

Date of Hearing: April 22, 2013

ASSEMBLY COMMITTEE ON BANKING AND FINANCE  
Roger Dickinson, Chair  
AB 844 (Dickinson) – As Amended: April 15, 2013

SUBJECT: Credit and debit cards: transactions: personal information.

SUMMARY: Permits the operator of a commercial Internet Web site or online service that collects personal identifiable information (PII) to request a credit cardholder or debit cardholder to provide only the billing ZIP Code to complete the online credit card or debit card transaction. Specifically, this bill:

- 1) Requires that the ZIP Code is solely collected for the prevention of fraud, theft, or identify theft, except under specified circumstances.
- 2) Requires the operator to destroy or dispose of the ZIP Code in a secure manner after it is no longer needed for the prevention of fraud, theft, or identity theft.
- 3) Prohibits an operator of a commercial internet Web site or online service accepting the credit card or debit from aggregating the ZIP Code with any other personal identifiable information.
- 4) Prohibits an operator of a commercial internet Web site from sharing the ZIP Code with any other operator.
- 5) Provides that the above requirements do not apply in the following circumstances:
  - a) Instances in which the credit card or debit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence.
  - b) Cash advance transactions.
  - c) An operator of a commercial Internet Web site or online service is contractually obligated to provide PII in order to complete the credit card or debit card transaction.
  - d) An operator of a commercial Internet Web site or online service is obligated to collect and record the PII by federal or state law or regulation.
  - e) An operator of a commercial Internet Web site or online service maintains a preexisting account associated with the cardholder or debit cardholder where the cardholder or debit cardholder has previously provided PII as part of the creation of an account on the commercial Internet Web site or online service.
  - f) Instances in which PII is required for a special purpose incidental but related to the individual credit card or debit card transaction, including, but not limited to, information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders.

- 6) Defines “Personal identifiable information” as individually identifiable information concerning a cardholder or debit cardholder, other than information set forth on the credit card or debit card, collected online by the operator from that cardholder or debit cardholder, including, but not limited to, the following:
  - a) Home or other physical address, including street name and name of a city or town,
  - b) Email address,
  - c) Telephone number.
- 7) Defines “Operator” as a person or entity and any and all affiliated corporate entities that own an Internet Web site or an online service that collects and maintains personal identifiable information from a cardholder or debit cardholder residing in California who uses or visits the Internet Web site or online service if the Internet Web site or online service is operated for commercial purposes.
- 8) Extends the above provisions to debit cards.
  - a) Defines "debit card" as an accepted debit card or other means of access to a debit cardholder's account that may be used to initiate electronic funds transfers and may be used without unique identifying information such as personal identification number to initiate access to the debit cardholder's account.
  - b) Defines "debit cardholder" as a natural person to whom a debit card is issued.
- 9) Removes specific references of terms that could be inferred only applying to "brick and mortar" retailers.
- 10) Authorizes the assessment of civil penalties or an action for injunctive relief, or both, for a violation of the provisions.

#### EXISTING LAW

- 1) Provides that under the Song-Beverly Credit Card Act of 1971 (Credit Card Act) (Civil Code Section 1747 *et seq*), no person, firm, partnership, association or corporation that accepts credit cards shall do any of the following:
  - a) Require, or request, as condition of accepting the credit card, the cardholder to write any PII upon the credit card transaction form or other document. [Section 1747.08a(1)]
  - b) Require, or request, as a condition of accepting the credit card, the cardholder to provide personal identification information which the entity accepting the card would then write or record upon the credit transaction form or otherwise. [Section 1747.08a(2)]
  - c) Utilize in any credit card transaction, a credit card form that contains preprinted spaces for PII of the cardholder. [Section 1747.08a(3)]

- 2) Specifies that the prohibitions in a, b and c do not apply under the following circumstances:
  - a) If the credit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence. [Section 1747.08(1)]
  - b) Cash advance transactions. [Section 1747.08(2)]
  - c) If the entity requesting the information is contractually obligated to provide the personal information in order to complete the transaction, or is obligated to collect and record the PII by federal law or regulation. [Section 1747.08(3)]
  - d) If the entity accepting the credit card in a sales transaction at a retail motor fuel dispenser or retail motor fuel payment island automated cashier uses the ZIP Code information solely for the prevention of fraud, theft, or identity theft. [Section 1747.08 (3)]
  - e) If PII is required for a special purpose incidental but related to the individual credit card transaction, including but not limited to, information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders. [Section 1747.08(4)]
- 3) Clarifies that the prohibitions on collecting PII relating to the credit card transaction does not prohibit a requirement that the cardholder provide reasonable forms of positive identification, including a driver's license or California State identification card, or another form of identification. [Section 1747.08(4)d]
- 4) Specifies that if the cardholder pays for the transaction with a credit card number and does not make the credit card available upon request to verify the number, the cardholder's driver's license number or identification card number may be recorded on the credit card transaction form. [1747.08(4)d].
- 5) Defines "personal identification information" (PII) as information concerning the cardholder, other than information set forth on the credit card, and including but not limited to, the cardholder's address and telephone number. [Section 1747.08(3)b]
- 6) Defines "debit card" and "debit cardholder" as defined in this measure. [Civil Code, Section 1748.30]

FISCAL EFFECT: Unknown.

