ARNOLD & PORTER LLP

202.942.5000
202.942.5999 Fax
555 Twelfth Street, NW
Washington, DC 20004-1206

August 6, 2004

United States Court of Appeals for the Ninth Circuit
125 South Grand Avenue
Pasadena, CA 91105

Re: ***American Bankers Association, et al. v. Bill Lockyer, et al.***
No. 04-16334

Honorable Judges of the Ninth Circuit:

On behalf of America's Community Bankers ("ACB"), we submit this *amicus* letter pursuant to the Advisory Committee Note to Circuit Rule 29-1, with the consent of counsel for all parties, in support of the appeal of the American Bankers Association, the Financial Services Roundtable, and Consumer Bankers Association ("Appellants") in the above-referenced case. In accordance with Rule 29-1, this letter serves to reinforce, without repetition, the arguments of Appellants in their brief filed on August 2, 2004.

Interest of the ACB

America's Community Bankers is the member-driven national trade association representing community banks that pursue progressive, entrepreneurial, and service-oriented strategies to benefit their customers and communities nationwide. This case presents issues of great importance not only to ACB and its members, but also to the thousands of California consumers who are or might be served by them. ACB members have an outstanding record of protecting the confidentiality and security of customer information. Because consumer trust is one of the cornerstones of a community bank's business relationships, these institutions protect the confidentiality of consumer information as part of their business practices, consistent with all applicable privacy laws and regulations. The federal Fair Credit Reporting Act ("FCRA") provision at issue here, 15 U.S.C. § 1681t(b)(2), which preempts state laws and regulations governing the sharing of consumer information with affiliates, serves the interests of both ACB members and their customers by ensuring proper protection for personal information under uniform national standards as well as facilitating the efficient provision of innovative, cost-effective financial products and services.

The district court's erroneous interpretation of the preemptive scope of the FCRA with respect to affiliate information sharing seriously threatens the ability of ACB members and their affiliates to most effectively serve the needs of California consumers. Absent reversal by this Court, the district court's ruling will harm both businesses and

consumers, in direct contravention of Congress' objective to further their interests through the establishment of uniform *national* standards exclusively governing the sharing of *all* types of personal information shared among financial institution affiliates.

Errors of the Court Below

ACB fully supports the factual statements and legal arguments of Appellants as presented in their brief to this Court. ACB wishes to highlight here several key points that underscore the merits of Appellants' position.

The district court found that the FCRA does not preempt the state laws, such as the California Financial Information Privacy Act at issue here, Cal. Fin. Code Div. 1.2 ("SB1"), with respect to affiliated companies' sharing of information that does not constitute a "consumer report" as defined in the FCRA. *See* Appellants' Excerpts of Record ("ER") at 71. According to the district court, by excluding from the FCRA's definition of a "consumer report" certain information, such as information solely as to transactions or experiences between a consumer and a financial institution communicating the information, "Congress made it clear that such information was not subject to the FCRA's requirements, which are not intended to regulate the simple sharing of information between affiliates." *Id.* at 69. This reading ignores not only the express language of FCRA's affiliate information-sharing preemption provision, which prohibits the imposition of any state law governing "the exchange of information among persons affiliated by common ownership or common corporate control," 15 U.S.C. § 1681t(b)(2), but also other provisions of the FCRA and its legislative history.

Contrary to the view of the district court, the FCRA does regulate information that is not a "consumer report," even while exempting such information from the restrictions that apply to consumer reports. For example, Section 615(b) of the FCRA, 15 U.S.C. § 1681m(b), specifically requires a person who takes "adverse action" against a consumer based on information received from an affiliated entity that is *not* a consumer report (and is not "transaction or experience" information), but that does "bear[] on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer," to provide notice to the consumer and follow-up information upon request. *Id.* § 1681m(b)(2). Thus, it is simply not true that "[i]nformation not constituting a 'consumer report' is not governed by the FCRA," as the district court held. ER68. Contrary to the district court's opinion, Congress did not "expressly remove[] such information from the purview of the FCRA in Section 1681a(d)(2)(A)(ii)." *Id.* at 70-71. Rather, Congress excluded such information from the definition of a "consumer report," but simultaneously made clear that the FCRA governs actions based on information of *any* type that is shared among affiliates and used or intended to be used for specified purposes. Thus, while the FCRA does not *restrict* the

sharing of non-consumer-report information among affiliates, it still *regulates* that information, including by expressly prohibiting the states to interfere with affiliates' sharing of the information.

