No. 04-16334

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN BANKERS ASSOCIATION,
THE FINANCIAL SERVICES ROUNDTABLE, and
CONSUMER BANKERS ASSOCIATION,

Plaintiffs-Appellants,

v.

BILL LOCKYER, in his official capacity as Attorney General of California,
HOWARD GOULD, in his official capacity as Commissioner of
the Department of Financial Institutions of the State of California,
WILLIAM P. WOOD, in his official capacity as Commissioner
of the Department of Corporations of the State of California, and
JOHN GARAMENDI, in his official capacity as Commissioner
of the Department of Insurance of the State of California,

Defendants-Appellees.

On Appeal From the Final Judgment and Denial of Injunction of the
United States District Court for the Eastern District of California
Case No. S-04-0778 MCE KJM

BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

American Bankers Association is a non-profit trade group, based in Washington, DC. It has no parent corporation, nor has it issued shares or securities that are publicly traded.

The Financial Services Roundtable is a non-profit trade group, based in Washington, DC. It has no parent corporation, nor has it issued shares or securities that are publicly traded.

Consumer Bankers Association is a non-profit trade group, based in Arlington, Virginia. It has no parent corporation, nor has it issued shares or securities that are publicly traded.

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JURISDICTION

The district court, Hon. Morrison C. England, Jr., had jurisdiction over this case under 28 U.S.C. § 1331, because the Appellant Associations' claim that the California statute at issue here is preempted by the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681t(b)(2), arises under the Supremacy Clause of the United States Constitution (art. VI), as well as that statute. *See Verizon Maryland, Inc. v. Public Service Comm'n*, 535 U.S. 635, 648 (2002). The district court entered final judgment dismissing the Associations' complaint on June 30, 2004, ER76, and the Associations filed their notice of appeal on July 1, 2004, ER77.

The district court sua sponte on July 9, 2004, issued an amended memorandum and order supplementing its prior opinion, ER79, and an Amended Judgment pursuant to that amended order, ER94. There is a substantial question whether the district court retained jurisdiction for this purpose after the notice of appeal had been filed. *See McClatchy Newspapers v. Central Valley Typographical Union*, 686 F.2d 731, 734 (9th Cir. 1982) ("When a judgment is appealed, jurisdiction over the case passes to the appellate court. The filing of a notice of appeal generally divests the district court of jurisdiction over the matters

appealed.").[1] Nevertheless, as a precaution, the Associations, on July 13, 2004, timely filed an amended notice of appeal to include the Amended Judgment. *See* ER95.

This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

Between 1996 and 2003, Congress on three separate occasions adopted laws designed to allow financial institutions to share customer information among their affiliates – the essential predicate to offering comprehensive banking, insurance, and securities products and services to their customers. The district court has undermined these federal laws as they apply to the nation's most populous state by upholding a California statute that imposes requirements and prohibitions on the exchange of customer information among financial institution affiliates. The district court reached this result by refusing to apply the plain meaning of all three congressional enactments.

In 1996, Congress amended the FCRA to permit affiliated financial institutions to share customer information. *See, e.g.*, 15 U.S.C. § 1681a(d)(2)(A). At the same time, Congress expressly preempted state laws that impose

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[1] *Compare* Fed. R. App. P. 4(a)(4)(B) (allowing district court jurisdiction to amend order in response to timely filed post-judgment motions even after notice of appeal has been filed, but making no such provision for sua sponte amendments to order and judgment).

"requirement[s] or prohibition[s]" on the exchange of information among affiliates. 15 U.S.C. § 1681t(b)(2). The district court admitted that, under the plain language of that statute, the California statute would be preempted insofar as it applies to the exchange of information among financial institution affiliates. It nonetheless upheld the state statute by narrowing the FCRA preemption clause to apply only to state laws regulating "consumer reports," like those generated by consumer reporting agencies.

In 1999, Congress enacted the Gramm-Leach-Bliley Act ("GLBA"), which expanded banks' and other depository institutions' ability to affiliate with, and operate through, securities and insurance companies. *See, e.g.*, 12 U.S.C. §§ 24a, 1843(k). In doing so, Congress regulated financial institutions' disclosure of customer information with nonaffiliated third parties, but left affiliated companies free to share customer information among themselves. *See* 15 U.S.C. § 6801, *et seq*. Congress expressly provided that GLBA "shall [not] be construed to modify, limit, or supersede the operation of the [FCRA]," 15 U.S.C. § 6806, thereby ensuring that GLBA would not disturb the FCRA preemption clause that allows affiliate sharing of information free of any state "requirement or prohibition." The district court nonetheless relied on GLBA to limit its construction of FCRA's preemption clause and thereby allow California to impose

requirements and prohibitions on the exchange of customer information among financial institution affiliates.

In 2003, Congress again amended the FCRA to further regulate information shared among affiliates, expand the scope of the Act's preemption clause to preclude states from imposing requirements or prohibitions on the use of shared customer information by affiliates for marketing (as the California statute does), and to make permanent that clause, which otherwise would have sunset on January 1, 2004. Once again, the district court refused to apply the plain language of the statute.

Appellant Associations ask this Court to apply the plain language of the governing federal statutes and to hold that the California statute is preempted as it applies to the sharing of customer information among financial institution affiliates.

ISSUE PRESENTED

Whether the district court erred in upholding the challenged portions of the California statute at issue here by: (1) refusing to apply the plain language of the FCRA's preemption clause, 15 U.S.C. § 1681t(b)(2); (2) treating as irrelevant the 2003 Amendments to the FCRA that expanded and made permanent § 1681t(b)(2); and (3) instead relying on the purported "purposes" of the FCRA

and on GLBA to limit the FCRA's preemption clause even though GLBA directs that it shall not be construed to "modify, limit or supercede the [FCRA]"?

STATEMENT OF THE CASE

The California Financial Information Privacy Act, Cal. Fin. Code Div. 1.2, known as "SB1" for the Senate bill on which it is based (text at ER12-37), imposes requirements and prohibitions on the exchange of customer information among financial institution affiliates that are more restrictive than those imposed by federal law.[2] Appellant Associations, therefore, on April 19, 2004, filed suit seeking a declaratory judgment that SB1 is preempted, as well as injunctive relief against the Appellee California public officials charged with its enforcement ("California Defendants"). ER1. Relying on the FCRA, 15 U.S.C. § 1681t(b)(2), which provides that no state shall impose any "requirement or prohibition" relating to affiliate sharing of customer information, the Associations moved as soon as possible for summary judgment that the FCRA preempts SB1 so that the district court could decide this legal issue before July 1, 2004, when SB1 became operative. The California Defendants cross-moved for dismissal of the complaint and summary judgment. Defendants did not dispute that SB1 imposes

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[2] SB1 also imposes requirements on financial institutions' sharing of customer information with nonaffiliated third parties. The Associations have not challenged those restrictions, and they are not subject to the FCRA preemption clause.

requirements and prohibitions on affiliate sharing and that the case raises no disputed factual issues.

On June 30, 2004, following a June 28 hearing, the district court granted California Defendants' cross-motions, entered final judgment for them and dismissed the Associations' complaint. ER76. The Associations appealed the next day. ER77.

The district court amended its Judgment on July 9, 2004. ER94. On July 13, 2004, the Associations filed a timely amended notice of appeal to include the amended judgment, ER95, although they question the district court's authority to amend its judgment after they filed their notice of appeal. *See supra* p. 1. On July 28, 2004, this Court granted the Associations' motion, which was filed with the California Defendants' consent, to expedite briefing and argument of this appeal.

STATEMENT OF FACTS

A. The Federal Statutes Relating To Information Sharing By Financial Institutions

FCRA, 15 U.S.C. § 1681 *et seq.*, was originally enacted in 1970, but was substantially amended in 1996 and 2003 in ways that are decisive here. It defines the rights and obligations of banks and other institutions that receive, use, collect or exchange information regarding the creditworthiness of consumers and other related consumer characteristics. In doing so, the Act imposes different

levels of regulation on the exchange of this information. Since the original 1970 Act, the most stringent regulation has been on "consumer reports," for example, information compiled and disseminated by consumer reporting agencies, but also information collected by financial institutions and other businesses for potential use in deciding whether to extend credit, or insurance. 15 U.S.C. § 1681a(d)(1). The FCRA provides that "consumer reports" can only be used for "permissible purposes," 15 U.S.C. § 1681b, regulates their disclosure, *id.* §§ 1681d, 1681f, 1681g, and imposes requirements to investigate consumer disputes, *id.* § 1681e(b).

The FCRA was amended in 1996 to allow financial institutions to freely share among their affiliates information they collect about their own customers, without the limitations imposed by the FCRA's more stringent regulations of "consumer reports."

First, financial institutions were allowed to share among affiliates information that they derive from their own dealings with their customers (so-called "experience information") regarding "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." This was achieved by exempting such information, when so shared, from the definition of a "consumer report." 15 U.S.C. § 1681a(d)(2)(A).[3]

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[3] The relevant, codified sections of the FCRA, §§ 1681a, 1681s-3, and 1681t, are set out in full in the Addendum to this Brief, starting at A-1.

Second, Congress exempted from the definition of "consumer report" (and therefore stricter regulation) financial institutions' exchange of customer information among their affiliates that they derive from banking and loan applications and the like (so-called "non-experience" information). The 1996 FCRA regulates the exchange of such information by requiring financial institutions to notify their customers that it might be shared among affiliates and give them an opportunity to opt-out of the sharing of this information. 15 U.S.C. § 1681a(d)(2)(A)(iii). When this opt-out option is provided to a customer, the non-experience information is no longer a "consumer report." *Id.*

Third, Congress added the express federal preemption clause at issue here – 15 U.S.C. § 1681t(b)(2). Unlike most other preemption clauses enacted as part of the 1996 Amendments that are expressly limited to state laws regulating "consumer reports," *e.g.*, 15 U.S.C. § 1681t(b)(1)(A), the FCRA's affiliate-sharing preemption clause broadly and without qualification preempts any "requirement or prohibition" with respect to the exchange of "information" among affiliates. Reflecting the compromise which produced this legislation, § 1681t(b)(2) was scheduled to sunset on January 1, 2004. *See* former 15 U.S.C. § 1681t(d)(2) (repealed by Pub. L. No. 108-159, § 711(3), 117 Stat. 1952 (Dec. 4, 2003)).

In sum, under the 1996 FCRA Amendments, federal law permitted financial institutions to share "experience information" among affiliates without

restriction and "non-experience information" subject to a federal opt-out regime. At the same time, 15 U.S.C. § 1681t(b)(2) barred states from imposing any restriction on information sharing among affiliates.

