> consumer report, but rather intends to permit the sharing of that information among a broader range of affiliated entities *without triggering the conditions governing the sharing of consumer reports under the FCRA.*

Id. at 6 (emphasis added) (Comm.Add. at p. 92).

Having addressed the banks' concern that information sharing among affiliates was not subject to the requirements of the FCRA, Congress went on to add section 1681t(b)(2), the state law preemption provision. The Congressional history confirms that this section was added to make clear that the FCRA established a national standard and that states were not to treat information sharing among affiliates as the sharing or dissemination of credit reports, and could not regulate affiliate information sharing under state credit reporting laws. The Senate Report on this issue provides:

> Section 116 [section 1681t] preempts any state law related to the exchange of information among persons affiliated by common ownership or common corporate control. The Committee intends that this provision will be applied to the modifications made by [other provisions] of the Committee bill which amend section 603 [section 1681a] of the FCRA pertaining to exclusions from the definition of consumer report that permit, subject to certain restrictions, the sharing of information among affiliates.

S. Rep. 103-209 at 18 (1993) (Comm.Add. at p. 104).

The preemption provision is limited to only state credit reporting laws as demonstrated by a review of the language of 15 U.S.C. § 1681t(b)(2) as it was enacted in 1996. Subsection (b)(2) to Title 15 U.S.C. Section 1681t provides that

state laws placing requirements on the exchange of information among affiliates are preempted, "except that this paragraph shall not apply with respect to subsection (a) or (c)(1) of section 2480e of title 9, Vermont Statutes Annotated (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996 [enacted Sept. 30, 1996]). The referenced Vermont Code section regulated consumer reporting and the dissemination of credit reports.[6]

In order to give full effect to the statute as enacted by Congress, statutes are to be interpreted so as to not to make ineffective other provisions of the statute or statutory scheme. *See generally, United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Bifulco v. United States,* 447 U.S. 381, 387 (1980). To read the preemption provision broadly as proposed by the Associations would be to make

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[6] Title 9, Section 2480e of the Vermont Statute provides:
Consumer consent
(a) A person shall not obtain the credit report of a consumer unless:
(1) the report is obtained in response to the order of a court having jurisdiction to issue such an order; or
(2) the person has secured the consent of the consumer, and the report is used for the purpose consented to by the consumer.
(b) Credit reporting agencies shall adopt reasonable procedures to assure maximum possible compliance with subsection (a) of this section.
(c) Nothing in this section shall be construed to affect:
(1) the ability of a person who has secured the consent of the consumer pursuant to subdivision (a)(2) of this section to include in his or her request to the consumer permission to also obtain credit reports, in connection with the same transaction or extension of credit, for the purpose of reviewing the account, increasing the credit line on the account, for the purpose of taking collection action on the account, or for other legitimate purposes associated with the account; and

the inclusion of the Vermont statute, dealing with credit reports, unnecessary and superfluous. As the district court found, the fact that Congress exempted the Vermont statute dealing with consumer reporting and credit reports from the preemption provision further evidences the intent behind the provision.

The preemption provision was intended to preempt those state laws that place prohibitions or restrictions on consumer reporting agencies and the dissemination and distribution of credit reports by affiliates. To read the FCRA and the 1996 amendments as the Associations propose would be to expand the purpose of the FCRA beyond that contemplated by Congress and would be an impermissible construction of the statutory scheme. *Id.*

In summary, section 1681t(b)(2) must be read in the context of the FCRA as a whole and in conjunction with the other 1996 amendments regarding information sharing among affiliates. To interpret section 1681t(b)(2) to preempt all state laws that regulate the sharing of information among affiliates, as the Associations propose, would expand the purpose of the FCRA beyond that contemplated by Congress in enacting the statutory scheme. Further, such a reading and application would eviscerate other federal statutory provisions, such as Title V of the GLBA. 15 U.S.C. §§ 6801 – 6809. *See generally, United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Bifulco v. United States,* 447 U.S. 381, 387 (1980).

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(2) the use of credit information for the purpose of prescreening, as defined and

The stated purpose of the FCRA is to regulate consumer reporting agencies and the dissemination of consumer reports. The preemption provision quoted above provides that state laws inconsistent with the provisions of the FCRA regarding consumer reporting agencies and consumer reports are preempted. 15 U.S.C. § 1681t(a). Subsection (b)(2) of Title 15 U.S.C. Section 1681t, read in the context of the statutory scheme as a whole, merely restates and clarifies Congress' position with regard to the sharing of information by affiliates.

The sharing of information by affiliates is expressly excluded from the definition of a consumer report and, thus, is excluded from coverage under the provisions of the FCRA. Only consumer reporting and credit reports are covered by the FCRA. State laws, such as SB1, which apply to the sharing of information by financial institutions with their affiliates and third party nonaffiliates are not preempted.

