

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE  
Roger Dickinson, Chair  
SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
  - a) Limits the PII collected for the purpose of establishing maintaining or updating the account or to process a credit card transaction.
- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
  - i) That providing the information is not required to complete the transaction;
  - ii) The purpose of the request; and,
  - iii) The intended use of the information.

- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

*Need for the bill*

According to the Author, "*Consumer privacy protections are particularly crucial in the digital age, where the collection and retention of personal information has made it possible for*

*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.

### *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."

### *Related Legislation*

AB 844 permits the operator of a commercial Internet Web site or online service that collects 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. Pending in the Senate Banking and Financial Institutions Committee.

### *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.

### *Arguments in Support*

*According to the Consumer Federation of California, SB 383 provides consumers with modest privacy protection when making an online transaction involving a downloadable product. This bill allow a business to gather any personally identifiable information from a customer, who is making an online transaction for a downloadable product, as long as that information is only used for the detection, investigation, or prevention of fraud, identity theft or other criminal activity, or to enforce the terms of the transaction. SB 383 also clarifies that a business may request the consumer to voluntarily opt-in to information gathering for other purposes, as long as business explains the intended use for that personally identifiable information.*

*According to the Consumer Attorneys of California, "instead of permitting limited data collection for fraud prevention, as the legislature did when enacted the gas station amendment, the Court voided Son Beverly in its entirety for certain online transactions. Under this ruling,*

*online merchants may demand personal information without limit from credit card holders and use information gathered for marketing, creation of customer dossiers, for sale to third parties, or other purposes. SB 383 strikes a balance between consumer privacy and crime prevention.*

### *Arguments in Opposition*

*According to the Los Angeles Area Chamber of Commerce, "While we appreciate that SB 383 attempts to address consumer privacy concerns, it only creates complex and confusing regulations that hinder Internet-based shopping and services. For example, in order to comply with SB 383, California based businesses would potentially have to create a two-tiered online system, one tailored to California customers and other tailored to non-California customers. California customers would need to enter more personal information before completing their purchase. The creation of an unequal payment and service systems means added costs and inefficiencies to businesses because of the need to adopt their online system to gather the additional California customer's information and subsequently dispose of that information after a given date, as proposed in the bill."*

*According to the California Newspaper Publishers Association, "SB 383 would impose a significant burden if not outright prohibition on the use of personal information that rewards customer loyalty by making it convenient for readers and subscribers to access downloadable content about their communities. Newspapers, in order to survive in today's hyper competitive media market, legitimately use personal information as the lifeblood to obtain and retain subscribers. Keeping the personal information of customers on file also allows readers to readily access and purchase single stories about important events they want as keepsakes and photographs of their kids who are featured in an issue. This will further harm newspapers and in some cases where a newspaper is already struggling, could be the death blow that puts them out of business."*

### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
- 3) The measure may open the door for online retailers who sell downloadable products to ask for any information if they use the information solely for fraud, theft, identity theft, or criminal activity, or enforcement of terms of sale. What does enforcement of terms of sale mean and is this provision a potential loophole because who make these determinations?
- 4) Since the Court's ruling in the *Apple* case, have online retailers who sell downloadable products changed their behavior? Are online retailers who sell downloadable products

collecting more information than is necessary to complete the transaction since the court ruling?

*Recommended Amendments & Double Referral*

This measure is double-referred to the Assembly Judiciary Committee. Should this measure pass out of the Assembly Banking & Finance Committee, it will be heard in the Assembly Judiciary Committee on Tuesday, June 24 at 9am. Due to this timeframe, amendments will be adopted in the Assembly Judiciary Committee.

The author has proposed author's amendments that will be taken in the Assembly Judiciary Committee. These amends attempt to clarify the author's intent of the measure as related to the credit card holder setting up an account when purchasing a downloadable product.

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (Sponsor)  
UFCW Western States Council (Sponsor)  
American Civil Liberties Union of California (ACLU)  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Alliance for Retired Americans  
California Public Interest Research Group (CALPIRG)  
California Teamsters Public Affairs Council  
CALPIRG  
Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America



Opposition

California Bankers Association (CBA)  
California Chamber of Commerce  
California Credit Union League (CCLU)  
California Independent Bankers (CIB)  
California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
Internet Coalition  
Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

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ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

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SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
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- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
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- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
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- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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:
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- 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

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*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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."

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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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.

### *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."

### *Related Legislation*

AB 844 permits the operator of a commercial Internet Web site or online service that collects 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. Pending in the Senate Banking and Financial Institutions Committee.

