment.

S. 3987, sponsored by Sens. John Thune (R-S.D.) and Mark Begich ( D-Alaska), narrowed the scope of FACTA to exempt not only lawyers but other professionals and small businesses that do not operate as creditors and would have been required to undertake costly, burdensome measures to prevent identity theft in industries where there is little threat of such theft. The Senate passed the bill by unanimous consent Nov. 30.

During House floor debate on the bill, Rep. John H. Adler (D-N.J.), who sponsored a House version of the Senate bill, maintained that it is clear that when Congress wrote the law members never contemplated including businesses such as law firms, dentists and accounting firms within the broad scope of the law.

“At last, the American legal profession has clear and final relief from attempts to solve a non-existent problem that would have created paper-pushing and raised legal costs,” ABA President Stephen N. Zack said after House passage of the bill. “The mission of every lawyer is to provide aid and counsel to our clients and improve access to the justice system,” Zack added, emphasizing that the ABA will continue to defend the legal profession against all forms of unnecessary and unintended regulation.

The ABA learned in April 2009 that the FTC intended to include lawyers as creditors under the new Red Flags rule, and the FTC responded to the ABA’s concerns by postponing enforcement of the rule. After the ABA Board of Governors adopted policy in June 2009 urging the FTC and Congress to clarify that the

*see “Red flags,” page 8*

# LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p><b>Independence of the Legal Profession.</b> On 7/29/09, the Federal Trade Commission (FTC) announced a 90-day delay until 11/1/09 for a "Red Flags Rule" that would include attorneys in the definition of "creditor" and require lawyers to implement programs to detect, identify and respond to activities that could indicate identity theft. The ABA filed a lawsuit against the FTC on 8/27/09 and a motion for partial summary judgment on 9/23/09 to block the Rule's application to lawyers. On 10/30/09, the court ruled that the FTC had exceeded its authority. The FTC appealed the decision and delayed implementation of the rule for all entities through 12/31/10. Oral arguments were 11/15/10. S. 3987 and H.R. 6420 would clarify that lawyers are not creditors under the act.</p>	House passed S. 3987 on 12/7/10.	Senate passed S. 3987 on 11/20/10.		<p><b>Opposes the application of the FTC's "Red Flags Rule" to lawyers. Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections, including the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage. See front page.</b></p>
<p><b>Health Care Law.</b> P.L. 111-148 (H.R. 3590), the Patient Protection and Affordable Care Act, and P.L. 111-152 (H.R. 4872), the Health Care and Education Reconciliation Act, overhaul the nation's health care system. S. 1347 and H.R. 1478 would repeal the <i>Feres</i> Doctrine, which prohibits members of the armed forces and their families from suing the military for negligent medical care during their service.</p>	Judiciary subcommittee held a hearing on H.R. 1478 on 3/25/09 and approved the bill on 5/19/09.		President signed P.L. 111-148 (H.R. 3590) on 3/23/10 and P.L. 111-152 (H.R. 4872) on 3/30/10.	<p><b>Supports increased access to health care for all Americans. Opposes federal legislation to preempt state medical liability laws or legislation to require patients injured by malpractice to use "health courts" that take away jury trials. Supports S. 1347 and H.R. 1478.</b></p>
<p><b>Judicial Independence.</b> No cost-of-living adjustment was provided for federal judges for fiscal year 2010. S. 220 and H.R. 486 would create an inspector general for the judicial branch. S. 1653 and H.R. 3362 would authorize new federal judgeships.</p>	H.R. 486 was referred to the Judiciary Cmte. on 2/9/09. H.R. 3362 was referred to the Judiciary Cmte. on 9/29/09.	S. 220 was referred to the Judiciary Committee on 1/13/09. Judiciary subc. held a hearing on S. 1653 on 9/30/09.		<p><b>Supports increased judicial pay. Opposes initiatives that infringe upon the separation of powers between Congress and the courts.</b></p>
<p><b>Legal Services Corporation.</b> H.R. 3082, a full-year continuing resolution, includes \$420 million, current funding, for the LSC in fiscal year 2011. S. 718 and 3467 would reauthorize the LSC and lift several restrictions.</p>	Judiciary subc. held LSC reauthorization hearings on 10/27/09 and 4/27/10. House passed H.R. 3082 on 12/8/10.	S. 718 was referred to Health, Education, Labor and Pensions Committee on 4/1/09.	President signed P.L. 111-290 (H.J. Res. 101), funding programs at current levels through 12/18/10.	<p><b>Supports an independent, well-funded LSC.</b></p>

## House votes to restore IOLTA's TAG coverage

### *IOLTA programs are a critical source for legal aid funding*

The House approved ABA-supported legislation Nov. 30 to ensure that Interest on Lawyers' Trust Accounts (IOLTA) funds are fully insured under the Transaction Account Guarantee (TAG), a special insurance program created by the Federal Deposit Insurance Corporation (FDIC) in 2008.