Gramm-Leach-Bliley Act ("GLBA"). In 1999, Congress expanded banks' and other depository institutions' ability to affiliate with, and thereby operate through, securities and insurance companies by allowing bank holding companies to own both depository institutions and insurance and securities companies. *See, e.g.*, 12 U.S.C. § 1843(k). In defined circumstances, depository institutions were themselves allowed to own securities and insurance subsidiaries. *See, e.g.*, 12 U.S.C. § 24a. In fact, GLBA required depository institutions to "push out" some securities activities to an affiliate.[4]

In taking this action, Congress restricted these institutions' sharing of their customers' information with nonaffiliated third parties by giving customers the right to opt-out of such sharing. *See* GLBA Title V, Subtitle A, codified at 15 U.S.C. § 6801, *et seq.* However, GLBA does not impose any restrictions on financial institutions' ability to share customer information among affiliates. GLBA also provides that financial institutions – whether or not they share with

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[4] *See* Pub. L. No. 106-102, title II, 113 Stat. 1338 (Nov. 12, 1999) (*e.g.*, narrowing SEC exemption from regulation as "broker" and "dealer" for banks' securities activities).

affiliates and/or nonaffiliated third parties – must provide customers a federally prescribed notice regarding their practices. *Id.* § 6803(a).

GLBA Title V, Subtitle A has a savings clause regarding state law, but this savings clause is limited to "this subchapter":

> This subchapter and the amendments made by this subchapter shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order or interpretation is inconsistent with the provisions of this subchapter.

15 U.S.C. § 6807(a). Thus, GLBA permits states, for example, to bar sharing with nonaffiliated third parties, but it does not change or limit the FCRA's preemption of state laws regulating or prohibiting affiliate sharing. To the contrary, GLBA expressly provides that it "shall [not] be construed to modify, limit, or supersede the operation of the [FCRA]," 15 U.S.C. § 6806.

The 2003 FCRA Amendments. Faced with the January 1, 2004, sunset of the 1996 FCRA preemption clause relating to affiliate sharing, *see supra* p. 8, and California's August 2003 enactment of SB1 imposing requirements and prohibitions on such sharing (discussed below at pp. 13-15), Congress was forced to decide whether to allow FCRA preemption to lapse and permit states to regulate affiliate sharing through enactments like SB1, or whether to renew the FCRA affiliate sharing preemption provision. Congress took the latter course.

In the Fair and Accurate Credit Transactions Act of 2003 ("2003 Act" or "2003 FCRA Amendments"), Pub. L. No. 108-159 (excerpted in Addendum, starting at A-18), enacted December 4, 2003, Congress provided additional regulation for financial institution affiliates' exchange and use of customer information, made the FCRA preemption clause permanent, and expanded its scope.

First, in the 2003 Act, Congress amended the FCRA to impose an additional "[a]ffiliate sharing" requirement beyond those of the 1996 FCRA Amendments and GLBA. Under the 2003 Act, "[a]ny 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 [FCRA § 1681a(d)(2)(A)(i), (ii) & (iii), *see supra* pp. 7-8]," may "use the information to make a solicitation for marketing purposes to a consumer about its products or services," only if the person first "provide[s] [customers] an opportunity and a simple method to prohibit the making of such solicitations." 15 U.S.C. § 1681s-3(a) (emphasis added).[5] Thus, the 2003 FCRA Amendments

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[5] Section 214(c)(1) of the 2003 Amendments to the FCRA (*see* Pub. L. No. 108-159, excerpted in the Addendum to this Brief), amends 15 U.S.C. § 1681a(d)(2)(A) to make financial institutions' ability to escape the more stringent "consumer report" regulation for exchange among affiliates of their customer information for marketing purposes, "subject to" their compliance with marketing use opt-out requirements imposed by 15 U.S.C. § 1681s-3. Therefore, before any

(continued...)

regulate through an opt-out regime an affiliate's use of shared customer information that is not a "consumer report" for certain marketing purposes. Apart from this limited opt-out, affiliates can share and use information under the 1996 FCRA and GLBA regimes. *See supra* pp. 7-10.

The 2003 FCRA Amendments also established, however, exceptions to this limited marketing use opt out requirement – *see, e.g.*, 15 U.S.C. § 1681s-3(a)(4), "solicitation[s] . . . to a consumer with whom the [affiliate] has a pre-existing business relationship." And they directed the federal banking agencies, as well as the National Credit Union Administration and Federal Trade Commission, to issue regulations within nine months of the FCRA's date of enactment – *i.e.*, by September 4, 2004 – to implement the new FCRA notice and opt out procedures. *See* Pub. L. No. 108-159, § 214(b)(4). Pending the promulgation of such regulations, the 2003 FCRA Amendments allow unrestricted marketing use of customer information obtained from an affiliate. *See* 15 U.S.C. § 1681s-3(a)(5). Thus, under the 2003 FCRA Amendments, the exchange with affiliates of

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(footnote continued)

such exchange of information can be exempted from regulation as a consumer report under the 1996 Amendments, a financial institution must now first comply with the FCRA's marketing requirements in § 1681s-3 added by the 2003 Amendments.

customer information, including information that is not a consumer report, continues to be regulated by the FCRA pursuant to nationwide standards.

Second, building on the 1996 federal regime for affiliate sharing, with federal preemption to protect it, Congress in the 2003 Act amended the FCRA to make the affiliate sharing preemption clause in § 1681t(b)(2) permanent. *See* Pub. L. No. 108-159, § 711(3) (repealing former 15 U.S.C. § 1681t(d)(2), the sunset clause). In addition, to ensure that states, like California in SB1, could not contradict the marketing-use provisions established by the 2003 FCRA Amendments, the scope of the FCRA preemption under § 1681t(b)(2) was expanded to preempt state laws imposing requirements or prohibitions related to affiliates' "use" of non-consumer report information received from an affiliate. 15 U.S.C. § 1681s-3(c).

B. SB1's Requirements And Prohibitions Regarding Financial Institutions' Information Sharing With Affiliates

In August 2003, three months before adoption of the 2003 FCRA Amendments, the California Legislature enacted SB1, specifying an "operative date" of July 1, 2004. SB1 applies to all "financial institutions" "doing business in th[e] state [of California]," §4052(c), with "consumers," defined as "individual resident[s] of th[e] state," to the extent that they use financial products for their individual, family or household needs, § 4052(f).

SB1 provides that a "financial institution shall not disclose to, or share a consumer's nonpublic personal information for any purpose with, an affiliate unless the financial institution . . . notifie[s] the consumer annually in writing . . . that the nonpublic personal information may be disclosed to an affiliate of the financial institution and the consumer has not directed that the nonpublic personal information not be disclosed." § 4053(b)(1).[6] Thereafter, a "consumer shall be provided a reasonable opportunity (at least 45 days) prior to disclosure of nonpublic personal information to direct that nonpublic personal information not be disclosed," § 4053(d)(3). SB1 imposes extensive requirements on the form and content of the notices financial institutions must annually send to their customers to inform them of their right to opt-out. § 4053(d).

"'Nonpublic personal information' means personally identifiable financial information (1) provided by a consumer to a financial institution [including the customer's name and address], (2) resulting from any transaction with the consumer or any service performed for the consumer, or (3) otherwise obtained by the financial institution." § 4052(a). "Personally identifiable financial information" includes "[t]he fact that an individual is or has been a consumer of a

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[6] As noted above, p. 5 n.2, SB1 limits sharing of information with nonaffiliated parties, § 4053(a), but those provisions are not at issue here.

financial institution or has obtained a financial product or service from a financial institution." § 4052(b).

SB1 exempts from its requirements and prohibitions the sharing of information between a financial institution and affiliates that use the same brand, § 4053(c)(3), operate within the "same line of business," – *i.e.*, "banking," "insurance," or "securities," § 4053(c)(2), and have the same regulator, § 4053(c)(1). Thus, for example, banks can disclose information to their affiliated, commonly branded credit card banks, but not their insurance or securities affiliates unless SB1's notice requirement is satisfied and the customer has not opted out. In this fashion, SB1 imposes requirements on, or prohibits, banks from sharing any information with insurance or securities affiliates.

Enormous penalties undergird these requirements and prohibitions. A financial institution that negligently discloses nonpublic personal information in violation of SB1 is subject to a civil penalty of $2,500 per individual violation, capped at $500,000 if a negligent violation results in the release of such information for more than one individual. The penalty for knowing and willful violations is also $2,500 per individual violation, but there is no cap on the financial institution's liability. § 4057.

C. The Associations' Members Use Affiliated Companies To Provide Comprehensive Financial Services To California Customers

The Associations are three national trade associations that represent the interests of their members in this lawsuit, which include large financial services companies that do business nationwide and have thousands or even millions of California customers.[7] Pursuant to the affiliations that were authorized and/or mandated by GLBA – and for reasons of efficiency and administrative convenience – many of the Associations' members operate through affiliates that are subsidiaries either of the main financial institution or of a holding company that owns that institution. ER39 (¶ 2). They operate as integrated financial services businesses, often under a common brand.

As a result, many of the Associations' members share customer information among their affiliates to provide comprehensive, seamless services and products that customers expect, especially from commonly branded entities – *e.g.*, immediate transfer of funds and balance information between a bank and its securities affiliate. ER39 (¶ 3). Other examples: After closing, an insurance affiliate of a bank may use a list of the bank's new mortgage customers to offer the

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[7] A representative list of members of American Bankers Association is published at www.aba.com/Sites+of+Interest/membanks.htm. A list of members of The Financial Services Roundtable is published at www.fsround.org/membercos.html, and a list of the members of Consumer Bankers Association is published at www.cbanet.org/membership/cba_members/cba_members.html.

new homeowner insurance at special rates available to the bank's customers. ER39 (¶¶ 2, 3). Or a bank may offer various types of deposit products to customers with securities holdings at a brokerage affiliate as "preferred customers."

Pursuant to the federal legislation discussed above, pp. 6-13, a financial institution is thus able to offer a full range of financial products and services to its collective customer bases through related affiliates, just as if it was a single corporate entity. Under SB1, such institutions must either cease sharing with affiliates that are not in the same line of business or submit to SB1's opt-out requirements and prohibitions.

D. The District Court's Decision

The district court acknowledged that FCRA § "1681t(b)(2) does indicate on its face that 'no requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control.'" ER88.[8] Like the parties, the district court also did not dispute that SB1 imposes such requirements and prohibitions. However, the district court did not construe § 1681t(b)(2) according to its plain terms. Instead, it held that doing so would be contrary to the

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[8] Citations are to the district court's amended opinion unless otherwise noted.

FCRA's "stated purpose and scope" (as set forth in the 1970 FCRA) which the district court found was solely the regulation of consumer reports. ER85. On the same grounds, the district court rejected the Associations' argument that where, in other FCRA preemption clauses, Congress wanted to limit preemption to "consumer reports" it did so explicitly. ER89 n.8.

The district court also rejected, in a footnote, the Associations' arguments that the 2003 Amendments to the FCRA regulate customer information shared among affiliates, while expanding and making permanent FCRA preemption, thus preempting SB1's affiliate sharing provisions. The district court asserted, without explanation, that the 2003 FCRA amendments "do[] not purport to regulate . . . affiliate information sharing in general and do[] not evince any congressional intent to do so." ER92 n.12.

The district court also relied on GLBA. It found that

> it is clear that Congress intended that states be afforded the right to regulate consumer financial privacy on behalf of their citizens in adopting statutes more protective in that regard than the provisions of the GLBA. This permits state law[s] like SB1, and weighs heavily against the preemption argument advanced by [the Associations].