COMMENTS:

AB 844 is in response to the recent court decision from February 4, 2013, *Apple v Superior Court of Los Angeles County (Krescent) S199384 (February 04, 2013)*. In *Apple*, the California Supreme Court opined that the state's statutory protection against the collection of PII when making credit card purchases does not apply to online retailers of electronically downloadable products. *Apple v Superior Court of Los Angeles County (Krescent)* decision highlights the need for California privacy law to be updated from the "brick and mortar" world to an online world.

The underlying statute, the Song Beverly Credit Card Act passed in 1990, generally prohibits businesses from requesting or requiring consumers to provide unnecessary PII during a credit card transaction. However, the Apple Court found, in essence, that the statute and its anti-fraud provisions had been designed for “brick and mortar” transactions that pre-dated the Internet era and the explosion of e-commerce, and that online retailers of electronically downloadable products were therefore outside of the intended scope of the law.

The Court also recognized the problem of new technologies outpacing existing laws, and the majority opinion explicitly invited the state Legislature to revisit the matter, and update its consumer protection laws accordingly should it so desire. AB 844 provides that an operator of a commercial Internet Website or online service can collect only the ZIP code for a credit card or debit card transaction if it is used for the prevention of fraud, theft or identity theft. The worry surrounding the recent court case decision encompasses the concern of online retailers having the unlimited ability to ask consumers for any amount of personal information when making an online transaction. Due to the recent Court decision online merchants selling digital goods no longer need to worry about the Song-Beverly Act. AB 844 attempts to limit this abuse and maintain that the online retailer can only collect the zip code unless more information is allowed under the exemptions provided in the bill.

To be clear, those exemptions in the bill where more than a billing ZIP Code would be allowed are:

- 1) Instances when the card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrences.
- 2) Cash advance transactions.
- 3) the online retailer is contractually obligated to provide personal identifiable information in order to complete the card transactions.
- 4) Federal or state law regulations require information to be collected by the operator.
- 5) An operator maintains a preexisting account associated with the cardholder where the cardholder has previously provided personal identifiable information as part of the account.
- 6) If personal identifiable information is needed for shipping, delivery, servicing, or installation of the purchased merchandise.

In response to the Court case, AB 844 attempts to strike a balance between protecting consumer's privacy while also allowing online retailers to collect the necessary information to complete the transaction.

BACKGROUND:

Song-Beverly Credit Card Act of 1971: Under state law, a person who accepts a credit card for payment shall not record the consumer's PII on the credit card transaction form, except as specified. Originally enacted in 1971, the Song-Beverly Credit Card Act regulates the issuance and use of credit cards and the respective rights and responsibilities of cardholders and retailers. Section 1747.08 of the Act, in particular, seeks to protect a consumer's privacy and to address

"the misuse of personal identification information for, inter alia, marketing purposes." Specifically, the Act prohibits a retailer from requesting, as a condition of acceptance of a credit card, that the cardholder provide the retailer with PII, which is defined to mean any information about the cardholder that does not appear on the card, including, but not limited to, the cardholder's name and address.

Existing law carves out reasonable exceptions to this general rule, including where the business is contractually or legally required to collect the information, or where the business needs the information to perform some "special purpose," such as shipping, installing, or servicing a purchased item. A business that accepts credit cards is also permitted to require the cardholder, as a condition to accepting the card as payment, to provide reasonable forms of identification, such as a driver's license. AB 1219 (2012 legislative year), created another limited exception: in order to prevent fraud, a business that sells fuel may ask the purchaser to provide a zip code in order to process a fuel purchase at an automated fuel dispenser island. A person or business that violates the Act is subject to civil penalties, which may be assessed in a civil action by an affected cardholder, or in an action brought by the Attorney General or a district or city attorney.

"Personal Identification Information" Under Song-Beverly-Pineda: In 2011 the California Supreme Court confronted the question of what constitutes "personal identification information" under the Song-Beverly Credit Card Act and, more specifically, whether a person's zip code – with nothing else – constitutes an "address." (Pineda v. Williams- Sonoma Stores, Inc. (2011) 51 Cal. 4th. 524.) In Pineda, a customer sued a retailer claiming that it had violated the provisions of the Song-Beverly Act when a store clerk asked the customer for a zip code during the credit card transaction, and then recorded that zip code along with the customer's name and credit card number. The customer subsequently learned that the retailer used this information to do a "reverse search" to locate the customer's home address. The retailer then kept the customer's information in a data base that it used for marketing purposes. The customer filed the matter as a putative class action, alleging invasion of privacy, unfair competition, and violation of the Song-Beverly Act. Both the trial court and the Court of Appeal sided with the retailer, finding that a zip code, without any other component of the address, was too general to be considered "personal identification information." However the California Supreme Court reversed, holding, unanimously, that the word "address" in the statute means either a complete address or any portion of an address, and that a zip code is "readily understood to be part of an address."