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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.

### *Arguments in Support*

*According to the Consumer Federation of California, SB 383 provides consumers with modest privacy protection when making an online transaction involving a downloadable product. This bill allow a business to gather any personally identifiable information from a customer, who is making an online transaction for a downloadable product, as long as that information is only used for the detection, investigation, or prevention of fraud, identity theft or other criminal activity, or to enforce the terms of the transaction. SB 383 also clarifies that a business may request the consumer to voluntarily opt-in to information gathering for other purposes, as long as business explains the intended use for that personally identifiable information.*

*According to the Consumer Attorneys of California, "instead of permitting limited data collection for fraud prevention, as the legislature did when enacted the gas station amendment, the Court voided Son Beverly in its entirety for certain online transactions. Under this ruling,*

*online merchants may demand personal information without limit from credit card holders and use information gathered for marketing, creation of customer dossiers, for sale to third parties, or other purposes. SB 383 strikes a balance between consumer privacy and crime prevention.*

### *Arguments in Opposition*

*According to the Los Angeles Area Chamber of Commerce, "While we appreciate that SB 383 attempts to address consumer privacy concerns, it only creates complex and confusing regulations that hinder Internet-based shopping and services. For example, in order to comply with SB 383, California based businesses would potentially have to create a two-tiered online system, one tailored to California customers and other tailored to non-California customers. California customers would need to enter more personal information before completing their purchase. The creation of an unequal payment and service systems means added costs and inefficiencies to businesses because of the need to adopt their online system to gather the additional California customer's information and subsequently dispose of that information after a given date, as proposed in the bill."*

*According to the California Newspaper Publishers Association, "SB 383 would impose a significant burden if not outright prohibition on the use of personal information that rewards customer loyalty by making it convenient for readers and subscribers to access downloadable content about their communities. Newspapers, in order to survive in today's hyper competitive media market, legitimately use personal information as the lifeblood to obtain and retain subscribers. Keeping the personal information of customers on file also allows readers to readily access and purchase single stories about important events they want as keepsakes and photographs of their kids who are featured in an issue. This will further harm newspapers and in some cases where a newspaper is already struggling, could be the death blow that puts them out of business."*

### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
- 3) The measure may open the door for online retailers who sell downloadable products to ask for any information if they use the information solely for fraud, theft, identity theft, or criminal activity, or enforcement of terms of sale. What does enforcement of terms of sale mean and is this provision a potential loophole because who make these determinations?
- 4) Since the Court's ruling in the *Apple* case, have online retailers who sell downloadable products changed their behavior? Are online retailers who sell downloadable products



collecting more information than is necessary to complete the transaction since the court ruling?

*Recommended Amendments & Double Referral*

This measure is double-referred to the Assembly Judiciary Committee. Should this measure pass out of the Assembly Banking & Finance Committee, it will be heard in the Assembly Judiciary Committee on Tuesday, June 24 at 9am. Due to this timeframe, amendments will be adopted in the Assembly Judiciary Committee.

The author has proposed author's amendments that will be taken in the Assembly Judiciary Committee. These amends attempt to clarify the author's intent of the measure as related to the credit card holder setting up an account when purchasing a downloadable product.

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (Sponsor)  
UFCW Western States Council (Sponsor)  
American Civil Liberties Union of California (ACLU)  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Alliance for Retired Americans  
California Public Interest Research Group (CALPIRG)  
California Teamsters Public Affairs Council  
CALPIRG  
Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America

Opposition

California Bankers Association (CBA)  
California Chamber of Commerce  
California Credit Union League (CCLU)  
California Independent Bankers (CIB)  
California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
Internet Coalition  
Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
  - a) Limits the PII collected for the purpose of establishing maintaining or updating the account or to process a credit card transaction.
- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
  - i) That providing the information is not required to complete the transaction;
  - ii) The purpose of the request; and,
  - iii) The intended use of the information.

- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

*Need for the bill*

According to the Author, "*Consumer privacy protections are particularly crucial in the digital age, where the collection and retention of personal information has made it possible for*

*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

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Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
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Utility Workers Union of America

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CTIA – The Wireless Association  
Direct Marketing Association  
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Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
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TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

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SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

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- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
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  - iii) The intended use of the information.

- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

*Need for the bill*

According to the Author, "*Consumer privacy protections are particularly crucial in the digital age, where the collection and retention of personal information has made it possible for*

*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.



### *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."

### *Related Legislation*

AB 844 permits the operator of a commercial Internet Web site or online service that collects 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. Pending in the Senate Banking and Financial Institutions Committee.