ER91. The district court asserted that GLBA § 6806's express preservation of all of the provisions of the FCRA did not apply here because § 6806 "was intended only to preserve the FCRA's specific consumer protections with respect to consumer reporting, and does not operate to limit the GLBA's explicit

preservation, at Section 6807, of states' rights to enact more stringent financial privacy laws." ER92.

SUMMARY OF ARGUMENT

The district court erred in refusing to apply the plain meaning of the 1996, 1999, and 2003 Acts at issue here.

The 1996 FCRA, 15 U.S.C. § 1681t(b)(2), preempts state laws that impose "requirements" or "prohibitions" on financial institutions' exchange of customer information with their affiliates, and it is undisputed that SB1 imposes such requirements and prohibitions. Notwithstanding controlling precedent that "where, as here, the words of a statute are unambiguous, the 'judicial inquiry is complete,'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003), as well as its own acknowledgment that the plain meaning of §1681t(b)(2) preempts SB1, the district court determined that the "purpose and scope of the [FCRA]" limit § 1681t(b)(2) to preemption of state regulation of only "consumer reports." ER85.

The district court's abandonment of the plain text of § 1681t(b)(2) violates the Supremacy Clause and undermines the statutory structure enacted by Congress to allow (and in some instances require) financial institutions to operate through affiliates with which they share customer information in order to offer integrated, comprehensive financial services and products to their customers. The district court's conclusion that the FCRA only regulates consumer reports was

based on the 1970 Act and ignores the fact that the 1996 FCRA Amendments do regulate the exchange of customer information among affiliates by imposing a federal "opt out" requirement with respect to "non-experience" information, while allowing affiliates freely to exchange "experience information" among affiliates. The broad preemption clause of § 1681t(b)(2) was adopted in 1996 to prevent states from imposing further requirements and prohibitions, as SB1 indisputably does.

The district court's disregard of the plain language of the FCRA also extends to the 2003 FCRA Amendments, which further regulate shared customer information. The 2003 Act does so by the new federal "[a]ffiliate sharing" regime of 15 U.S.C. § 1681s-3 that gives an opt-out right for an affiliate's use of shared information to solicit sales of its products and services. In addition, the 2003 Amendments not only made permanent the affiliate sharing preemption clause at issue here, § 1681t(b)(2), but also they expanded that clause to apply to the use of shared customer information, such as the information regulated by § 1681s-3. *See* 15 U.S.C. § 1681s-3(c). The district court brushed aside the 2003 Act in a footnote which did not even acknowledge the 2003 expansion and extension of the preemption clause or the 2003 legislative history where there was uniform agreement that Congress intended to preempt SB1 and all similar state laws.

Finally, in relying on GLBA to bolster its narrow reading of the FCRA preemption clause, the district court ignored the plain meaning of two more federal statutes. First, GLBA, 15 U.S.C. § 6806, provides that it does not "modify, limit or supercede" the FCRA. Second, GLBA's savings clause, 15 U.S.C. § 6807(a), on which the district court relied to override the FCRA, is limited to "this subchapter" of GLBA, so that GLBA does not save state laws that are preempted by the FCRA or other federal statutes.

The district court's latter error is compounded by its refusal to acknowledge legislative history that explicitly states that nothing in GLBA affects the FCRA's preemption of state laws like SB1, and this Court's decision in *Bank of America v. City and County of San Francisco*, 309 F.3d 551 (9th Cir. 2002), *cert. denied*, 538 U.S. 1069 (2003), which in nearly identical circumstances refused to apply the savings clause of one federal statute to avoid preemption by a different federal statute.

Because SB1 is plainly preempted by the FCRA, this Court should reverse the judgment below and render judgment for the Associations.

ARGUMENT

Standard of Review. This Court reviews summary judgment *de novo*. *Harris v. Harris & Hart, Inc.*, 206 F.3d 838, 841 (9th Cir. 2000). Summary judgment is merited "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). It was conceded below that SB1 imposes "requirement[s]" and "prohibition[s]" within the meaning of the FCRA's preemption clause on the exchange of customer information among affiliates. Accordingly, this case involves solely the legal question whether that preemption clause applies to SB1. *See, e.g., Bank of America v. San Francisco*, 309 F.3d at 556 (affirming summary judgment that cities' ATM-fee bans are preempted); *American Bankers Ass'n v. Lockyer*, 239 F. Supp.2d 1000 (E.D. Cal. 2002) (summary judgment that California statute regarding credit card billing procedures is preempted by the National Bank Act), *appeal dismissed* No. 03-15160 (9th Cir. Feb. 4, 2004).

Where the district court is faced with cross-motions for summary judgment on an issue of law and improperly grants summary judgment for one party and denies summary judgment for the other, and no issues remain to be resolved on remand, this Court may reverse and render judgment. *See R. W. Beck & Assocs. v. City and Borough of Sitka*, 27 F.3d 1475, 1483 n.12 (9th Cir. 1994).

I. THE FCRA EXPRESSLY PREEMPTS SB1'S AFFILIATE-SHARING REQUIREMENTS

A. The District Court Erred By Refusing To Apply The Plain Language Of FCRA's Preemption Clause

"[T]he starting point for [a court's statutory] analysis is the statutory text. And where, as here, the words of the statute are unambiguous, the 'judicial inquiry is complete.'" *Desert Palace*, 539 U.S. at 98, *quoting Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). *See also Confederated Salish & Kootenai Tribes v. United States ex rel. Norton*, 343 F.3d 1193, 1196 (9th Cir. 2003) (same).

The FCRA preemption clause at issue here, 15 U.S.C. § 1681t(b)(2), provides that "[n]o requirement or prohibition may be imposed under the laws of any State – . . . (2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control." The California Defendants do not dispute that SB1 imposes "requirement[s]" and "prohibition[s]" on "the exchange of information among" affiliates. ER52, 56.

The language of § 1681t(b)(2) is plain, unambiguous and directly applicable. In fact, the district court conceded that "[§] 1681t(b)(2) does indicate on its face that 'no requirement or prohibition may be imposed under the laws of any State . . . with respect to the exchange of information among persons affiliated by common ownership or common corporate control.'" ER88. Accordingly, its

"judicial inquiry" should have been "complete" at this point. *Desert Palace*, 539 U.S. at 98. However, the district court proceeded to narrow the FCRA's affiliate-sharing preemption clause, purporting to read it "in . . . context." ER88. In doing so, the district court relied on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), but that case could not be more different than this one.

Unlike here, in that case, the statutory language was ambiguous. 529 U.S. at 125. Also, unlike here, the FDA sought to adopt a new interpretation of a disputed statutory term to justify its regulation of cigarettes and other tobacco products after decades of interpreting the statute as not permitting such regulation. *Id.* Finally, the Supreme Court looked to subsequent congressional enactments, relying on the often-stated views of the FDA that the statute did not apply to tobacco. *Id.* at 156-57, 161.

Here, there is no ambiguity in the language of FCRA's preemption clause, no prior history of conflicting administrative interpretation, and all of the relevant, subsequent legislation is consistent with applying the plain language of § 1681t(b)(2). Nevertheless, the district court limited preemption only to the exchange between affiliates of "consumer reports," as opposed to all of the other customer information that the 1996 and 2003 FCRA Amendments were enacted to regulate and permit. The district court did not resolve an ambiguity; rather, it rewrote the statute by inserting a limiting phrase into § 1681t(b)(2) that drastically

reduces the scope of the preemption prescribed by Congress in the plain language of the statute.[9]

Moreover, even though it purported to apply § 1681t(b)(2) in "context" with the rest of the FCRA, 15 U.S.C. § 1681, *et seq.*, the district court was undeterred by the fact that other preemption clauses in § 1681t(b)(1) that were enacted at the same time as § 1681t(b)(2) are expressly limited to "consumer reports," in contrast to § 1681t(b)(2)'s unqualified language. ER89 n.8.[10] *See, e.g.*, 15 U.S.C. § 1681t(b)(1)(A) ("No requirement or prohibition may be imposed under the laws of any State – (1) with respect to any subject matter regulated under – (A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening

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[9] Sharply contrasting with the district court's approach in this case, *Bank of America, N.A. v. City of Daly City*, 279 F. Supp. 2d 1118 (N.D. Cal. 2003), held that the plain language of the FCRA's preemption clause invalidated local ordinances that imposed requirements and prohibitions on financial institutions' sharing of customer information among affiliates, specifically rejecting the argument that FCRA preemption was limited to "consumer reports": After detailing the history of FCRA's evolution since 1970, the court found that "Congress chose to . . . expressly preempt[ ] State laws that impose a requirement or prohibition on information-sharing among affiliates." *Id.* at 1124. While the *Daly City* opinion was vacated by this Court as moot on the banks' appeal of a different issue, *see* Order of May 14, 2004 (No. 03-16689), that appeal had nothing to do with the FCRA because the local governments did not cross-appeal the FCRA issue.

[10] The district court's statement that the limitations on other FCRA preemption clauses are irrelevant "simply because the FCRA does not regulate affiliate information sharing," ER89 n.8, is demonstrably wrong, as we have shown above, pp. 8, 11-12 & n.5. *See also* 15 U.S.C. §§ 1681a(d)(2)(A)(iii), 1681s-3.

of **consumer reports**") (emphasis added). *See also* 15 U.S.C. §§ 1681t(b)(1)(D), (E), (F) (limiting preemption to "consumer reports").

The fact that when Congress adopted § 1681t(b) in 1996, it limited many of the other preemption clauses of that subsection to "consumer reports," confirms that Congress did not intend such a restriction when it adopted the broad language of § 1681t(b)(1). *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation omitted)); *United States v. Anderson*, 895 F.2d 641, 645 (9th Cir. 1990) (same).

B. The District Court Misperceived The Purposes Of The FCRA

Instead of applying the plain meaning of the statutory text, the district court relied on "[t]he stated purpose and scope of the Fair Credit Reporting Act," which the Court found "is to regulate consumer reporting agencies and ensure the accuracy and fairness of credit reporting." ER85, citing the FCRA's "Congressional findings and statement of purpose" in 15 U.S.C. § 1681. The district court also found that it did not "make sense" for § 1681t(b)(2) to preempt state laws other than those regulating "consumer reports," because the FCRA purportedly regulates only such reports. ER89.