The legislative history of the FCRA preemption provisions bears this out. That history belies the district court's conclusion that "the only reasonable reading of the FCRA preemption provision is that it prevents states from enacting laws that prohibit or restrict the sharing of *consumer reports* among affiliates." ER71 (emphasis in original). The district court apparently reached this conclusion without examining the full history of the FCRA's enactment. If the court had undertaken such an examination, it would not have needed to conjecture about a "reasonable reading" of the FCRA's affiliate information-sharing preemption provisions, as Congress made quite clear what that preemption provision means.

As explained in the documentation of the FCRA's history by the former General Counsel of the House Banking Committee, Congress specifically *rejected* a proposal that would have limited FCRA's preemptive scope to state laws regulating credit reports. Joseph L. Seidel, *The Consumer Credit Reporting Reform Act: Information Sharing and Preemption*, 2 N.C. Banking Inst. 79, 90-91 (1998). Whereas the preemption provision in the bill reported by the House Banking Committee in the 102nd Congress "applied only to state credit reporting laws," *id.* at 93, leaving states free to enact laws "to address unfair or deceptive trade practices, or privacy laws that do not relate to the subject matter of the FCRA," H.R. Rep. No. 102-692, at 74 (1992), the bill that ultimately became the FCRA contained distinctly different preemption provisions. As reported by both the House and Senate Banking Committees in the 103rd Congress and by the Senate Banking Committee in the 104th Congress, the final FCRA preemption provision regarding affiliate information sharing "preempts *any* state law related to the exchange of information among persons affiliated by common ownership or common corporate control." S. Rep. No. 103-209, at 27 (1993) (emphasis added); *see also* H.R. Rep. No. 103-486, at 55 (1994) (same); S. Rep. No. 104-185, at 55 (1995) (same). Thus, the district court below was decidedly wrong in concluding that the only "reasonable" interpretation of the FCRA's preemption provision is one that limits its preemption to state laws prohibiting or restricting the sharing of *consumer reports* among affiliates. Congress provided for preemption of "the laws of any state . . . with respect to the exchange of information" among affiliates, without limitation other than for a preexisting Vermont law. 15 U.S.C. § 1681t(b)(2). Congress meant what it said.

By erroneously interpreting the scope of the FCRA's preemption provision, the district court further erred in finding that Title V of the Gramm-Leach-Bliley Act of 1996 ("GLBA"), not the FCRA, "encompasses the kind of information sharing at issue in this case." ER71. Accordingly, the district court wrongly held that, although Title V of the

GLBA expressly provides that "nothing in this title shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act," 15 U.S.C. § 6806, the FCRA "does not operate to limit the GLBA's explicit preservation . . . of states' rights to enact more stringent financial privacy laws." ER74. Because the FCRA *does* encompass, fully and expressly, the kind of information sharing at issue in this case, and because the only "preservation" of state law provided by Title V of the GLBA is against preemption by "[t]his subtitle" – *i.e.*, *GLBA Title V* (not the FCRA), 15 U.S.C. § 6807 – the district court's ruling cannot be reconciled with Congress' intent.

Practical Implications of This Appeal

In considering the legal questions raised by this appeal, it also merits note why Congress made the decision to preempt the states from interfering with affiliate information sharing. The responsible sharing among affiliates of consumer information has proven to the source of a wide range of benefits to both financial institutions and their customers or potential customers.

A principal purpose of the GLBA was to expand financial services companies' ability to offer consumers a variety of traditional banking products, insurance, and brokerage services, all from distinct business entities operating under one corporate umbrella. Information sharing among these affiliated entities is critical to facilitate the transactions this entails, as well as to provide other direct benefits to consumers. Such other benefits, as provided by community banks in particular, include:

- *Assessing Consumer Needs* – By assessing consumer needs based on information from affiliates, community banks are able to better align the needs of consumers with products/services offered – providing consumers with products/services at a competitive price and strengthening customer relationships.

- *One-Stop Call Centers* – In order to remain competitive in today's marketplace, some community banks are establishing insurance and brokerage businesses to complement their traditional financial product lines with a single service center for all products. Information sharing is critical to provide customers with a convenient way to obtain customer support on a full suite of financial products.