IOLTA accounts contain client funds held by a lawyer to cover routine court expenses and legal fees or as a temporary depository for large sums of money resulting from transactions such as real estate closings and settlements. Lawyers place client funds in these special accounts because the funds cannot earn net interest for the client. The interest earned on them is channeled to programs providing civil legal aid to the poor and is one of the largest sources of funding for such programs.

Normally, FDIC insures each individual's funds held at a given financial institution up to a maximum of \$250,000, but TAG fully insures non-interest-bearing deposit transaction accounts for the entire amount. As a result of advocacy by the ABA, state and local bar association and other legal groups, IOLTA programs have been covered under the TAG program since its inception.

When the program was extended for two years under P.L. 111-203, the new financial regulatory reform law enacted earlier this year, IOLTA was not included in the definition of covered accounts because of an

oversight. As a result, TAG coverage of IOLTA is scheduled to end Dec. 31 unless the law is amended.

Rep. Lloyd Doggett (D-Texas), who sponsored H.R. 6398, pointed out during House debate that at a time when interest rates are at an all-time low, it is particularly important that there be a complete government-backed guarantee against any

loss on IOLTA accounts. Rep. Judy Biggert (R-Ill.) agreed, saying that if coverage of the accounts is not extended, a critical source of civil legal aid might unnecessarily and inappropriately shrink. Both members cited ABA support for the legislation.

The Senate was expected to consider the provisions of H.R. 6398 before adjournment. ■

### Panel looks at slow rate of judicial confirmations



**A panel discussion sponsored Nov. 18 by the American Constitution Society brought together a distinguished group to discuss the slow pace of judicial confirmation. Those participating included (from left): Rachel Brand, counsel, WilmerHale, and former assistant attorney general for legal policy; ABA President-elect Wm. T. (Bill) Robinson III; moderator Carrie Johnson, National Public Radio justice correspondent; Russell Wheeler, visiting fellow, Governance Studies, Brookings Institution; and Robert Raben, president and founder, The Raben Group, and former assistant attorney general for legislative affairs.**

## ABA voices support for CEDAW ratification

ABA President Stephen N. Zack expressed the association's support last month for U.S. ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), for which the ABA has urged ratification for more than 25 years.

In a statement submitted Nov. 18 to the Senate Judiciary Subcommittee on Human Rights and the Law, Zack said that U.S. ratification of CEDAW would serve the dual purpose of signaling to all that this country is fully committed to strengthening human rights worldwide, while reaffirming the U.S. leadership role in promoting international human rights and equal protection under the law.

CEDAW includes a preamble and 30 articles that define discrimination against women and set up an agenda for national action to end such discrimination and achieve progress for women and girls. The United Nations approved the international agreement in 1979, and 186 out of 193 countries have ratified it. Although President Jimmy Carter signed the treaty in 1980, the United States is one of seven countries that have not ratified the treaty. The other countries are Iran, Nauru, Palau, Somalia, Sudan, and Tonga.

In his statement of support, Zack emphasized "As the first comprehensive treaty addressing women's rights, CEDAW provides a near-universally agreed-upon framework for defining basic human rights for women and girls, including equal access to educational opportunities, health care, employment without economic or other discrimination, ownership of property, and participation in all aspects of civic and political life."

He pointed out that the ABA has a long history of working to support women's rights and combating gender-based discrimination. The ABA

Commission on Women in the Profession and Commission on Domestic Violence both work domestically to achieve progress for women, while the ABA Rule of Law Initiative (ROLI) has worked to implement legal reform programs to expand the rights of women abroad.



Zack's submitted statement highlighted the ROLI CEDAW Assessment Tool, developed in 2002 to generate a comprehensive analysis of the status of women's rights in a country and to uncover legal obstacles that frustrate the achievement of greater gender equality. Fully implemented in Georgia, Moldova, Russia and Serbia, the tool is "an important capacity-building project for the ABA's local partners and the larger women's rights community," he said. The success of the CEDAW Assessment Tool, he added, only underscores the need for U.S. ratification of CEDAW and the even greater gains that can be achieved.