### *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.

### *Arguments in Support*

*According to the Consumer Federation of California, SB 383 provides consumers with modest privacy protection when making an online transaction involving a downloadable product. This bill allow a business to gather any personally identifiable information from a customer, who is making an online transaction for a downloadable product, as long as that information is only used for the detection, investigation, or prevention of fraud, identity theft or other criminal activity, or to enforce the terms of the transaction. SB 383 also clarifies that a business may request the consumer to voluntarily opt-in to information gathering for other purposes, as long as business explains the intended use for that personally identifiable information.*

*According to the Consumer Attorneys of California, "instead of permitting limited data collection for fraud prevention, as the legislature did when enacted the gas station amendment, the Court voided Son Beverly in its entirety for certain online transactions. Under this ruling,*

*online merchants may demand personal information without limit from credit card holders and use information gathered for marketing, creation of customer dossiers, for sale to third parties, or other purposes. SB 383 strikes a balance between consumer privacy and crime prevention.*

### *Arguments in Opposition*

*According to the Los Angeles Area Chamber of Commerce, "While we appreciate that SB 383 attempts to address consumer privacy concerns, it only creates complex and confusing regulations that hinder Internet-based shopping and services. For example, in order to comply with SB 383, California based businesses would potentially have to create a two-tiered online system, one tailored to California customers and other tailored to non-California customers. California customers would need to enter more personal information before completing their purchase. The creation of an unequal payment and service systems means added costs and inefficiencies to businesses because of the need to adopt their online system to gather the additional California customer's information and subsequently dispose of that information after a given date, as proposed in the bill."*

*According to the California Newspaper Publishers Association, "SB 383 would impose a significant burden if not outright prohibition on the use of personal information that rewards customer loyalty by making it convenient for readers and subscribers to access downloadable content about their communities. Newspapers, in order to survive in today's hyper competitive media market, legitimately use personal information as the lifeblood to obtain and retain subscribers. Keeping the personal information of customers on file also allows readers to readily access and purchase single stories about important events they want as keepsakes and photographs of their kids who are featured in an issue. This will further harm newspapers and in some cases where a newspaper is already struggling, could be the death blow that puts them out of business."*

### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
- 3) The measure may open the door for online retailers who sell downloadable products to ask for any information if they use the information solely for fraud, theft, identity theft, or criminal activity, or enforcement of terms of sale. What does enforcement of terms of sale mean and is this provision a potential loophole because who make these determinations?
- 4) Since the Court's ruling in the *Apple* case, have online retailers who sell downloadable products changed their behavior? Are online retailers who sell downloadable products

collecting more information than is necessary to complete the transaction since the court ruling?

*Recommended Amendments & Double Referral*

This measure is double-referred to the Assembly Judiciary Committee. Should this measure pass out of the Assembly Banking & Finance Committee, it will be heard in the Assembly Judiciary Committee on Tuesday, June 24 at 9am. Due to this timeframe, amendments will be adopted in the Assembly Judiciary Committee.

The author has proposed author's amendments that will be taken in the Assembly Judiciary Committee. These amends attempt to clarify the author's intent of the measure as related to the credit card holder setting up an account when purchasing a downloadable product.

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (Sponsor)  
UFCW Western States Council (Sponsor)  
American Civil Liberties Union of California (ACLU)  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Alliance for Retired Americans  
California Public Interest Research Group (CALPIRG)  
California Teamsters Public Affairs Council  
CALPIRG  
Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America

Opposition

California Bankers Association (CBA)  
California Chamber of Commerce  
California Credit Union League (CCLU)  
California Independent Bankers (CIB)  
California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
Internet Coalition  
Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
  - a) Limits the PII collected for the purpose of establishing maintaining or updating the account or to process a credit card transaction.
- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
  - i) That providing the information is not required to complete the transaction;
  - ii) The purpose of the request; and,
  - iii) The intended use of the information.

- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

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*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

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### *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."

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AB 844 permits the operator of a commercial Internet Web site or online service that collects 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. Pending in the Senate Banking and Financial Institutions Committee.