1. Recent Amendments To The FCRA Do Not Expand Its Preemption Provision Beyond State Credit Reporting Laws To State Information Privacy Statutes Enacted Pursuant To The Authority Reserved To The States Under The GLBA

The Associations, unwisely, place great weight on the 2003 amendments to the FCRA. Pub. L. No. 108-159 (Fair and Accurate Credit Transactions Act of 2003). Rather than supporting the Associations' argument, the amendments confirm that the FCRA is limited to the regulation of consumer

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permitted from time to time by the Federal Trade Commission.

reports and their dissemination and distribution.

Newly enacted Section 1681s-3 is titled "Affiliate sharing." 15 U.S.C. § 1681s-3. This provision sets forth the rules governing solicitations by affiliates for purposes of marketing. Specifically, it provides:

> (a) Special rule for solicitation for purposes of marketing.
> (1) Notice. Any person that receives from another person related to it by common ownership or affiliated by corporate control *a communication of information that would be a consumer report, but for clauses (i), (ii), and (iii) of section 603(d)(2)(A) [15 USCS § 1681a(d)(2)(A)]*, may not use the information to make a solicitation for marketing purposes to a consumer about its products or services, unless--
> (A) it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons for purposes of making such solicitations to the consumer; and
> (B) the consumer is provided an opportunity and a simple method to prohibit the making of such solicitations to the consumer by such person. (Emphasis added).

The Associations' reliance on this section for the proposition that preemption of state laws was expanded by the 2003 amendments is unsupported. Associations' Opening Brief, p. 11. Title 15 U.S.C. section 1681s-3 addresses the solicitation of consumers for *marketing purposes*, using information shared among affiliates. 15 U.S.C. § 1681s-3 (emphasis added). This section does not establish uniform standards for the sharing of information among affiliates. This section does not address preemption of state law. Rather, section 1681s-3 is applicable only to the *use* of shared information for marketing purposes.

Further, the Associations misunderstand the nature and language of 15 U.S.C. § 1681s-3. As previously stated, Section 1681s-3 regulates the sharing of information among affiliates for purposes of marketing. The very language of the statute acknowledges that the shared information *would be* a consumer report, *but for* the exclusion of such information from the definition of "consumer report" in Section 1681a(d)(2)(A). 15 U.S.C. § 1681s-3(a)(1) (emphasis added). The inclusion of this language constitutes an acknowledgement by Congress that information shared by affiliates, whether for marketing purposes or otherwise, expressly meets the definition of a "consumer report." *See* 15 U.S.C. 1681a(d).

Section 1681s-3, read together with the preemption provision, 15 U.S.C. § 1681t(b)(2), confirms the limited scope of the FCRA to the regulation of consumer reports. This recent enactment also confirms that the FCRA is limited in scope and does not regulate information sharing by affiliates.

The 2003 amendments to the FCRA also preserved the preemption provision relied on by the Associations, which was scheduled to sunset on January 1, 2004. *See* former 15 U.S.C. § 1681(d)(2). However, the 2003 amendments made no changes to the language of the preemption provision as set forth in 15 U.S.C. § 1681t(b)(2) and, accordingly, did not expand its scope beyond the scope of the FCRA.

In an attempt to buttress their interpretation of the FCRA preemption provision, 15 U.S.C. § 1681t(b)(2), which was not substantively changed in 2003, the Associations and amici detail the legislative history related to the 2003 amendments. The Associations' reliance on this legislative history as evidence of the legislature's intent in enacting 15 U.S.C. § 1681t(b)(2) is misplaced.

The legislative intent that is pertinent to this case is the intent of the legislature that enacted the statute in question. *See Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 758 (1979) (finding that " '. . . [legislative] observations . . . are in no sense part of the legislative history.' (citations) 'It is the intent of the Congress that enacted [the section] . . . that controls.' (citations)"; *see also United States v. X-Citement Video,* 513 U.S. 64, 77, fn. 6 (1994) (noting that [t]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight. (citations)."

In this case, the Associations are relying on commentary by a Congress that was discussing the meaning of a statute seven years after its enactment. Furthermore, neither the language nor the substance of the statute changed in those seven years. To allow a subsequent Congress to comment upon the intent of the Congress that initially enacted the statute would be to place the law in a constant state of flux and uncertainty. This approach defies logic.

As set forth above, the FCRA preemption provision was enacted in 1996. The 2003 amendment to this provision removed the sunset provision and made preemption of state credit reporting laws permanent, without substantive change to the preemption language. Accordingly, the legislative history relied on by the Associations constitutes nothing more than "legislative observations" that are in no way "part of the legislative history." *Oscar Mayer and Co. v. Evans,* 441 U.S. 750, 758 (1979).