The Nov. 18 Senate hearing included supportive testimony from

U.S. Ambassador-at-Large Melanne Verveer of the State Department's Office of Global Women's Issues, actress Geena Davis, and Wazhma Frogh, a women's rights activist who experienced gender injustices starting at the age of 10 as a youth in Afghanistan. All urged immediate passage of the treaty in order to end worldwide gender inequality.

Steven Groves of The Heritage Foundation expressed opposition to CEDAW, stating that "the resolution of gender issues should be sought through domestic legislative and judicial avenues rather than through the judgment of gender experts on the CEDAW Committee...who may not fully understand U.S. laws and practices." Opponents also cite reservations about the treaty's provisions regarding abortion and contraception.

The Obama Administration has made repeated public statements supporting CEDAW ratification, but action before the conclusion of the 111th Congress is highly unlikely. A number of obstacles are responsible for this, chief among them include pressing domestic issues, such as ongoing tax cut legislation, that remain unsolved.

The ABA and other supporters of the treaty will continue to press for ratification in the 112th Congress. ■

**Save the Date!**

**ABA Day in Washington  
April 12-14, 2011**

**<http://new.abanet.org/calendar/abaday/Pages/default.aspx>**

## ABA urges prompt action on child waiver legislation

The ABA urged the Senate last month to support H.R. 6156, a bill unanimously passed in September by the House to renew the authority of the secretary of Health and Human Services to waive certain federal funding requirements and approve up to 10 demonstration projects aimed at improving child welfare programs.

“Child welfare innovations tested in state demonstration projects have been vital to informing child welfare policy reform at the state and national level,” ABA Governmental Affairs Director Thomas M. Susman wrote to Senate leaders Nov. 15. He pointed out that nearly two dozen states have received waivers under the program since it began in 1996. The program has not been reauthorized, however, since the legislative authority ended in 2006. Projects have covered a wide array of services, including subsidized guardianship, flexible funding to local agencies, managed care, substance abuse services, intensive preventive services, and tribal administration of federal child welfare funds.

Rep. Jim McDermott (D-Wash), who cosponsored the bipartisan bill with Rep. John Linder (R-Ga.), pointed out during House debate on H.R. 6156 that one of the most successful strategies tested through the waiver authority provides assistance to grandparents and other relatives who assume legal custody of children in foster care. The strategy was so successful in improving the outcomes for foster children that it was incorporated in the Fostering Connections to Success and Increasing Adoptions Act signed into law in 2008. Another promising strategy, he said, is the child welfare reform model tested in Florida, which reduced the number of Florida children in foster care by 36 percent and increased adoptions by 12,000.

In his letter, Susman said that the ABA adopted policy earlier this year urging reform of child welfare financing laws to encourage keeping or reunifying children safely with their birth families and flexibility of funding for a broad range of child welfare services, including reauthorization of the waiver authority.

Reinstating and expanding demonstration project authority, Susman said, “will allow states to improve the quality of their child welfare interventions and provide both state and federal legislators with key information on what innovations are effective at improving the lives of children who are involved in the child welfare system.” ■

### ABA announces Labor Department lawyer referral partnership



Photo: Lisa Helfert

**ABA President-elect Wm. T. (Bill) Robinson III (right), announced Nov. 19 that the ABA will work with the Labor Department (DOL) to help middle-class and low-income individuals find legal assistance. The program, which will build on the lawyer referral network already in place at the ABA, will establish a new toll-free number that can be called by workers with unresolved complaints under the Fair Labor Standards Act or the Family and Medical Leave Act. The ABA-DOL partnership was one of three new initiatives unveiled at a press conference sponsored by the White House Middle Class Task Force and hosted by Vice President Joseph R. Biden Jr. The other initiatives will link veterans to legal aid programs and will train lawyers and others to help homeowners with mortgage modifications. Appearing on a panel with Robinson were Lawrence Tribe, then senior counsel for access to justice at the Justice Department, and Labor Secretary Hilda Solis.**

## ABA applauds lawyer exemption in FTC mortgage rule

### *Exemption maintains existing state court regulation*

ABA President Stephen N. Zack applauded the Federal Trade Commission's (FTC) decision last month to broaden the attorney exemption contained in its final Mortgage Assistance Relief Services (MARS) rule.