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### *Arguments in Support*

*According to the Consumer Federation of California, SB 383 provides consumers with modest privacy protection when making an online transaction involving a downloadable product. This bill allow a business to gather any personally identifiable information from a customer, who is making an online transaction for a downloadable product, as long as that information is only used for the detection, investigation, or prevention of fraud, identity theft or other criminal activity, or to enforce the terms of the transaction. SB 383 also clarifies that a business may request the consumer to voluntarily opt-in to information gathering for other purposes, as long as business explains the intended use for that personally identifiable information.*

*According to the Consumer Attorneys of California, "instead of permitting limited data collection for fraud prevention, as the legislature did when enacted the gas station amendment, the Court voided Son Beverly in its entirety for certain online transactions. Under this ruling,*

*online merchants may demand personal information without limit from credit card holders and use information gathered for marketing, creation of customer dossiers, for sale to third parties, or other purposes. SB 383 strikes a balance between consumer privacy and crime prevention.*

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*According to the Los Angeles Area Chamber of Commerce, "While we appreciate that SB 383 attempts to address consumer privacy concerns, it only creates complex and confusing regulations that hinder Internet-based shopping and services. For example, in order to comply with SB 383, California based businesses would potentially have to create a two-tiered online system, one tailored to California customers and other tailored to non-California customers. California customers would need to enter more personal information before completing their purchase. The creation of an unequal payment and service systems means added costs and inefficiencies to businesses because of the need to adopt their online system to gather the additional California customer's information and subsequently dispose of that information after a given date, as proposed in the bill."*

*According to the California Newspaper Publishers Association, "SB 383 would impose a significant burden if not outright prohibition on the use of personal information that rewards customer loyalty by making it convenient for readers and subscribers to access downloadable content about their communities. Newspapers, in order to survive in today's hyper competitive media market, legitimately use personal information as the lifeblood to obtain and retain subscribers. Keeping the personal information of customers on file also allows readers to readily access and purchase single stories about important events they want as keepsakes and photographs of their kids who are featured in an issue. This will further harm newspapers and in some cases where a newspaper is already struggling, could be the death blow that puts them out of business."*

### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
- 3) The measure may open the door for online retailers who sell downloadable products to ask for any information if they use the information solely for fraud, theft, identity theft, or criminal activity, or enforcement of terms of sale. What does enforcement of terms of sale mean and is this provision a potential loophole because who make these determinations?
- 4) Since the Court's ruling in the *Apple* case, have online retailers who sell downloadable products changed their behavior? Are online retailers who sell downloadable products

collecting more information than is necessary to complete the transaction since the court ruling?

*Recommended Amendments & Double Referral*

This measure is double-referred to the Assembly Judiciary Committee. Should this measure pass out of the Assembly Banking & Finance Committee, it will be heard in the Assembly Judiciary Committee on Tuesday, June 24 at 9am. Due to this timeframe, amendments will be adopted in the Assembly Judiciary Committee.

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REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (Sponsor)  
UFCW Western States Council (Sponsor)  
American Civil Liberties Union of California (ACLU)  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Alliance for Retired Americans  
California Public Interest Research Group (CALPIRG)  
California Teamsters Public Affairs Council  
CALPIRG  
Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America

Opposition

California Bankers Association (CBA)  
California Chamber of Commerce  
California Credit Union League (CCLU)  
California Independent Bankers (CIB)  
California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
Internet Coalition  
Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
  - a) Limits the PII collected for the purpose of establishing maintaining or updating the account or to process a credit card transaction.
- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
  - i) That providing the information is not required to complete the transaction;
  - ii) The purpose of the request; and,
  - iii) The intended use of the information.

- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

*Need for the bill*

According to the Author, "*Consumer privacy protections are particularly crucial in the digital age, where the collection and retention of personal information has made it possible for*



*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.

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Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
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Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

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Roger Dickinson, Chair

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- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
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- 7) Makes various findings and declarations.

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  - 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

*Need for the bill*

According to the Author, "*Consumer privacy protections are particularly crucial in the digital age, where the collection and retention of personal information has made it possible for*

*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.

### *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."

### *Related Legislation*

AB 844 permits the operator of a commercial Internet Web site or online service that collects 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. Pending in the Senate Banking and Financial Institutions Committee.

### *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.

### *Arguments in Support*

*According to the Consumer Federation of California, SB 383 provides consumers with modest privacy protection when making an online transaction involving a downloadable product. This bill allow a business to gather any personally identifiable information from a customer, who is making an online transaction for a downloadable product, as long as that information is only used for the detection, investigation, or prevention of fraud, identity theft or other criminal activity, or to enforce the terms of the transaction. SB 383 also clarifies that a business may request the consumer to voluntarily opt-in to information gathering for other purposes, as long as business explains the intended use for that personally identifiable information.*

*According to the Consumer Attorneys of California, "instead of permitting limited data collection for fraud prevention, as the legislature did when enacted the gas station amendment, the Court voided Son Beverly in its entirety for certain online transactions. Under this ruling,*