The Recent Apple Case - Online Businesses Held Not to Be Covered by Song-Beverly: A bare majority of four justices held that it did not apply to online businesses. The majority opinion conceded that the statute does not make any express exception for online business transactions – applying as it does to any person, firm, etc. that accepts credit cards. However, the court concluded that both the legislative history and the overall statutory framework strongly suggest that the statute was only meant to apply to in-person transactions at brick and mortar businesses; online purchasers were not contemplated, as it was crafted prior to the explosion of online commerce.

In support of this conclusion, the Court made the following points:

- When the statute was originally enacted in 1971 the Internet did not exist, and even at the time of the most recent amendment – 1991 – online commercial sales were virtually non-existent and certainly not widespread, suggesting that the original intent of the legislature

concerned in-person brick and mortar transactions.

- In order to prevent fraud, the statute permits a business to require the customer to present a form of identification, such as a driver's license or other photo ID, so long as none of the information is written down or recorded. This provision, the court reasoned, showed that the overall framework did not contemplate online transactions, for an online business would not be able to request a photo ID for purposes of fraud prevention.

#### CALIFORNIA'S RIGHT TO PRIVACY:

The California Constitution expressly protects an individual's right to privacy. Added to the California Constitution in 1972 when voters adopted Proposition 11, the California privacy provision protects an individual's right to privacy from both governmental and private actors.

The California Supreme Court has held that the privacy provision in the California Constitution "creates a legal and enforceable right of privacy for every Californian." (White v. Davis (1975) 13 Cal. 3d 757, 775.) Despite this express protection, however, just what is included in the state's constitutional right of privacy has necessarily been developed in a body of case law. These cases tend to be very fact-specific. As a general rule, however, in order to maintain a claim for infringement of one's right of privacy under the California Constitution, the plaintiff must (1) identify a legally protected privacy interest; (2) establish that he or she had a "reasonable expectation of privacy" under the circumstances; and (3) that the defendant's conduct constituted a "serious" invasion of privacy. If a plaintiff establishes all three of these elements, the defendant may still show the invasion of privacy was justified if it furthers a legitimate and competing interest. Specifically, the California Supreme Court has held that an "invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest."

#### SUGGESTED AMENDMENTS:

The author is actively considering proposed changes proposed by the opposition but not all the issues have been resolved, to date. The author has committed to continue to work with the opposition. The clarification below reflects taking at least one concern from the opposition and ensuring the measure is not intended to capture consumer online accounts.

The amendments clarify that should a consumer create an account and opt-in to save this information on an internet website, then this information would not apply to the provisions of ZIP code only.

On Page 9, line 20, delete "a preexisting" and insert, "an"

On Page 9, line 22, delete, "has previously provided" and insert "provides"

On Page 9, line 23, delete, "creation of an"

#### RELATED LEGISLATION:

SB 383 (Jackson, 2013 Legislative Year) authorizes a person or entity that accepts credit cards in an online transaction involving an electronically downloadable product, to require a cardholder, as a condition to accepting a credit card as payment in full or in part for goods or services, to provide the billing ZIP Code and street address number associated with the credit card, if used solely for the prevention of fraud, theft, or identity theft. The bill would require that person or

entity to destroy or dispose of the ZIP Code and street address number information in a secure manner after it is no longer needed for the prevention of fraud, theft, or identity theft. The bill would further prohibit that person or entity from aggregating the ZIP Code and street address number information with any other personal identification information, and from sharing the ZIP Code. Currently in Senate Judiciary.

PREVIOUS LEGISLATION:

AB 1219 (Perea, Chapter 690, Statutes of 2011) provided clarification for those instances when an entity that accepts credit cards may not request certain types of PII to complete the transaction. Created an express exemption from the prohibition against the collection and retention of zip code information when the zip code is used solely for prevention of fraud, theft, or identify theft in a sales transaction at a retail motor fuel dispenser or retail motor fuel payment island automated cashier.

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Attorneys of California

Opposition

California Bankers Association (CBA)  
California Cable and Telecommunications Association  
California Chamber of Commerce  
California Grocers Association  
California Land Title Association  
California Manufacturers and Technology Association  
California Retailers Association  
California Travel Association  
Direct Marketing Association  
Internet Alliance  
Personal Insurance Federation of California  
State Privacy and Security Coalition, Inc.  
TechAmerica

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