The final FTC rule, announced Nov. 19 to protect distressed homeowners from mortgage relief scams, imposes new regulations on providers of mortgage foreclosure rescue and loan modification services, including a ban on the collection of advance fees and other restrictions on the types of fees that can be charged. Other parts of the rule require mortgage relief providers to disclose key information to consumers and prohibit such providers from making false or misleading claims about their services. The new rule also includes numerous additional mandates, including detailed recordkeeping and compliance requirements.

Lawyers are generally exempt from the rule if they meet three conditions. They must be engaged in the practice of law, licensed in the state where the consumer or the dwelling is located, and comply with state laws and regulations governing attorney conduct related to the rule. To be exempt from the advance fee ban, lawyers also must place any fees they collect in a client trust account and abide by state laws and regulations covering such accounts, a requirement that closely parallels ABA Model Rule of Professional Conduct 1.15.

Zack explained that homeowners facing foreclosure often go to lawyers for help negotiating changes to their mortgages. The final FTC rule, according to Zack, "will allow lawyers to continue to provide the critical legal services and expertise homeowners in crisis need." The attorney exemption, he added, "protects consumer clients by largely preserving both the confidential attorney-client relationship and rigorous state court enforcement of professional regulations."

"By maintaining the existing state court regulatory environment and declining to impose an unnecessary new federal layer of regulation on most lawyers, the FTC has secured a lifeline for homeowners in danger of losing their homes," Zack emphasized.

The ABA views the broader exemption in the final rule as a substantial improvement over the earlier proposed rule, which included two very narrow and limited exclusions for certain types of lawyers. In comments submitted to the FTC in March, the ABA urged the commission to exempt all practicing lawyers who help consumer clients renegotiate their mortgages or otherwise avoid foreclosure, not just those lawyers who are licensed in the state where the consumer resides or where the property is located.

Zack said the ABA will continue to work with FTC, the state courts, and state bars in an effort to protect homeowners' access to effective representation. ■

### Judicial Vacancies/Confirmations — 111th Congress (as of 12/14/10)

<u>Court</u>	<u>Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	2
US Courts of Appeals (179 judgeships)	21	14	11
US District Courts (678 judgeships)	88	48	30
Court of International Trade (9 judgeships)	0	0	0
Totals	109	62	43

## Washington News Briefs

**ADVANCE CARE PLANNING:** ABA President Stephen N. Zack conveyed the association's appreciation Nov. 19 to Rep. Earl Blumenauer (D-Ore.) for his efforts toward meaningful access to patient-centered advance care planning for all Medicare beneficiaries. An example of Blumenauer's advocacy is his impact on the drafting of a final physician reimbursement rule for the annual wellness visits mandated by the Patient Protection and Affordable Care Act and the inclusion of voluntary advance care planning as a core element of those visits. Zack also noted that provisions included in the House health care reform legislation during the 111th Congress were modeled after Blumenauer's proposed Life Sustaining Treatment Preferences Act, H.R. 1898. During the 111th Congress, Blumenauer also sponsored H.R. 2580, the Empowering Medicare Patient Choices Act; H.R. 2911, the Advance Planning and Compassionate Care Act; and H.R. 5795, the Personalize Your Care Act. All of these efforts would have "significantly enhanced the patient's ability and authority to direct their own health care," Zack said. Since the mid-1980s, the ABA has strongly promoted the value of advance care planning and the use of advance health directives by all adults. Zack pointed out that an increasing body of medical literature has demonstrated the importance of recurring physician-patient-family communications as a key to making advance care planning effective.

**OVERCRIMINALIZATION:** Congress continued to study the issue of overcriminalization this fall when the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security held a hearing to assess the problem and look at possible solutions. The hearing focused on a recent joint report by the National Association of Criminal Defense Counsel and The Heritage Foundation. The report, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, offers five reforms to provide protection from unjust prosecutions and convictions: enact default rules of interpretation ensuring that mens rea requirements are adequate to protect against unjust conviction; codify the rule of lenity, which grants defendants the benefit of the doubt when Congress fails to legislate clearly; require adequate judiciary committee oversight of every bill proposing offenses or penalties; provide detailed written justification for an analysis of all new federal criminalizations; and redouble efforts to draft every federal criminal offense clearly and precisely. The ABA, which presented testimony at a hearing in July 2009, expressed support for efforts to bring atten-

tion to problems with overcriminalization of federal law and the crucial contributing role of federal mandatory minimum sentencing laws. ABA witness George Washington University law professor Stephen A. Saltzburg expressed ABA support for repeal of mandatory minimum sentences, which he said result in unfair sentences by treating offenders convicted of unlike offenses exactly the same regardless of differences.