However, the "purpose and scope" of the FCRA upon which the district court relied was recited in 1970, when the FCRA was first enacted, decades before the 1996 and 2003 Amendments. The 1970 Act obviously does not state the purposes of those later statutes. Moreover, as shown above, pp. 7-9, 11-13, and discussed in detail below, pp. 28-34, the 1996 and 2003 FCRA Amendments, contrary to the district court, **do** regulate the exchange of customer information among affiliates even when it does not constitute "consumer reports."[11]

1. The District Court Mistakenly Concluded That The FCRA Regulates Only Consumer Reports

a. The 1996 FCRA Amendments

The premise of the district court's holding – that "[i]nformation not constituting a 'consumer report' is not governed by the FCRA," ER86 – is patently wrong.[12] In 1996 when Congress enacted the preemption clause at issue here, it

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[11] The district court erred more generally in "treat[ing] the purpose, and not the operative words of the statute, as the law." *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433, 436 (9th Cir. 1994). *See also Nat'l Coal Ass'n v. Chater*, 81 F.3d 1077, 1082 (11th Cir. 1996) ("general purpose of the Act do[es] not overcome its plain statutory language"). As this Court held in *In re Transcom Lines*, 58 F.3d 1432, 1437-38 (9th Cir. 1995), "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents effectuation of congressional intent," citing *Board of Governors of the Fed. Res. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986).

[12] The district court's citation (ER86) to *Individual Reference Servs. Group v. FTC*, 145 F. Supp.2d 6, 17 (D.D.C. 2001), *aff'd*, 295 F.3d 42 (D.C. Cir. 2002), for the proposition that "[t]he FCRA does not regulate the dissemination of information that is not a consumer report" is misplaced. That case addressed

(continued...)

also ensured that the FCRA would permit the exchange of "experience information" among financial institutions and affiliates by specifying that "any – (i) report containing information solely as to transactions or experiences between the consumer and the person making the report; [or] (ii) communication of that information among persons related by common ownership or affiliated by corporate control" would not be restricted like a "consumer report." 15 U.S.C. § 1681a(d)(2)(A). Patently, Congress wanted to allow the sharing of such information. The district court was obviously wrong in concluding that Congress' decision to remove federal restrictions that would have limited such sharing somehow permitted states to impose such restrictions, even though Congress simultaneously preempted the states from imposing any "requirements" or "prohibitions" on affiliate sharing.

(footnote continued)

application of GLBA's federal privacy regulations to third-party information sharing by consumer reporting agencies; the court said nothing about FCRA's regulation of affiliate-sharing of customer information nor about the FCRA's affiliate-sharing preemption clause. Moreover, that case pre-dated the 2003 FCRA Amendments, which clearly regulate financial institutions' affiliate-sharing and use of non-consumer report customer information of the type that is also regulated by SB1. *See* 15 U.S.C. § 1681s-3; *supra* pp. 11-13.

Ippolito v. WNS, Inc., 864 F.2d 440 (7th Cir. 1988) (ER86), dealt with civil suits brought under the FCRA for improper disclosures of consumer reports. The case had nothing to do with state laws regulating affiliate-sharing, or preemption.

Moreover, when Congress also allowed financial institutions to exchange among their affiliates "non-experience information" gathered from applications and the like, it regulated that information sharing through the FCRA's federal opt-out regime, *see* 15 U.S.C. § 1681a(d)(2)(A)(iii); *supra* p. 8. In this fashion, financial institutions share among affiliates all the information they collect about their customers with precisely the degree of federal regulation that Congress deemed appropriate in the 1996 FCRA Amendments.

The district court was accordingly also wrong in concluding that "[i]t makes no sense to exempt such information sharing in one part of the statute, then argue through a later preemption provision that the FCRA, though not governing such exchange, nonetheless prevents states from doing so." ER89. It made perfect sense that when Congress permitted affiliate sharing of experience information, and applied a federal opt-out scheme to affiliate sharing of non-experience information, it would also enact § 1681t(b)(2) to preempt states from regulating customer information sharing in ways that would disrupt – as SB1 does here – this federal regulatory scheme.

Finally, in a footnote to its amended opinion, the district court professed not to find any indication that the 1996 FCRA Amendments "support Plaintiffs' theory that either or both of those pieces of legislation had the purpose of promoting Plaintiffs' commercial revenue through general sharing of personal

information." ER87 n.5. In fact, the authoritative discussion of the 1996 Act and affiliate sharing, written by the General Counsel of the House Banking Committee during the years that the 1996 FCRA amendments were evolving and enacted, shows that Congress focused directly on the need for financial institutions to exchange customer information among affiliates. *See* Joseph L. Seidel, *The Consumer Credit Reporting Reform Act: Information Sharing And Preemption*, 2 N.C. Banking Inst. 79 (1998).

While "[t]he initial [1991] amendment likely was intended to preempt only state credit reporting laws or mini-FCRAs," *id.* at 86, the banking industry argued that it was too narrow and the Chairman of the House Banking Committee argued that it was too broad, and the bill subsequently died on the House floor in 1992, *id.* at 88. When the 103d Congress convened in 1993, the banking industry argued that:

> It is clear that the divisions or departments of the same company may share information under the FCRA, but there is less certainty with respect to sharing among organizations, such as banking companies, that are required or choose to operate many of their activities through separate affiliated legal entities . . . . Accordingly, any FCRA legislation should clarify that such organizations are permitted to share information among affiliated companies, just as departments or divisions of the same company may share information.

Consumer Reporting Reform Act of 1993: Hearings on S. 783 Before the Senate Comm. on Banking, Housing and Urban Affairs, 103d Cong., 70 (1993) (statement on behalf of American Bankers Association, *et al.*).

The House Banking Committee's 1994 Report adopted the banking industry's reasoning in what later became the 1996 FCRA amendments:

> The bill expands the experience and transaction exception in the definition of "consumer report" to allow persons related by common ownership or affiliated by corporate control ("affiliates") to share specified types of information, under certain conditions, among themselves without triggering the provisions of the FCRA.

H.R. Rep. No. 103-486, at 27-28 (1994).

Thereafter, "[t]he form of the federal preemption provision changed from a format designed to override only state credit reporting laws to a format designed to override any state law related to certain operational areas . . . . include[ing] . . . affiliate information sharing." Seidel, *supra*, at 92. In order to compromise with Senators who opposed the broader preemptive language contained in the Senate bill, "the Senate passed a manager's amendment that left the affiliate information sharing provisions intact, but sunset the preemption provision after six years," *id.* at 94, which was later changed to an eight-year sunset, *id.* at 95-96.

In short, the history of the 1996 FCRA preemption clause leads to the same conclusion as its plain language: Congress intended to preempt all state laws

imposing requirements on the exchange of information among affiliates. This result was the product of a compromise that would allow Congress to revisit the issue before the 2004 "sunset" of the preemption clause.

b. The 2003 FCRA Amendments

The 2003 FCRA Amendments confirmed preemption, once and for all, by further regulating affiliate sharing, broadening § 1681t(b)(2), and making it permanent. *See* 15 U.S.C. § 1681s-3(a) & (c); Pub. L. No. 108-159, § 711(3).

Section 1681s-3 puts into sharp focus the error in the district court's finding that "[i]nformation not constituting a 'consumer report' is not governed by the FCRA." ER86. In fact, the 2003 Amendments **only** regulate (through a federal opt-out regime) information that is **not** a "consumer report." *See* 15 U.S.C. § 1681s-3(a) (applying requirements to "information that **would be** a consumer report, **but for**" 15 U.S.C. § 1681a(d)(2)(A) (emphasis added)). Plainly, the information regulated by the 2003 FCRA Amendments is **not** limited to consumer reports, and includes the same kinds of customer information that is at issue here.[13] As a result, the entire premise of lower court's holding – that the FCRA's

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[13] The same is true of the 1996 FCRA Amendments – *i.e.*, the sharing of non-experience information is regulated by a federal opt-out regime and is not a "consumer report," so long as it is subject to that regime. 15 U.S.C. § 1681a(d)(2)(A)(iii).

preemption clause must be limited to "consumer reports" because the Act regulates only such reports – is mistaken.

Moreover, the 2003 FCRA amendments added a new subsection (c) to § 1681s-3, which expands the FCRA's affiliate-sharing preemption clause in § 1681t(b)(2) to preempt state laws that impose requirements on affiliates' use of shared non-consumer report customer information for marketing purposes:

> Requirements with respect to the **use** by a person of information received from another person related to it by common ownership or affiliated by [common] corporate control, such as the requirements of this section, constitute requirements with respect to the exchange of information among persons affiliated by common ownership or common corporate control, within the meaning of section 1681t(b)(2) [*i.e.*, the FCRA affiliate-sharing preemption clause].

15 U.S.C. § 1681s-3(c) (emphasis added). SB1 imposes the very requirements described by this new provision. *See, e.g.*, § 4053(b)(1) ("A financial institution does not disclose information to, or share information with, its affiliate merely because information is maintained in common information systems or databases . . . provided that . . . nonpublic personal information is not further disclosed **or used by an affiliate** except as permitted by this division.") (emphasis added). Section 1681t(b)(2), as expanded by the 2003 FCRA Amendments, expressly preempts states from imposing requirements or prohibitions relating to the use of customer information as SB1 does. This, and all of the preexisting preemption flowing from the 1996 FCRA Amendments, was made permanent,

when in the 2003 Amendments, Congress repealed the sunset provision. *See* Pub. L. No. 108-159, § 711(3) (repealing former 15 U.S.C. § 1681t(d)(2)).

Making FCRA preemption regarding affiliate sharing of customer information even clearer, the 2003 Amendments produced uniform legislative history explicitly stating that the provisions of SB1 challenged here are preempted. In the course of debating the 2003 Amendments, the Senate considered an amendment from California's two senators, both of whom recognized that renewal of the FCRA affiliate sharing preemption clause would preempt SB1, as did the California Senate sponsor of SB1. *See* 149 Cong. Rec. S13848, S13860 (Nov. 4, 2003) (floor statements of Sen. Feinstein, reading letter from state sponsor of SB1 that renewal of FCRA preemption clause at issue here would "preempt California's standard on affiliate sharing with a weaker one"); *id.* at S13874 (floor statement of Sen. Boxer, stating that "California finds itself left out" if FCRA preemption renewal adopted).[14] Senators Feinstein and Boxer thus proposed an amendment that would have imposed SB1's information-sharing requirements nationally. The amendment was rejected by a 70-24 vote (Roll Call Vote No. 434, 108th Cong. 1st Sess.), thus providing the clearest possible confirmation that SB1 was intended to be preempted.

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[14] *See also id.* ("We have 35 million people in our State. We can't get an exemption. We understand that.") (Statement of Sen. Boxer).

There is more: The Senate manager of the 2003 FCRA Amendments opined on the Senate floor that Congress was relying on the fact that SB1 was preempted by § 1681t(b)(2) when it enacted the new restrictions on the use of shared information in § 1681s-3. *See* 149 Cong. Rec. S13863, S13873 (Nov. 4, 2003) (Statement of Sen. Shelby) ("With respect to the part of SB-1 [*i.e.*, the affiliate-sharing requirements] that conflicts with the [FCRA], the California law was preempted, making it unenforceable when it was enacted."). *See also* 149 Cong. Rec. at S13875 (Nov. 4, 2003) (Statement of Sen. Durbin) ("Another thing to remember about this [Feinstein-Boxer] amendment: the amendment does not alter preemption. With this provision States would still be deprived, permanently, of the opportunity of enacting their own legislation relating to affiliate sharing. If we are going to have a national law, we need a reasonable national standard.").