*online merchants may demand personal information without limit from credit card holders and use information gathered for marketing, creation of customer dossiers, for sale to third parties, or other purposes. SB 383 strikes a balance between consumer privacy and crime prevention.*

### *Arguments in Opposition*

*According to the Los Angeles Area Chamber of Commerce, "While we appreciate that SB 383 attempts to address consumer privacy concerns, it only creates complex and confusing regulations that hinder Internet-based shopping and services. For example, in order to comply with SB 383, California based businesses would potentially have to create a two-tiered online system, one tailored to California customers and other tailored to non-California customers. California customers would need to enter more personal information before completing their purchase. The creation of an unequal payment and service systems means added costs and inefficiencies to businesses because of the need to adopt their online system to gather the additional California customer's information and subsequently dispose of that information after a given date, as proposed in the bill."*

*According to the California Newspaper Publishers Association, "SB 383 would impose a significant burden if not outright prohibition on the use of personal information that rewards customer loyalty by making it convenient for readers and subscribers to access downloadable content about their communities. Newspapers, in order to survive in today's hyper competitive media market, legitimately use personal information as the lifeblood to obtain and retain subscribers. Keeping the personal information of customers on file also allows readers to readily access and purchase single stories about important events they want as keepsakes and photographs of their kids who are featured in an issue. This will further harm newspapers and in some cases where a newspaper is already struggling, could be the death blow that puts them out of business."*

### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
- 3) The measure may open the door for online retailers who sell downloadable products to ask for any information if they use the information solely for fraud, theft, identity theft, or criminal activity, or enforcement of terms of sale. What does enforcement of terms of sale mean and is this provision a potential loophole because who make these determinations?
- 4) Since the Court's ruling in the *Apple* case, have online retailers who sell downloadable products changed their behavior? Are online retailers who sell downloadable products

collecting more information than is necessary to complete the transaction since the court ruling?

*Recommended Amendments & Double Referral*

This measure is double-referred to the Assembly Judiciary Committee. Should this measure pass out of the Assembly Banking & Finance Committee, it will be heard in the Assembly Judiciary Committee on Tuesday, June 24 at 9am. Due to this timeframe, amendments will be adopted in the Assembly Judiciary Committee.

The author has proposed author's amendments that will be taken in the Assembly Judiciary Committee. These amends attempt to clarify the author's intent of the measure as related to the credit card holder setting up an account when purchasing a downloadable product.

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (Sponsor)  
UFCW Western States Council (Sponsor)  
American Civil Liberties Union of California (ACLU)  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Alliance for Retired Americans  
California Public Interest Research Group (CALPIRG)  
California Teamsters Public Affairs Council  
CALPIRG  
Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America

Opposition

California Bankers Association (CBA)  
California Chamber of Commerce  
California Credit Union League (CCLU)  
California Independent Bankers (CIB)  
California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
Internet Coalition  
Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
  - a) Limits the PII collected for the purpose of establishing maintaining or updating the account or to process a credit card transaction.
- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
  - i) That providing the information is not required to complete the transaction;
  - ii) The purpose of the request; and,
  - iii) The intended use of the information.



- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

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*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.

### *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."

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*online merchants may demand personal information without limit from credit card holders and use information gathered for marketing, creation of customer dossiers, for sale to third parties, or other purposes. SB 383 strikes a balance between consumer privacy and crime prevention.*

### *Arguments in Opposition*

*According to the Los Angeles Area Chamber of Commerce, "While we appreciate that SB 383 attempts to address consumer privacy concerns, it only creates complex and confusing regulations that hinder Internet-based shopping and services. For example, in order to comply with SB 383, California based businesses would potentially have to create a two-tiered online system, one tailored to California customers and other tailored to non-California customers. California customers would need to enter more personal information before completing their purchase. The creation of an unequal payment and service systems means added costs and inefficiencies to businesses because of the need to adopt their online system to gather the additional California customer's information and subsequently dispose of that information after a given date, as proposed in the bill."*

*According to the California Newspaper Publishers Association, "SB 383 would impose a significant burden if not outright prohibition on the use of personal information that rewards customer loyalty by making it convenient for readers and subscribers to access downloadable content about their communities. Newspapers, in order to survive in today's hyper competitive media market, legitimately use personal information as the lifeblood to obtain and retain subscribers. Keeping the personal information of customers on file also allows readers to readily access and purchase single stories about important events they want as keepsakes and photographs of their kids who are featured in an issue. This will further harm newspapers and in some cases where a newspaper is already struggling, could be the death blow that puts them out of business."*

### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
- 3) The measure may open the door for online retailers who sell downloadable products to ask for any information if they use the information solely for fraud, theft, identity theft, or criminal activity, or enforcement of terms of sale. What does enforcement of terms of sale mean and is this provision a potential loophole because who make these determinations?
- 4) Since the Court's ruling in the *Apple* case, have online retailers who sell downloadable products changed their behavior? Are online retailers who sell downloadable products

collecting more information than is necessary to complete the transaction since the court ruling?