**DREAM ACT:** The ABA reiterated its support this month for the Development, Relief and Education for Alien Minors Act (DREAM Act), emphasizing that the act promotes American ideals of fairness and opportunity. The legislation, H.R. 5281 and S. 3992, would provide a path to legal residence and citizenship for certain deserving undocumented immigrant youth by permitting eligible students to obtain constitutional legal status. To qualify, students must demonstrate good moral character and have entered the United States before the age of 16, been present in the country for at least five years, and graduated from high school or received a graduate equivalency degree (GED). "The DREAM Act will give these young people the opportunity to earn legal status and become fully contributing members of our society," ABA President Stephen N. Zack wrote to the House and Senate Dec. 8. He emphasized that "earn is the key word," highlighting that individuals would be required to go through a rigorous application process, including a criminal background check. Also required would be two years of college or military service and a 10-year wait before legal permanent resident status could be pursued. Zack noted that the legislation enjoys broad bipartisan support from the government and the public and has been endorsed by a lengthy list of educational institutions and associations. He also emphasized that the DREAM Act is a wise economic investment for the country and would increase the pool of highly qualified recruits for the U.S. armed forces. While the House passed its version of the legislation Dec. 8, the Senate tabled a motion to consider its bill the next day. Proponents were still hopeful that the Senate might consider the House-passed version before Congress adjourns.

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## Senate vote falls short on paycheck fairness bill

The Senate fell two votes short Nov. 17 of the 60 votes necessary to end debate and vote on the Paycheck Fairness Act, legislation strongly supported by the ABA and numerous other organizations to assure that men and women have the tools to assert their legal right to equal pay for equal work.

In a letter to all senators prior to the vote, ABA President Stephen N. Zack emphasized that the legislation had been stalled in the Senate for 21 months even though the House swiftly passed an identical bill at the beginning of the Congress and President Obama pledged his support. The 58-41 vote broke down along party lines with the exception of Sen. Ben Nelson (D-Neb.), who voted with Republicans against the motion to proceed.

The bill, S. 3772, would update the Equal Pay Act of 1963 (EPA) to prohibit an employer from paying unequal wages to male and female workers who perform jobs under similar work conditions that require substantially equal skill, effort and responsibility unless there is a legitimate reason for a pay differential. The legislation also would prohibit employer retaliation against employees who share salary information with their coworkers.

Addressing concerns expressed by opponents of the proposal, Zack explained that the bill would apply equally to men and women and would not compel businesses to pay their female work force substantially more money to eliminate the “77 cents wage gap,” make employers liable for every wage differential, or encourage outrageous verdicts against employers that will bankrupt businesses and further jeopardize a frail economy.

He further explained that an employer is not guilty of wage discrimination if a pay differential is based on seniority, merit, quantity or quality of production, or a factor other than sex. The legislation would close a loophole in current law by assuring that the “factor other than sex” defense is valid only when it is based on a bona fide factor (such as education or training)

that is job-related and consistent with business necessity, and when there is no other alternative practice that would serve the same business purpose without producing the wage differential.

In addition, even though the bill would strengthen and update remedies available under the EPA, Zack said punitive damages would be permitted only upon a showing of malice or reckless indifference by the employer.

Sen. Barbara Mikulski (D-Md.), a co-sponsor of the legislation, said on the Senate floor that the Paycheck Fairness Act picks up where the Lilly Ledbetter Fair Pay Act left off. That act, signed into law in January 2009, clarified that the statute of limitations for claims of pay discrimination runs from each paycheck reflecting the improper disparity rather than from the employer’s original discriminatory decision.

“Paycheck fairness makes it more difficult to discriminate in the first place,” she said. ■

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## Red Flags Rule

*continued from front page*

rule should not apply to lawyers, the association began advocating Congress for exemption from the rule and also filed suit against the FTC.

Following a summary judgment ruling in October 2009 in the ABA’s favor by the U.S. District Court for the District of Columbia, the FTC appealed the decision. Bar associations from 47 states, the District of Columbia and seven metropolitan areas signed onto a brief written by the New York State Bar Association in favor of the ABA position. The Court of Appeals for the District of Columbia Circuit heard oral arguments in the case just last month, and no decision had been issued when Congress passed the clarifying legislation.

Now that the legislation has been cleared for the White House, President Obama is expected to sign the bill into law. ■

**The monthly *Washington Letter* reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association’s legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at <http://www.abanet.org/poladv/publications.shtml>. © 2010 American Bar Association. All rights reserved. Please address correspondence to:**

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