Without question, in the 2003 Amendments to the FCRA, Congress intended to maintain national uniformity by broadening the preemptive scope of § 1681t(b)(2), making it permanent, and imposing the federal FCRA requirements of § 1681s-3 on financial institutions' exchange and use of customer information among affiliates for marketing purposes. The district court inexplicably ignored this clear evidence of Congress' intent, as well as the plain language of the FCRA, thereby undoing Congress' decision to allow nationwide affiliate-information sharing, subject only to federal standards.

C. The Presumption Against Preemption Cannot Save SB1

The district court relied on the "presumption against preemption." ER84-85. However, that presumption cannot overcome the plain language of an express preemption clause, nor excuse the district court's errors in misperceiving the purposes of the FCRA. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-85 (1992) (rejecting state's argument that presumption against preemption warranted a narrowing construction of a broadly worded federal statute expressly preempting all state laws "relating to" airline rates to save a state consumer protection statute). To rely on the presumption in this case, a court would have to convert it into an iron-clad, irrefutable rule. There is, of course, no support for such a rule of law.

II. THE DISTRICT COURT ERRONEOUSLY RELIED ON GLBA

The district court sought to shore up its disregard of the plain language of the FCRA's preemption clause by finding that GLBA regulates the information here at issue to the exclusion of the FCRA:

> Examination of Title V of the Gramm-Leach-Bliley Act of 1999, which sets forth basic privacy protections that must be provided to consumers by financial institutions, demonstrates that it, and not the FCRA, encompasses the kind of information sharing at issue in this case.

ER89. As with the FCRA, the district court ignored GLBA's text. That text, as well as directly applicable legislative history and controlling precedent of this

Court, show that GLBA does not affect the FCRA's preemption of state requirements and prohibitions on customer information sharing among financial institution affiliates.

A. The District Court's Reliance On GLBA Defies The Text Of That Statute

GLBA Title V, Subtitle A expressly provides that "nothing in this chapter shall be construed to modify, limit, or supersede the operation of the [FCRA], and no inference shall be drawn on the basis of the provisions of this chapter regarding whether information is transaction or experience information under [15 U.S.C. § 1681a]." 15 U.S.C. § 6806 (emphasis added). Just as in its FCRA analysis, the district court refused to apply the plain meaning of GLBA, holding instead that GLBA controls because "the FCRA does not apply to general sharing of information by financial institutions with either affiliates or third party nonaffiliates." ER92. But GLBA disavows, without qualification, "modify[ing], limit[ing], or supersed[ing]" the FCRA. GLBA's preservation of the FCRA thus cannot be avoided by any construction of the FCRA – let alone the erroneous one adopted by the district court.

Moreover, the savings clause in GLBA Title V, Subtitle A, on which the district court relied to reject the Associations' FCRA preemption argument, ER90, in no way alters the preemptive effect of the FCRA or any other federal statute. It is limited by its terms to "this subchapter":

> **This subchapter** and the amendments made to this subchapter shall not be construed as superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of **this subchapter**, and then only to the extent of the inconsistency.

15 U.S.C. § 6807(a) (emphasis added). Thus, GLBA Title V, Subtitle A's savings clause only saves state laws from preemption by "[t]his subchapter" – *i.e.*, Title V, Subtitle A of GLBA.

In holding that GLBA made it "clear that Congress intended that states be afforded the right to regulate consumer financial privacy on behalf of their citizens in adopting statutes more protective in that regard than the provisions of the GLBA," and that GLBA "permits state law[s] like SB1," ER91, the district court again ignored the plain text of GLBA, which limits GLBA's savings clause to "this subchapter" of GLBA.

It also ignored this Court's decision in *Bank of America v. San Francisco*, 309 F.3d at 565-66, where the cities erroneously relied on the nearly identical language of the savings clause of the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693q,[15] in attempting to avoid the preemptive force of the

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[15] The full text of EFTA's savings clause, 15 U.S.C. § 1693q, provides:

> This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the

(continued...)

National Bank Act. This Court rejected that argument in terms that fit this case to a tee:

> the plain language of § 1693q [of the EFTA, here GLBA § 6807(a)] indicates that it is limited to the EFTA [GLBA Title V]. Section 1693q's [§ 6807(a)'s] reference to "this subchapter" indicates that the EFTA's [GLBA's] anti-preemption provision does not apply to other statutes.

309 F.3d at 565. *See also Bank One (Utah), N.A. v. Guttau*, 190 F.3d 844 (8th Cir. 1999), a decision that this Court recognized "rejected the same argument raised by the cities here . . . . The Eighth Circuit explained that the EFTA's 'anti-preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks.'" 309 F.3d at 565, quoting *Bank One*, 190 F.3d at 850.

This Court also recognized in *Bank of America* that *United States v. Locke*, 529 U.S. 89, 106 (2000), condemns reliance upon a savings clause of one statute to avoid preemption by another. In *Locke*, the Supreme Court held that the anti-preemption clause in the Oil Pollution Act, 33 U.S.C. § 2718 – which provides that "nothing in this Act" preempts state authority – "did not 'extend to subjects addressed in the other titles of the Act or other acts' and therefore did not preclude

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(footnote continued)

> extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.

preemption of state laws by [the] Ports and Waterways Safety Act." 309 F.3d at 565, quoting *Locke*, 529 U.S. at 106.

The district court's refusal to follow these controlling precedents on the ground that "the legislative intent in permitting states to enact more protective privacy regulations appears clear," ER91 n.11, is particularly egregious given GLBA's express statement that it "shall [not] be construed to modify, limit, or supersede the operation of the [FCRA]." 15 U.S.C. § 6806.

B. The Legislative History Of GLBA Confirms That It Does Not Affect The FCRA Affiliate Sharing Preemption Clause

The district court relied on statements made by several members of Congress regarding the savings clause of GLBA Title V, Subtitle A as though they support its reading of the clause to avoid the preemptive force of other statutes. *See* ER91 & n.10, quoting Senator Sarbanes, who merely stated that the savings clause "ensures that the Federal Government will not preempt stronger State financial privacy laws . . . ." All these statements are perfectly consistent with the plain meaning of the GLBA savings clause that nothing enacted by Congress in Title V, Subtitle A of GLBA preempts stronger state financial privacy laws.[16]

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[16] Unsupported by the plain meaning of GLBA's text, such statements are, in any event, of no consequence in construing that statute. *See Shannon v. United States*, 512 U.S. 573, 583 (1994) (The Supreme Court is "not aware of any case . . . in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute.").

Senator Sarbanes did not address the relationship between GLBA Title V, Subtitle A's savings clause and the preemptive force of the FCRA or other federal statutes.

There was, however, an exchange on the Senate floor at the final passage of GLBA between Senator Gramm, the principal sponsor of the Gramm-Leach-Bliley Act, and Senator Mack, which the district court ignored even though it directly addresses that issue:

> Mr. MACK . . . I want to confirm that section 507 [the savings clause codified at § 6807] is intended to apply only to the amendments made by subtitle A of title V of the bill, and that section 507 is not to be construed, under any circumstances, to apply to any provision of law other than the provisions of subtitle A. For instance, subtitle A of title V relates only to disclosure of nonpublic personal information to nonaffiliated third parties. This means that section 507 of the bill does not supersede, alter, or affect laws on the disclosure of information among affiliated entities. **In particular, section 507 does not supersede, alter, or affect the provisions of the Federal Fair Credit Reporting Act (or FCRA) regarding the communication of information among persons related by common ownership or affiliated by corporate control, nor does section 507 supersede, alter, or affect the existing FCRA preemption of state laws with respect to the exchange of information among affiliated entities . . . .**
>
> Mr. GRAMM. Mr. President, the understanding of the Senator from Florida is correct. **Section 507 is intended to apply only to subtitle A of title V of the bill, and is not to be construed to apply to any provision of law other than the provisions of the subtitle. Thus, section 507 does not affect the existing FCRA provisions on that statute's relationship to state laws.**

145 Cong. Rec. S13883, S13901 (daily ed. Nov. 4, 1999) (emphasis added). This discussion conclusively refutes the argument that the savings clause in Title V, Subtitle A of GLBA extends beyond that subchapter to avoid preemption by FCRA, *i.e.*, the precise issue in this case.

III. THIS COURT SHOULD REVERSE, RENDER JUDGMENT FOR THE ASSOCIATIONS, AND DIRECT THE ENTRY OF A PERMANENT INJUNCTION

Because SB1 is preempted by the FCRA, this Court should render judgment for the Associations on their preemption claim, *R. W. Beck & Assocs.*, 27 F.3d at 1483 n.12, and direct the district court to order the declaratory and injunctive relief that the Associations seek in this case. No argument is necessary regarding the Associations' right to declaratory relief, if this Court agrees with the Associations' arguments in this Brief. We, therefore, turn to their entitlement to injunctive relief.

A. SB1's Affiliate-Sharing Provisions Cause The Associations' Members Irreparable Injury

In addition to success on the merits, "[t]he requirements for the issuance of a permanent injunction are the likelihood of substantial and immediate irreparable injury and inadequacy of remedies at law." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir. 1996) (internal citations and quotation marks omitted). The California Defendants conceded below that the Associations' members face irreparable harm from having to comply with SB1's

affiliate-sharing requirements. ER57, 60-61. *See also* ER39-40 (¶¶ 3, 4). Indeed, two of them even argued that the district court should broadly issue a permanent injunction in favor of all financial institutions, and not just the Associations' members, if it found SB1 is preempted. *See* ER57-58.

B. The State Will Suffer No Harm As A Result Of, And The Public Interest Will Be Served By, The Grant Of Injunctive Relief

Because the California Defendants did not contest the Associations' right to an injunction if the FCRA preempts SB1, they concede that neither the state's interests, nor those of the public, stand against an injunction if the Associations prevail on the merits. Thus, for the same reasons stated in *Bank One*, 190 F.3d at 847-48, the Court should direct a permanent injunction in this case:

> Because Bank One and the State disagree only on questions of law, nothing remains for the district court to resolve regarding the underlying facts. Accordingly, we must determine whether a permanent injunction is appropriate.
>
> . . . .
>
> If Bank One proves that the relevant provisions of [state law] are preempted . . . and that it will suffer irreparable harm if the State is not enjoined from enforcing those provisions, then the question of harm to the State, and the matter of the public interest drop from the case, for Bank One will be entitled to injunctive relief, [since] . . . the public interest will perforce be served by enjoining the enforcement of the [preempted] provisions of state law.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment, render judgment for the Associations, and direct the district court to declare the affiliate-sharing provisions of SB1 (including, as they relate to affiliate-sharing, Cal. Fin. Code §§ 4053, 4053.5, 4054, 4054.6, 4056, 4056.5, 4057) invalid, null, void, and without effect, as well as to enter a permanent injunction against Defendants-Appellees' enforcement of those provisions against any financial institution.

Respectfully submitted,

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Dated: August 2, 2004

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1, counsel for Appellants certifies that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,939 words.

Keith A. Noreika

STATEMENT OF RELATED CASES

The Associations are not aware of any related cases pending in this Court.