- *Fraud Prevention* – By sharing information about customer transactions, institutions are able to identify potentially fraudulent transactions that can reduce the costs and burdens to both customers and financial institutions.

- *Online Product Offerings* – For institutions offering a range of products and services through affiliates, the Internet provides a great medium to provide cost-effective and centralized access to consumers' accounts. Information sharing makes these services possible.

- *Consolidated Billing Statements/Operations Centers* – Diversified financial institutions can now provide customers with information on all of their accounts (*e.g.*, savings, investment, etc.) in a single statement. This allows consumers to obtain a more complete picture of their financial status and better manage their finances. Using centralized operations centers to process and print statements can generate savings, which can be eventually passed down to consumers.

- *Minimizing Mass Marketing Techniques/Costs* – Responsible information sharing provides valuable data for developing marketing campaigns that help minimize the deluge of brochures, statement stuffers, and other marketing confronting consumers every day. This also helps financial institutions control costs and direct products and services to consumers who are most likely to be interested in them.

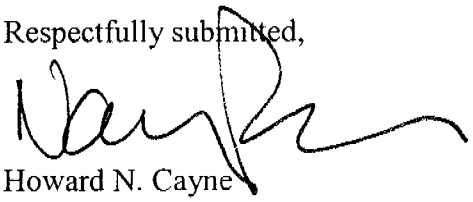
- *Providing Quick Access to Products/Services* – An increased use of technology and responsible information-sharing practices has enabled consumers to obtain credit and loan approvals in minutes, as opposed to days and weeks. Without the ability to share information with business affiliates, approval times would be lengthened and consumers could be forced to pay higher rates.

In summary, responsible information-sharing practices allow community banks to facilitate transactions, protect their customers, understand customers' financial needs, and improve overall customer service. The benefits from responsible information sharing can result in significant economic benefit for both consumers and financial institutions. The imposition of restrictions on such sharing state-by-state – or even locality-by-locality – could negatively affect all types of financial institutions and the overall economy. Thus, not only for the legal reasons detailed by Appellants and emphasized above, but also for sound policy reasons, this Court should carefully adhere to Congress' intent to preempt all state law restrictions on affiliate information sharing such as those in SB1.

Conclusion

In conclusion, ACB strongly urges this Court to reverse the decision below and direct the district court to enter a permanent injunction against the enforcement of the affiliate information-sharing provisions of SB1.

Respectfully submitted,



Howard N. Cayne
Nancy L. Perkins
ARNOLD & PORTER
Counsel for America's Community Bankers

CERTIFICATE OF SERVICE

I hereby certify that I have caused one original and three copies of the foregoing letter of *amicus curiae* America's Community Bankers to be dispatched this 6th day of August, 2004, by Federal Express next business day delivery, postage prepaid, to the Clerk, United States Court of Appeals, 95 Seventh Street, San Francisco, CA 94103-1526.

I further certify that I have caused a copy of the foregoing letter to be served this 6th day of August, 2004, by Federal Express next business day delivery, postage prepaid, on each of the following:

Counsel for Appellants:

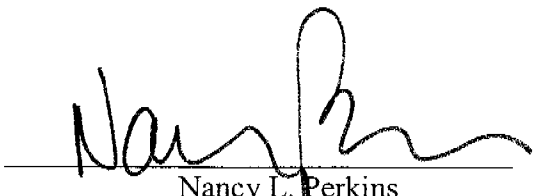
RICHARD A. JONES
COVINGTON & BURLING
One Front Street
San Francisco, CA 94111
Telephone: 415-591-6000
Telecopy: 415-591-6091

E. EDWARD BRUCE
STUART C. STOCK
KEITH A. NOREIKA
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-662-6000
Telecopy: 202-662-6291

Counsel for Appellees:

SUSAN HENRICHSEN
CATHERINE YSREAL
Department of Justice
110 West A Street
Suite 1100
San Diego, California 92101
Telephone: 619-645-2080
Telecopy: 619-645-2062

KIMBERLY GAUTHIER
JUDITH A. CARLSON
Department of Corporations
1515 K Street, Suite 200
Sacramento, California 95814-4052
Telephone: 916-327-1626
Telecopy: 916-445-6985



Nancy L. Perkins