*Recommended Amendments & Double Referral*

This measure is double-referred to the Assembly Judiciary Committee. Should this measure pass out of the Assembly Banking & Finance Committee, it will be heard in the Assembly Judiciary Committee on Tuesday, June 24 at 9am. Due to this timeframe, amendments will be adopted in the Assembly Judiciary Committee.

The author has proposed author's amendments that will be taken in the Assembly Judiciary Committee. These amends attempt to clarify the author's intent of the measure as related to the credit card holder setting up an account when purchasing a downloadable product.

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (Sponsor)  
UFCW Western States Council (Sponsor)  
American Civil Liberties Union of California (ACLU)  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Alliance for Retired Americans  
California Public Interest Research Group (CALPIRG)  
California Teamsters Public Affairs Council  
CALPIRG  
Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America

Opposition

California Bankers Association (CBA)  
California Chamber of Commerce  
California Credit Union League (CCLU)  
California Independent Bankers (CIB)  
California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
Internet Coalition  
Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081



Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
  - a) Limits the PII collected for the purpose of establishing maintaining or updating the account or to process a credit card transaction.
- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
  - i) That providing the information is not required to complete the transaction;
  - ii) The purpose of the request; and,
  - iii) The intended use of the information.

- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

*Need for the bill*

According to the Author, "*Consumer privacy protections are particularly crucial in the digital age, where the collection and retention of personal information has made it possible for*

*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.

### *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."

### *Related Legislation*

AB 844 permits the operator of a commercial Internet Web site or online service that collects 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. Pending in the Senate Banking and Financial Institutions Committee.

### *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.

### *Arguments in Support*

*According to the Consumer Federation of California, SB 383 provides consumers with modest privacy protection when making an online transaction involving a downloadable product. This bill allow a business to gather any personally identifiable information from a customer, who is making an online transaction for a downloadable product, as long as that information is only used for the detection, investigation, or prevention of fraud, identity theft or other criminal activity, or to enforce the terms of the transaction. SB 383 also clarifies that a business may request the consumer to voluntarily opt-in to information gathering for other purposes, as long as business explains the intended use for that personally identifiable information.*

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### *Questions*

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- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
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REGISTERED SUPPORT / OPPOSITION:

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Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America



Opposition

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California Chamber of Commerce  
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California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
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Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
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- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
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- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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)]
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- 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

*Need for the bill*

According to the Author, "*Consumer privacy protections are particularly crucial in the digital age, where the collection and retention of personal information has made it possible for*

*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.

### *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."

### *Related Legislation*

AB 844 permits the operator of a commercial Internet Web site or online service that collects 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. Pending in the Senate Banking and Financial Institutions Committee.

### *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.

### *Arguments in Support*

*According to the Consumer Federation of California, SB 383 provides consumers with modest privacy protection when making an online transaction involving a downloadable product. This bill allow a business to gather any personally identifiable information from a customer, who is making an online transaction for a downloadable product, as long as that information is only used for the detection, investigation, or prevention of fraud, identity theft or other criminal activity, or to enforce the terms of the transaction. SB 383 also clarifies that a business may request the consumer to voluntarily opt-in to information gathering for other purposes, as long as business explains the intended use for that personally identifiable information.*

*According to the Consumer Attorneys of California, "instead of permitting limited data collection for fraud prevention, as the legislature did when enacted the gas station amendment, the Court voided Son Beverly in its entirety for certain online transactions. Under this ruling,*

*online merchants may demand personal information without limit from credit card holders and use information gathered for marketing, creation of customer dossiers, for sale to third parties, or other purposes. SB 383 strikes a balance between consumer privacy and crime prevention.*

### *Arguments in Opposition*

*According to the Los Angeles Area Chamber of Commerce, "While we appreciate that SB 383 attempts to address consumer privacy concerns, it only creates complex and confusing regulations that hinder Internet-based shopping and services. For example, in order to comply with SB 383, California based businesses would potentially have to create a two-tiered online system, one tailored to California customers and other tailored to non-California customers. California customers would need to enter more personal information before completing their purchase. The creation of an unequal payment and service systems means added costs and inefficiencies to businesses because of the need to adopt their online system to gather the additional California customer's information and subsequently dispose of that information after a given date, as proposed in the bill."*