Keith A. Noreika

ADDENDUM

15 U.S.C.A. § 1681a

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection (Refs & Annos)
Subchapter III. Credit Reporting Agencies (Refs & Annos)

§ 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer report.--

(1) In general.--The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness [FN1], 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 section 1681b of this title.

(2) Exclusions.--Except as provided in paragraph (3), the term "consumer report" does not include--

(A) any--

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the

information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 1681m of this title; or

(D) a communication described in subsection (o) of this section.

(3) Restriction on sharing of medical information.--Except for information or any communication of information disclosed as provided in section 1681b(g)(3) of this title, the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is--

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) Medical information.--The term "medical information"--

(1) means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to--

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the payment for the provision of health care to an individual.

(2) does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(j) Definitions relating to child support obligations

(1) Overdue support

The term "overdue support" has the meaning given to such term in section 666(e) of Title 42.

(2) State or local child support enforcement agency

The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse action.--

(1) Actions included.--The term "adverse action"--

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means--

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is--

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) Applicable findings, decisions, commentary, and orders.--For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

(l) Firm offer of credit or insurance.--The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness [FN1] or insurability, as applicable, that are established--

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification--

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness [FN1] or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness [FN1] or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was--

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) Credit or insurance transaction that is not initiated by the consumer.--The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of--

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) State.--The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(o) Excluded communications.--A communication is described in this subsection if it is a communication--

(1) that, but for subsection (d)(2)(D) of this section, would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of--

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and

(5) with respect to which--

(A) the consumer who is the subject of the communication--

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication--

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) Consumer reporting agency that compiles and maintains files on consumers on a nationwide basis.--The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness [FN1], credit standing, or credit capacity, each of the following regarding consumers residing nationwide:

(1) Public record information.

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of

business.

CREDIT(S)

(Pub.L. 90-321, Title VI, § 603, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1128, and amended Pub.L. 102-537, § 2(b), Oct. 27, 1992, 106 Stat. 3531; Pub.L. 104-208, Div. A, Title II, § 2402(a) to (g), Sept. 30, 1996, 110 Stat. 3009-428; Pub.L. 105-347, § 6(1) to (3), Nov. 2, 1998, 112 Stat. 3211; Pub.L. 108-159, Title IV, § 411(b), (c), Dec. 4, 2003, 117 Stat. 2001.)

[FN1] So in original. Probably should be "creditworthiness".

AMENDMENT OF SUBSEC. (D)(2)(A)

<Pub.L. 108-159, § 3, Title II, § 214(c)(1), Dec. 4, 2003, 117 Stat. 1953, 1983, provided that, unless otherwise specifically provided, effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of issuance of the final regulations, subsec. (d)(2)(A), is amended by inserting "subject to section 1681s-3 of this title," after "(A)".>

* * *

15 U.S.C.A. § 1681s-3

C
United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection (Refs & Annos)
Subchapter III. Credit Reporting Agencies (Refs & Annos)

→ § 1681s-3. Affiliate sharing

(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 1681a(d)(2)(A) of this title, 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.

(2) Consumer choice

(A) In general

The notice required under paragraph (1) shall allow the consumer the opportunity to prohibit all solicitations referred to in such paragraph, and may allow the consumer to choose from different options when electing to prohibit the sending of such solicitations, including options regarding the types of entities and information covered, and which methods of delivering solicitations the consumer elects to prohibit.

(B) Format

Notwithstanding subparagraph (A), the notice required under paragraph (1) shall be clear, conspicuous, and concise, and any method provided under paragraph (1)(B) shall be simple. The regulations prescribed to implement this section shall provide specific guidance regarding how to comply with such standards.

15 U.S.C.A. § 1681s-3

(3) Duration

(A) In general

The election of a consumer pursuant to paragraph (1)(B) to prohibit the making of solicitations shall be effective for at least 5 years, beginning on the date on which the person receives the election of the consumer, unless the consumer requests that such election be revoked.

(B) Notice upon expiration of effective period

At such time as the election of a consumer pursuant to paragraph (1)(B) is no longer effective, a person may not use information that the person receives in the manner described in paragraph (1) to make any solicitation for marketing purposes to the consumer, unless the consumer receives a notice and an opportunity, using a simple method, to extend the opt-out for another period of at least 5 years, pursuant to the procedures described in paragraph (1).

(4) Scope

This section shall not apply to a person--

(A) using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship;

(B) using information to facilitate communications to an individual for whose benefit the person provides employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

(C) using information to perform services on behalf of another person related by common ownership or affiliated by corporate control, except that this subparagraph shall not be construed as permitting a person to send solicitations on behalf of another person, if such other person would not be permitted to send the solicitation on its own behalf as a result of the election of the consumer to prohibit solicitations under paragraph (1)(B);

(D) using information in response to a communication initiated by the consumer;

(E) using information in response to solicitations authorized or requested by the consumer; or

(F) if compliance with this section by that person would prevent compliance by that person with any provision of State insurance laws pertaining to unfair discrimination in any State in which the person is lawfully doing business.

(5) No retroactivity

This subsection shall not prohibit the use of information to send a solicitation to a consumer if such information was received prior to the date on which persons are required to comply with regulations implementing this

subsection.

(b) Notice for other purposes permissible

A notice or other disclosure under this section may be coordinated and consolidated with any other notice required to be issued under any other provision of law by a person that is subject to this section, and a notice or other disclosure that is equivalent to the notice required by subsection (a) of this section, and that is provided by a person described in subsection (a) of this section to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of subsection (a) of this section.

(c) User requirements

Requirements with respect to the use by a person of information received from another person related to it by common ownership or affiliated by corporate control, such as the requirements of this section, constitute requirements with respect to the exchange of information among persons affiliated by common ownership or common corporate control, within the meaning of section 1681t(b)(2) of this title.

(d) Definitions

For purposes of this section, the following definitions shall apply:

(1) Pre-existing business relationship

The term "pre-existing business relationship" means a relationship between a person, or a person's licensed agent, and a consumer, based on--

(A) a financial contract between a person and a consumer which is in force;

(B) the purchase, rental, or lease by the consumer of that person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and that person during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section;

(C) an inquiry or application by the consumer regarding a product or service offered by that person, during the 3-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section; or

(D) any other pre-existing customer relationship defined in the regulations implementing this section.

(2) Solicitation

The term "solicitation" means the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of information described in subsection (a) of this section, and is intended to encourage the consumer to purchase such product or service, but does not include communications that are directed at the general public or determined not to be a solicitation by the regulations prescribed under this section.

CREDIT(S)

(Pub.L. 90-321, Title VI, § 624, as added Pub.L. 108-159, Title II, § 214(a)(2), Dec. 4, 2003, 117 Stat. 1980.)

ENACTMENT OF SECTION

<Pub.L. 108-159, § 3, Title II, § 214(a)(2), Dec. 4, 2003, 117 Stat. 1953, 1980, provided that, unless otherwise specifically provided, effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of issuance of the final regulations, this section is enacted.>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2003 Acts. House Conference Report No. 108-396 and Statement by President, see 2003 U.S. Code Cong. and Adm. News, p. 1753.

Effective and Applicability Provisions

2003 Acts. Unless otherwise specifically provided, enactment by Pub.L. 108- 159 effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of issuance of the final regulations, see Pub.L. 108-159, § 3, set out as an Effective and Applicability Provisions note under 15 U.S.C.A. § 1681.

Prior Provisions

A prior section 624 of Pub.L. 90-321, describing the relation to State laws, was renumbered section 625 of Pub.L. 90-321, and is set out as 15 U.S.C.A. § 1681t.

Rulemaking Required

15 U.S.C.A. § 1681s-3

Pub.L. 108-159, Title II, § 214(b), Dec. 4, 2003, 117 Stat. 1982, provided that:

"(1) **In general.**--The Federal banking agencies, the National Credit Union Administration, and the Commission, with respect to the entities that are subject to their respective enforcement authority under section 621 of the Fair Credit Reporting Act [15 U.S.C.A. § 1681s] and the Securities and Exchange Commission, and in coordination as described in paragraph (2), shall prescribe regulations to implement section 624 of the Fair Credit Reporting Act [this section], as added by this section.

"(2) **Coordination.**--Each agency required to prescribe regulations under paragraph (1) shall consult and coordinate with each other such agency so that, to the extent possible, the regulations prescribed by each such entity are consistent and comparable with the regulations prescribed by each other such agency.

"(3) **Considerations.**--In promulgating regulations under this subsection, each agency referred to in paragraph (1) shall--

"(A) ensure that affiliate sharing notification methods provide a simple means for consumers to make determinations and choices under section 624 [this section] of the Fair Credit Reporting Act, as added by this section;

"(B) consider the affiliate sharing notification practices employed on the date of enactment of this Act [Dec. 4, 2003] by persons that will be subject to that section 624 [this section]; and

"(C) ensure that notices and disclosures may be coordinated and consolidated, as provided in subsection (b) of that section 624 [subsec. (b) of this section]."

"(4) **Timing.**--Regulations required by this subsection shall--

"(A) be issued in final form not later than 9 months after the date of enactment of this Act [Dec. 4, 2003]; and

"(B) become effective not later than 6 months after the date on which they are issued in final form."

Studies of Information Sharing Practices

Pub.L. 108-159, Title II, § 214(e), Dec. 4, 2003, 117 Stat. 1983, provided that:

"(1) **In general.**--The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly conduct regular studies of the consumer information sharing practices by financial institutions and other persons that are creditors or users of consumer reports with their affiliates.

"(2) **Matters for study.**--In conducting the studies required by paragraph (1), the agencies described in paragraph (1) shall--

"(A) Identify--

"(i) the purposes for which financial institutions and other creditors and users of consumer reports share consumer information;

"(ii) the types of information shared by such entities with their affiliates;

"(iii) the number of choices provided to consumers with respect to the control of such sharing, and the degree to and manner in which consumers exercise such choices, if at all; and

"(iv) Whether such entities share or may share personally identifiable transaction or experience information with affiliates for purposes--

"(I) that are related to employment or hiring, including whether the person that is the subject of such information is given notice of such sharing, and the specific uses of such shared information; or

"(II) of general publication of such information; and

"(B) specifically examine the information sharing practices that financial institutions and other creditors and users of consumer reports and their affiliates employ for the purpose of making underwriting decisions or credit evaluations of consumers.

"(3) **Reports.**--

"(A) **Initial report.**--Not later than 3 years after the date of enactment of this Act [Dec. 4, 2003], the Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly submit a report to the Congress on the results of the initial study conducted in accordance with this subsection, together with any recommendations for legislative or regulatory action.

"(B) **Followup reports.**--The Federal banking agencies, the National Credit Union Administration, and the Commission shall, not less frequently than once every 3 years following the date of submission of the initial report under subparagraph (A), jointly submit a report to the Congress that, together with any recommendations for legislative or regulatory action--

"(i) documents any changes in the areas of study referred to in paragraph (2)(A) occurring since the date of submission of the previous report;

"(ii) identifies any changes in the practices of financial institutions and other creditors and users of consumer reports in sharing consumer information with their affiliates for the purpose of making underwriting decisions or credit evaluations of consumers occurring since the date of submission of the previous report; and

"(iii) examines the effects that changes described in clause (ii) have had, if any, on the degree to which such affiliate sharing practices reduce the need for financial institutions, creditors, and other users of consumer reports to rely on consumer reports for such decisions."