III. THE AMICUS BRIEF FILED BY THE FEDERAL AGENCIES IS NOT ENTITLED TO DEFERENCE AND IS NOT A REASONABLE INTERPRETATION OF THE STATUTE

Six federal agencies, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the National Credit Union Administration, and the Federal Trade Commission ("federal agencies"), have opted to weigh in by filing a joint amicus brief regarding their interpretations of the FCRA, the FACT Act, and the GLBA. The Commissioners do not dispute these federal agencies' authority to enforce these statutes against the institutions under their jurisdiction. However, the federal agencies' interpretation of these statutes is not entitled to deference.

The Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) set forth the deference analysis due an agency

interpretation in two steps. In the first step, the Court must determine if "Congress has directly spoken to the precise question at issue." *Id.* at 842-843. If Congress has spoken to the issue, the Court's inquiry ends because the Court, as well as the agency, "must give effect to the unambiguously expressed intent of Congress." *Id.*

As set forth above in great detail, Congress left no gaps for the federal agencies to fill and Congress has spoken to the issue of preemption under the FCRA. Reading the preemption provision of the FCRA within the context of the statutory scheme as a whole, while giving full effect to the GLBA, leads to the inevitable conclusion that Congress has spoken to the issue.

Accordingly, the Court need not engage in the second step of the *Chevron* analysis. However, even if the Court were to do so, the federal agencies' interpretation as set forth in their amicus brief is not reasonable.

If Congress has not spoken to the exact question and the agency is acting pursuant to an express or implied grant of authority, the Court must employ the second step of the *Chevron* analysis. Under this second step, the Court must determine if the agency's interpretation of the statute is "reasonable" and not otherwise "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Deference to an agency's action is warranted "only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,*

467 U.S. 837, 843-844 (1984); *see also United States v. Mead Corp.,* 533 U.S. 218, 226-227 (2001); *Christensen v. Harris County,* 529 U.S. 576, 596-597 (2000) (BREYER. J., dissenting) (where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable").

Here, the federal agencies have been given the authority to enforce compliance with the FCRA and the FACT Act with respect to "consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of 15 U.S.C. § 1681m." 15 U.S.C. §1681s(b). This is in direct contrast to a delegation of authority requiring them to promulgate regulations, which would constitute the agency's interpretation of the statute. *See, e.g.,* 15 U.S.C. §§ 6804, 6805 (authorizing the federal agencies to promulgate regulations and to enforce Title V of the GLBA and the regulations promulgated thereunder).

Further, the court need not defer to the agency's interpretation if "an alternate reading is compelled by the regulation's [statute's] plain language." *Alhambra Hosp. v. Thompson,* 259 F.3d 1071, 1074 (9th Cir. 2001). Here, the federal agencies are not charged with interpreting the meaning of a regulation promulgated pursuant to Congressional authority. Instead, the federal agencies are directly interpreting the federal statutes in dispute. In this instance, the federal agencies are attempting to walk in the shoes of Congress and dictate the meaning

and application of these laws. This is an impermissible exercise of the federal agencies' authority.

For the reasons set forth above in Section II, the FCRA preemption provision is limited to state credit reporting laws. The FACT Act amendments did not alter this provision or the preemption analysis. As Congress has spoken to these issues through the language of the statutes and also through the pertinent legislative history, a contrary interpretation by the federal agencies is not warranted. Moreover, as the federal agencies' interpretation set forth in their amicus brief conflicts with this language and legislative history, it is not reasonable. Accordingly, the federal agencies' opinions espoused in their amicus brief are not entitled to deference.

CONCLUSION

As in the trial court below, the Associations cannot overcome the presumption against preemption and cannot meet their burden of showing that Congress intended to preempt state consumer privacy protection laws such as SB1. The Associations have failed to show that the FCRA regulates information sharing by affiliates beyond consumer reports and consumer reporting. The preemption provision/state law savings clause in Title V of the GLBA expressly reserved to the states the authority to enact financial privacy legislation that provided for greater protections to consumers. SB1 was enacted in direct response to this authority and

is not in conflict with the GLBA.

For these reasons and those set forth more fully above, William P. Wood, in his official capacity as Commissioner of the California Department of Corporations and Howard Gould, in his official capacity as Commissioner of the California Department of Financial Institutions, respectfully request this Court affirm the judgment entered by the Eastern District of California.

Dated: September 1, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1, counsel for Appellees certifies that the Answering Brief filed herewith is proportionately spaced, has a typeface of 14 points or more and contains 9,859 words.

Executed on September 1, 2004, at Sacramento, California.

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Kimberly L. Gauthier

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellees, William P. Wood and Howard Gould, state that case of American Bankers Association, et al. v. Bill Lockyer, et al. (Case No. 04-16560) is related to the within case, which bears Case No. 04-16334, as it raises the same issues. Appellees are not aware of any other related cases in this Court or any other court of appeals.

Executed on September 1, 2004, at Sacramento, California.

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Kimberly L. Gauthier

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered to the Clerk of the Court 15 copies of the foregoing Answering Brief of Appellees, William P. Wood and Howard Gould, on this 1st day of September, 2004, by United Parcel Service, next business day delivery, addressed as follows:

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