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M E M O R A N D U M

September 8, 2008

To Our Clients and Friends

Re: California SB1 Litigation

The Ninth Circuit U.S. Court of Appeals has upheld a portion of California SB1, which requires financial institutions to provide consumers with the opportunity to opt out before the institution may share nonpublic personal information with affiliates.

The court held that the affiliate sharing pre-emption provision of the Fair Credit Reporting Act ("FCRA") pre-empted SB1 only with respect to information that is a "consumer report" as defined in the FCRA.[1] With regard to other information, the court held that SB1's affiliate sharing provisions are not pre-empted by the FCRA and therefore the affiliate sharing provisions continue in effect with respect to that information. The court concluded that the California legislature intended that even if partially pre-empted, SB1 should continue to apply to non-consumer report information. It is unclear at this point how, as a practical matter, the court's decision affects financial institutions in view of the affiliate marketing provisions of the FCRA, as amended by the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act").

A copy of the court's opinion can be found on our website at http://www.schwartzandballen.com/whats_new.html.

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

[1] The FCRA defines a "consumer report" as any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (a) credit or insurance to be used primarily for personal, family or household purposes; (b) employment purposes; or (c) any other purpose authorized under 15 U.S.C. § 1681b.