[Unless otherwise specifically provided, amendments by Pub.L. 108-159 effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of issuance of the final regulations, see Pub.L. 108-159, § 3, set out as an Effective and Applicability Provisions note under 15 U.S.C.A. § 1681.]

15 U.S.C.A. § 1681t

▷

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection (Refs & Annos)
Subchapter III. Credit Reporting Agencies (Refs & Annos)

→§ 1681t. Relation to State laws

(a) In general

Except as provided in subsections (b) and (c) of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

(b) General exceptions

No requirement or prohibition may be imposed under the laws of any State--

(1) with respect to any subject matter regulated under--

(A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports;

(B) section 1681i of this title, relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;

(C) subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;

(D) section 1681m(d) of this title, relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;

(E) section 1681c of this title, relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on September 30, 1996; or

(F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply--

(i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or

(ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996);

(2) with respect to the exchange of information among persons affiliated by common ownership or common corporate control, 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 September 30, 1996); or

(3) with respect to the form and content of any disclosure required to be made under section 1681g(c) of this title.

(c) "Firm offer of credit or insurance" defined

Notwithstanding any definition of the term "firm offer of credit or insurance" (or any equivalent term) under the laws of any State, the definition of that term contained in section 1681a(l) of this title shall be construed to apply in the enforcement and interpretation of the laws of any State governing consumer reports.

(d) Limitations

Subsections (b) and (c) of this section--

(1) do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on September 30, 1996; and

(2) do not apply to any provision of State law (including any provision of a State constitution) that--

(A) is enacted after January 1, 2004;

(B) states explicitly that the provision is intended to supplement this subchapter; and

(C) gives greater protection to consumers than is provided under this subchapter.

CREDIT(S)

(Pub.L. 90-321, Title VI, § 624, formerly § 622, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1136, and renumbered § 623, Pub.L. 102-537, § 2(a), Oct. 27, 1992, 106 Stat. 3531; renumbered § 624 and amended Pub.L. 104-208, Div. A, Title II, § § 2413(a)(1), 2419, Sept. 30, 1996, 110 Stat. 3009-447, 3009-452.)

AMENDMENT OF SECTION

<Pub.L. 108-159, § 3, Title II, § 214(a)(1), Dec. 4, 2003, 117 Stat. 1953, 1980, provided that, unless otherwise specifically provided, effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of

issuance of the final regulations, this section is redesignated as section 625 of the Fair Credit Reporting Act.>

AMENDMENT OF SUBSEC. (A)

<Pub.L. 108-159, § 3, Title VII, § 711(1), Dec. 4, 2003, 117 Stat. 1953, 2011, provided that, unless otherwise specifically provided, effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of issuance of the final regulations, subsec. (a) is amended by inserting "or for the prevention or mitigation of identity theft," after "information on consumers,".>

AMENDMENT OF SUBSEC. (B)(1)

<Pub.L. 108-159, § 3, Title I, § 151(a), Title II, § 214(c)(2), Title III, § 311(b), Dec. 4, 2003, 117 Stat. 1953, 1964, 1983, 1989, provided that, unless otherwise specifically provided, effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of issuance of the final regulations, subsec. (b)(1) is amended by striking "or" after the semicolon at the end of subpar. (E), and adding subpars. (G) to (I), to read as follows:>

<"(G) section 1681g(e) of this title, relating to information available to victims under section 1681g(e) of this title;>

<"(H) section 1681s-3 of this title, relating to the exchange and use of information to make a solicitation for marketing purposes; or>

<"(I) section 1681m(h) of this title, relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions;".>

AMENDMENT OF SUBSEC. (B)(2) TO (4)

<Pub.L. 108-159, § 3, Title II, § 211(e), Dec. 4, 2003, 117 Stat. 1953, 1977, provided that, unless otherwise specifically provided, effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of issuance of the final regulations, subsec. (b)(2), (3), is amended by striking "or" at the end of par. (2), striking out former par. (3), and adding new pars. (3) and (4) to read:>

<"(3) with respect to the disclosures required to be made under subsection (c), (d), (e), or (g) of section 1681g of this title, or subsection (f) of section 1681g of this title relating to the disclosure of credit scores

for credit granting purposes, except that this paragraph-->

<"**(A)** shall not apply with respect to sections 1785.10, 1785.16, and 1785.20.2 of the California Civil Code (as in effect on December 4, 2003) and section 1785.15 through section 1785.15.2 of such Code (as in effect on such date);>

<"**(B)** shall not apply with respect to sections 5-3-106(2) and 212-14.3- 104.3 of the Colorado Revised Statutes (as in effect on December 4, 2003); and>

<"**(C)** shall not be construed as limiting, annulling, affecting, or superseding any provision of the laws of any State regulating the use in an insurance activity, or regulating disclosures concerning such use, of a credit-based insurance score of a consumer by any person engaged in the business of insurance;>

<"**(4)** with respect to the frequency of any disclosure under section 1681j(a) of this title, except that this paragraph shall not apply-->

<"**(A)** with respect to section 12-14.3-105(1)(d) of the Colorado Revised Statutes (as in effect on December 4, 2003);>

<"**(B)** with respect to section 10-1-393(29)(C) of the Georgia Code (as in effect on December 4, 2003);>

<"**(C)** with respect to section 1316.2 of title 10 of the Maine Revised Statutes (as in effect on December 4, 2003);>

<"**(D)** with respect to sections 14-1209(a)(1) and 14-1209(b)(1)(i) of the Commercial Law Article of the Code of Maryland (as in effect on December 4, 2003);>

<"**(E)** with respect to section 59(d) and section 59(e) of chapter 93 of the General Laws of Massachusetts (as in effect December 4, 2003);>

<"**(F)** with respect to section 56:11-37.10(a)(1) of the New Jersey Revised Statutes (as in effect on December 4, 2003); or>

<"**(G)** with respect to section 2480c(a)(1) of title 9 of the Vermont Statutes Annotated (as in effect on December 4, 2003); or".>

ENACTMENT OF SUBSEC. (B)(5)

<Pub.L. 108-159, § 3, Title VII, § 711(2), Dec. 4, 2003, 117 Stat. 1953, 2011, provided that, unless otherwise specifically provided, effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-

month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of issuance of the final regulations, subsec. (b) is amended by adding a new par. (5) to read:>

<"**(5)** with respect to the conduct required by the specific provisions of-->

<"**(A)** section 1681c(g) of this title;>

<"**(B)** section 1681c-1 of this title;>

<"**(C)** section 1681c-2 of this title;>

<"**(D)** section 1681g(a)(1)(A) of this title;>

<"**(E)** section 1681j(a) of this title;>

<"**(F)** subsections (e), (f), and (g) of section 1681m of this title;>

<"**(G)** section 1681s(f) of this title;>

<"**(H)** section 1681s-2(a)(6) of this title; or>

<"**(I)** section 1681w of this title.">

AMENDMENT OF SUBSEC. (D)

<Pub.L. 108-159, § 3, Title VII, § 711(3), Dec. 4, 2003, 117 Stat. 1953, 2011, provided that, unless otherwise specifically provided, effective as established in final regulations jointly prescribed by the Board of Governors of the Federal Reserve System and the Federal Trade Commission, before the end of the 2-month period beginning on Dec. 4, 2003, with effective dates no later than 10 months after the date of issuance of the final regulations, subsec. (d) is amended to read:>

<"(d) Limitations>

<"Subsections (b) and (c) of this section do not affect any settlement, agreement, or consent judgment between any State Attorney General and any consumer reporting agency in effect on September 30, 1996.">

FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003

Public Law 108–159
108th Congress

An Act

Dec. 4, 2003
[H.R. 2622]

To amend the Fair Credit Reporting Act, to prevent identity theft, improve resolution of consumer disputes, improve the accuracy of consumer records, make improvements in the use of, and consumer access to, credit information, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Fair and Accurate Credit Transactions Act of 2003.
15 USC 1601 note.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Fair and Accurate Credit Transactions Act of 2003".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. DEFINITIONS.

15 USC 1681 note.

As used in this Act—

(1) the term "Board" means the Board of Governors of the Federal Reserve System;

(2) the term "Commission", other than as used in title V, means the Federal Trade Commission;

(3) the terms "consumer", "consumer report", "consumer reporting agency", "creditor", "Federal banking agencies", and "financial institution" have the same meanings as in section 603 of the Fair Credit Reporting Act, as amended by this Act; and

(4) the term "affiliates" means persons that are related by common ownership or affiliated by corporate control.

SEC. 3. EFFECTIVE DATES.

15 USC 1681 note.

Except as otherwise specifically provided in this Act and the amendments made by this Act—

Regulations.

(1) before the end of the 2-month period beginning on the date of enactment of this Act, the Board and the Commission shall jointly prescribe regulations in final form establishing effective dates for each provision of this Act; and

(2) the regulations prescribed under paragraph (1) shall establish effective dates that are as early as possible, while allowing a reasonable time for the implementation of the provisions of this Act, but in no case shall any such effective date be later than 10 months after the date of issuance of such regulations in final form.

(ii) the availability of credit or insurance;

(iii) consumers' knowledge about new or alternative products and services;

(iv) the ability of lenders or insurers to compete with one another; and

(v) the ability to offer credit or insurance products to consumers who have been traditionally underserved.

SEC. 214. AFFILIATE SHARING.

(a) LIMITATION.—The Fair Credit Reporting Act (15 U.S.C. 1601 et seq.) is amended—

(1) by redesignating sections 624 (15 U.S.C. 1681t), 625 (15 U.S.C. 1681u), and 626 (15 U.S.C. 6181v) as sections 625, 626, and 627, respectively; and

(2) by inserting after section 623 the following:

15 USC 1681s–3.

"§ 624. Affiliate sharing

"(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), 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.

"(2) CONSUMER CHOICE.—

"(A) IN GENERAL.—The notice required under paragraph (1) shall allow the consumer the opportunity to prohibit all solicitations referred to in such paragraph, and may allow the consumer to choose from different options when electing to prohibit the sending of such solicitations, including options regarding the types of entities and information covered, and which methods of delivering solicitations the consumer elects to prohibit.

"(B) FORMAT.—Notwithstanding subparagraph (A), the notice required under paragraph (1) shall be clear, conspicuous, and concise, and any method provided under paragraph (1)(B) shall be simple. The regulations prescribed to implement this section shall provide specific guidance regarding how to comply with such standards.

"(3) DURATION.—

"(A) IN GENERAL.—The election of a consumer pursuant to paragraph (1)(B) to prohibit the making of solicitations shall be effective for at least 5 years, beginning on the date on which the person receives the election of the consumer, unless the consumer requests that such election be revoked.