*According to the California Newspaper Publishers Association, "SB 383 would impose a significant burden if not outright prohibition on the use of personal information that rewards customer loyalty by making it convenient for readers and subscribers to access downloadable content about their communities. Newspapers, in order to survive in today's hyper competitive media market, legitimately use personal information as the lifeblood to obtain and retain subscribers. Keeping the personal information of customers on file also allows readers to readily access and purchase single stories about important events they want as keepsakes and photographs of their kids who are featured in an issue. This will further harm newspapers and in some cases where a newspaper is already struggling, could be the death blow that puts them out of business."*

### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
- 3) The measure may open the door for online retailers who sell downloadable products to ask for any information if they use the information solely for fraud, theft, identity theft, or criminal activity, or enforcement of terms of sale. What does enforcement of terms of sale mean and is this provision a potential loophole because who make these determinations?
- 4) Since the Court's ruling in the *Apple* case, have online retailers who sell downloadable products changed their behavior? Are online retailers who sell downloadable products



collecting more information than is necessary to complete the transaction since the court ruling?

*Recommended Amendments & Double Referral*

This measure is double-referred to the Assembly Judiciary Committee. Should this measure pass out of the Assembly Banking & Finance Committee, it will be heard in the Assembly Judiciary Committee on Tuesday, June 24 at 9am. Due to this timeframe, amendments will be adopted in the Assembly Judiciary Committee.

The author has proposed author's amendments that will be taken in the Assembly Judiciary Committee. These amends attempt to clarify the author's intent of the measure as related to the credit card holder setting up an account when purchasing a downloadable product.

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (Sponsor)  
UFCW Western States Council (Sponsor)  
American Civil Liberties Union of California (ACLU)  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Alliance for Retired Americans  
California Public Interest Research Group (CALPIRG)  
California Teamsters Public Affairs Council  
CALPIRG  
Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America

Opposition

California Bankers Association (CBA)  
California Chamber of Commerce  
California Credit Union League (CCLU)  
California Independent Bankers (CIB)  
California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
Internet Coalition  
Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE  
Roger Dickinson, Chair  
SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
  - a) Limits the PII collected for the purpose of establishing maintaining or updating the account or to process a credit card transaction.
- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
  - i) That providing the information is not required to complete the transaction;
  - ii) The purpose of the request; and,
  - iii) The intended use of the information.

- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

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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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

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### *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 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.

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"Personal Identification Information" Under Song-Beverly-Pineda: In 2011 the California Supreme Court confronted the question of what constitutes "personal identification information" under the 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 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."

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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.
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### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
- 3) The measure may open the door for online retailers who sell downloadable products to ask for any information if they use the information solely for fraud, theft, identity theft, or criminal activity, or enforcement of terms of sale. What does enforcement of terms of sale mean and is this provision a potential loophole because who make these determinations?
- 4) Since the Court's ruling in the *Apple* case, have online retailers who sell downloadable products changed their behavior? Are online retailers who sell downloadable products

collecting more information than is necessary to complete the transaction since the court ruling?

*Recommended Amendments & Double Referral*

This measure is double-referred to the Assembly Judiciary Committee. Should this measure pass out of the Assembly Banking & Finance Committee, it will be heard in the Assembly Judiciary Committee on Tuesday, June 24 at 9am. Due to this timeframe, amendments will be adopted in the Assembly Judiciary Committee.

The author has proposed author's amendments that will be taken in the Assembly Judiciary Committee. These amends attempt to clarify the author's intent of the measure as related to the credit card holder setting up an account when purchasing a downloadable product.

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (Sponsor)  
UFCW Western States Council (Sponsor)  
American Civil Liberties Union of California (ACLU)  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Alliance for Retired Americans  
California Public Interest Research Group (CALPIRG)  
California Teamsters Public Affairs Council  
CALPIRG  
Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America

Opposition

California Bankers Association (CBA)  
California Chamber of Commerce  
California Credit Union League (CCLU)  
California Independent Bankers (CIB)  
California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
Internet Coalition  
Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
  - a) Limits the PII collected for the purpose of establishing maintaining or updating the account or to process a credit card transaction.
- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
  - i) That providing the information is not required to complete the transaction;
  - ii) The purpose of the request; and,
  - iii) The intended use of the information.

- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

*Need for the bill*

According to the Author, "*Consumer privacy protections are particularly crucial in the digital age, where the collection and retention of personal information has made it possible for*

*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.



