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M E M O R A N D U M

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To Our Clients and Friends

Re: Preemption of Affiliate Sharing Provisions of California SB 1

In American Bankers Association v. Lockyer, the U.S. District Court for the Eastern District of California has released its opinion that the federal Fair Credit Reporting Act (“FCRA”) preempts the affiliate sharing provisions of California’s Financial Information Privacy Act (“SB 1”) in their entirety.

BACKGROUND

The Ninth Circuit Court of Appeals had previously held that the FCRA’s affiliate sharing preemption clause preempts SB 1 insofar as SB1 attempts to regulate communication of *information* between affiliates, as *information* is defined in the FCRA. Thus, the Ninth Circuit Court held that SB 1’s affiliate sharing provision is preempted to the extent it applies to information shared between affiliates relating to a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used, expected to be used, or collected for the purpose of establishing eligibility for credit or insurance, employment or other authorized purposes under the FCRA. The Ninth Circuit Court then remanded the case to the District Court for a determination of what, if any, portion of the affiliate sharing provision of SB 1 survives preemption.

DISTRICT COURT’S DECISION ON REMAND

On remand, the District Court held that no portion of SB 1’s affiliate sharing provisions survives federal preemption. The Court reasoned that it would be impossible for a financial institution to determine in advance what information that it collects or shares is entitled to federal protection under the affiliate sharing provisions of the FCRA and what information is not. Further, the Court found that even if some limited applications of the SB 1 affiliate sharing provisions could be saved from

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preemption, it is not within the province of the Court to rewrite a state statute to sever those applications from the statute. Thus, the Court held that federal law preempts the affiliate sharing provisions of SB 1 in their entirety.

A copy of the decision can be found on our web site at http://www.schwartzandballen.com/whats_new.html.

If you have any questions, please call Gilbert Schwartz, Robert Ballen or Tom Fox at (202) 776-0700.