"(B) NOTICE UPON EXPIRATION OF EFFECTIVE PERIOD.—At such time as the election of a consumer pursuant to

paragraph (1)(B) is no longer effective, a person may not use information that the person receives in the manner described in paragraph (1) to make any solicitation for marketing purposes to the consumer, unless the consumer receives a notice and an opportunity, using a simple method, to extend the opt-out for another period of at least 5 years, pursuant to the procedures described in paragraph (1).

"(4) SCOPE.—This section shall not apply to a person—

"(A) using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship;

"(B) using information to facilitate communications to an individual for whose benefit the person provides employee benefit or other services pursuant to a contract with an employer related to and arising out of the current employment relationship or status of the individual as a participant or beneficiary of an employee benefit plan;

"(C) using information to perform services on behalf of another person related by common ownership or affiliated by corporate control, except that this subparagraph shall not be construed as permitting a person to send solicitations on behalf of another person, if such other person would not be permitted to send the solicitation on its own behalf as a result of the election of the consumer to prohibit solicitations under paragraph (1)(B);

"(D) using information in response to a communication initiated by the consumer;

"(E) using information in response to solicitations authorized or requested by the consumer; or

"(F) if compliance with this section by that person would prevent compliance by that person with any provision of State insurance laws pertaining to unfair discrimination in any State in which the person is lawfully doing business.

"(5) NO RETROACTIVITY.—This subsection shall not prohibit the use of information to send a solicitation to a consumer if such information was received prior to the date on which persons are required to comply with regulations implementing this subsection.

"(b) NOTICE FOR OTHER PURPOSES PERMISSIBLE.—A notice or other disclosure under this section may be coordinated and consolidated with any other notice required to be issued under any other provision of law by a person that is subject to this section, and a notice or other disclosure that is equivalent to the notice required by subsection (a), and that is provided by a person described in subsection (a) to a consumer together with disclosures required by any other provision of law, shall satisfy the requirements of subsection (a).

"(c) USER REQUIREMENTS.—Requirements with respect to the use by a person of information received from another person related to it by common ownership or affiliated by corporate control, such as the requirements of this section, constitute requirements with respect to the exchange of information among persons affiliated by common ownership or common corporate control, within the meaning of section 625(b)(2).

"(d) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

"(1) PRE-EXISTING BUSINESS RELATIONSHIP.—The term 'pre-existing business relationship' means a relationship between a person, or a person's licensed agent, and a consumer, based on—

"(A) a financial contract between a person and a consumer which is in force;

"(B) the purchase, rental, or lease by the consumer of that person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and that person during the 18-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section;

"(C) an inquiry or application by the consumer regarding a product or service offered by that person, during the 3-month period immediately preceding the date on which the consumer is sent a solicitation covered by this section; or

"(D) any other pre-existing customer relationship defined in the regulations implementing this section.

"(2) SOLICITATION.—The term 'solicitation' means the marketing of a product or service initiated by a person to a particular consumer that is based on an exchange of information described in subsection (a), and is intended to encourage the consumer to purchase such product or service, but does not include communications that are directed at the general public or determined not to be a solicitation by the regulations prescribed under this section.".

15 USC 1681s–3 note.

(b) RULEMAKING REQUIRED.—

(1) IN GENERAL.—The Federal banking agencies, the National Credit Union Administration, and the Commission, with respect to the entities that are subject to their respective enforcement authority under section 621 of the Fair Credit Reporting Act and the Securities and Exchange Commission, and in coordination as described in paragraph (2), shall prescribe regulations to implement section 624 of the Fair Credit Reporting Act, as added by this section.

(2) COORDINATION.—Each agency required to prescribe regulations under paragraph (1) shall consult and coordinate with each other such agency so that, to the extent possible, the regulations prescribed by each such entity are consistent and comparable with the regulations prescribed by each other such agency.

(3) CONSIDERATIONS.—In promulgating regulations under this subsection, each agency referred to in paragraph (1) shall—

(A) ensure that affiliate sharing notification methods provide a simple means for consumers to make determinations and choices under section 624 of the Fair Credit Reporting Act, as added by this section;

(B) consider the affiliate sharing notification practices employed on the date of enactment of this Act by persons that will be subject to that section 624; and

(C) ensure that notices and disclosures may be coordinated and consolidated, as provided in subsection (b) of that section 624.

(4) TIMING.—Regulations required by this subsection shall—

(A) be issued in final form not later than 9 months after the date of enactment of this Act; and Deadline.

(B) become effective not later than 6 months after the date on which they are issued in final form. Effective date.

(c) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) DEFINITIONS.—Section 603(d)(2)(A) of the Fair Credit Reporting Act (15 U.S.C. 1681(d)(2)(A)) is amended by inserting "subject to section 624," after "(A)". 15 USC 1681a.

(2) RELATION TO STATE LAWS.—Section 625(b)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681t(b)(1)), as so designated by subsection (a) of this section, is amended—

(A) by striking "or" after the semicolon at the end of subparagraph (E); and

(B) by adding at the end the following new subparagraph:

"(H) section 624, relating to the exchange and use of information to make a solicitation for marketing purposes; or".

(3) CROSS REFERENCE CORRECTION.—Section 627(d) of the Fair Credit Reporting Act (15 U.S.C. 1681v(d)), as so designated by subsection (a) of this section, is amended by striking "section 625" and inserting "section 626".

(4) TABLE OF SECTIONS.—The table of sections for title VI of the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.) is amended by striking the items relating to sections 624 through 626 and inserting the following:

"624. Affiliate sharing.
"625. Relation to State laws.
"626. Disclosures to FBI for counterintelligence purposes.
"627. Disclosures to governmental agencies for counterintelligence purposes.".

(e) STUDIES OF INFORMATION SHARING PRACTICES.— 15 USC 1681s–3 note.

(1) IN GENERAL.—The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly conduct regular studies of the consumer information sharing practices by financial institutions and other persons that are creditors or users of consumer reports with their affiliates.

(2) MATTERS FOR STUDY.—In conducting the studies required by paragraph (1), the agencies described in paragraph (1) shall—

(A) identify—

(i) the purposes for which financial institutions and other creditors and users of consumer reports share consumer information;

(ii) the types of information shared by such entities with their affiliates;

(iii) the number of choices provided to consumers with respect to the control of such sharing, and the degree to and manner in which consumers exercise such choices, if at all; and

(iv) whether such entities share or may share personally identifiable transaction or experience information with affiliates for purposes—

(I) that are related to employment or hiring, including whether the person that is the subject

of such information is given notice of such sharing, and the specific uses of such shared information; or

(II) of general publication of such information; and

(B) specifically examine the information sharing practices that financial institutions and other creditors and users of consumer reports and their affiliates employ for the purpose of making underwriting decisions or credit evaluations of consumers.

(3) REPORTS.—

Deadlines.

(A) INITIAL REPORT.—Not later than 3 years after the date of enactment of this Act, the Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly submit a report to the Congress on the results of the initial study conducted in accordance with this subsection, together with any recommendations for legislative or regulatory action.

(B) FOLLOWUP REPORTS.—The Federal banking agencies, the National Credit Union Administration, and the Commission shall, not less frequently than once every 3 years following the date of submission of the initial report under subparagraph (A), jointly submit a report to the Congress that, together with any recommendations for legislative or regulatory action—

(i) documents any changes in the areas of study referred to in paragraph (2)(A) occurring since the date of submission of the previous report;

(ii) identifies any changes in the practices of financial institutions and other creditors and users of consumer reports in sharing consumer information with their affiliates for the purpose of making underwriting decisions or credit evaluations of consumers occurring since the date of submission of the previous report; and

(iii) examines the effects that changes described in clause (ii) have had, if any, on the degree to which such affiliate sharing practices reduce the need for financial institutions, creditors, and other users of consumer reports to rely on consumer reports for such decisions.

15 USC 1681 note.

SEC. 215. STUDY OF EFFECTS OF CREDIT SCORES AND CREDIT-BASED INSURANCE SCORES ON AVAILABILITY AND AFFORDABILITY OF FINANCIAL PRODUCTS.

(a) STUDY REQUIRED.—The Commission and the Board, in consultation with the Office of Fair Housing and Equal Opportunity of the Department of Housing and Urban Development, shall conduct a study of—

(1) the effects of the use of credit scores and credit-based insurance scores on the availability and affordability of financial products and services, including credit cards, mortgages, auto loans, and property and casualty insurance;

(2) the statistical relationship, utilizing a multivariate analysis that controls for prohibited factors under the Equal Credit Opportunity Act and other known risk factors, between credit

Trading Commission, and any futures association registered with such Commission.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 603(d)(2)(D) of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)(2)(D)) is amended by inserting "or (x)" after "subsection (o)".

TITLE VII—RELATION TO STATE LAWS

SEC. 711. RELATION TO STATE LAWS.

Section 625 of the Fair Credit Reporting Act (15 U.S.C. 1681t), as so designated by section 214 of this Act, is amended—

(1) in subsection (a), by inserting "or for the prevention or mitigation of identity theft," after "information on consumers,";

(2) in subsection (b), by adding at the end the following:

"(5) with respect to the conduct required by the specific provisions of—

"(A) section 605(g);
"(B) section 605A;
"(C) section 605B;
"(D) section 609(a)(1)(A);
"(E) section 612(a);
"(F) subsections (e), (f), and (g) of section 615;
"(G) section 621(f);
"(H) section 623(a)(6); or
"(I) section 628."; and

(3) in subsection (d)—

(A) by striking paragraph (2);

(B) by striking "(c)—" and all that follows through "do not affect" and inserting "(c) do not affect"; and

(C) by striking "1996; and" and inserting "1996.".

TITLE VIII—MISCELLANEOUS

SEC. 811. CLERICAL AMENDMENTS.

(a) SHORT TITLE.—Section 601 of the Fair Credit Reporting Act (15 U.S.C. 1601 note) is amended by striking "the Fair Credit Reporting Act." and inserting "the 'Fair Credit Reporting Act'.".

(b) SECTION 604.—Section 604(a) of the Fair Credit Reporting Act (15 U.S.C. 1681b(a)) is amended in paragraphs (1) through (5), other than subparagraphs (E) and (F) of paragraph (3), by moving each margin 2 ems to the right.

(c) SECTION 605.—

(1) Section 605(a)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681c(a)(1)) is amended by striking "(1) cases" and inserting "(1) Cases".

(2)(A) Section 5(1) of Public Law 105–347 (112 Stat. 3211) is amended by striking "Judgments which" and inserting "judgments which". 15 USC 1681c.

(B) The amendment made by subparagraph (A) shall be deemed to have the same effective date as section 5(1) of Public Law 105–347 (112 Stat. 3211). 15 USC 1681c note.

(d) SECTION 609.—Section 609(a) of the Fair Credit Reporting Act (15 U.S.C. 1681g(a)) is amended—

CERTIFICATE OF SERVICE

I hereby certify that I have caused two copies of the Brief of Plaintiffs-Appellants to be served this 2d day of August, 2004, by Federal Express, next business day delivery as follows:

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