### *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."

### *Related Legislation*

AB 844 permits the operator of a commercial Internet Web site or online service that collects 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. Pending in the Senate Banking and Financial Institutions Committee.

### *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.

### *Arguments in Support*

*According to the Consumer Federation of California, SB 383 provides consumers with modest privacy protection when making an online transaction involving a downloadable product. This bill allow a business to gather any personally identifiable information from a customer, who is making an online transaction for a downloadable product, as long as that information is only used for the detection, investigation, or prevention of fraud, identity theft or other criminal activity, or to enforce the terms of the transaction. SB 383 also clarifies that a business may request the consumer to voluntarily opt-in to information gathering for other purposes, as long as business explains the intended use for that personally identifiable information.*

*According to the Consumer Attorneys of California, "instead of permitting limited data collection for fraud prevention, as the legislature did when enacted the gas station amendment, the Court voided Son Beverly in its entirety for certain online transactions. Under this ruling,*

*online merchants may demand personal information without limit from credit card holders and use information gathered for marketing, creation of customer dossiers, for sale to third parties, or other purposes. SB 383 strikes a balance between consumer privacy and crime prevention.*

### *Arguments in Opposition*

*According to the Los Angeles Area Chamber of Commerce, "While we appreciate that SB 383 attempts to address consumer privacy concerns, it only creates complex and confusing regulations that hinder Internet-based shopping and services. For example, in order to comply with SB 383, California based businesses would potentially have to create a two-tiered online system, one tailored to California customers and other tailored to non-California customers. California customers would need to enter more personal information before completing their purchase. The creation of an unequal payment and service systems means added costs and inefficiencies to businesses because of the need to adopt their online system to gather the additional California customer's information and subsequently dispose of that information after a given date, as proposed in the bill."*

*According to the California Newspaper Publishers Association, "SB 383 would impose a significant burden if not outright prohibition on the use of personal information that rewards customer loyalty by making it convenient for readers and subscribers to access downloadable content about their communities. Newspapers, in order to survive in today's hyper competitive media market, legitimately use personal information as the lifeblood to obtain and retain subscribers. Keeping the personal information of customers on file also allows readers to readily access and purchase single stories about important events they want as keepsakes and photographs of their kids who are featured in an issue. This will further harm newspapers and in some cases where a newspaper is already struggling, could be the death blow that puts them out of business."*

### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
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Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
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CTIA – The Wireless Association  
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Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
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- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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)]
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FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the online world.

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*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.

### *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."

### *Related Legislation*

AB 844 permits the operator of a commercial Internet Web site or online service that collects 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. Pending in the Senate Banking and Financial Institutions Committee.

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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.

### *Arguments in Support*

*According to the Consumer Federation of California, SB 383 provides consumers with modest privacy protection when making an online transaction involving a downloadable product. This bill allow a business to gather any personally identifiable information from a customer, who is making an online transaction for a downloadable product, as long as that information is only used for the detection, investigation, or prevention of fraud, identity theft or other criminal activity, or to enforce the terms of the transaction. SB 383 also clarifies that a business may request the consumer to voluntarily opt-in to information gathering for other purposes, as long as business explains the intended use for that personally identifiable information.*

*According to the Consumer Attorneys of California, "instead of permitting limited data collection for fraud prevention, as the legislature did when enacted the gas station amendment, the Court voided Son Beverly in its entirety for certain online transactions. Under this ruling,*

*online merchants may demand personal information without limit from credit card holders and use information gathered for marketing, creation of customer dossiers, for sale to third parties, or other purposes. SB 383 strikes a balance between consumer privacy and crime prevention.*

### *Arguments in Opposition*

*According to the Los Angeles Area Chamber of Commerce, "While we appreciate that SB 383 attempts to address consumer privacy concerns, it only creates complex and confusing regulations that hinder Internet-based shopping and services. For example, in order to comply with SB 383, California based businesses would potentially have to create a two-tiered online system, one tailored to California customers and other tailored to non-California customers. California customers would need to enter more personal information before completing their purchase. The creation of an unequal payment and service systems means added costs and inefficiencies to businesses because of the need to adopt their online system to gather the additional California customer's information and subsequently dispose of that information after a given date, as proposed in the bill."*

*According to the California Newspaper Publishers Association, "SB 383 would impose a significant burden if not outright prohibition on the use of personal information that rewards customer loyalty by making it convenient for readers and subscribers to access downloadable content about their communities. Newspapers, in order to survive in today's hyper competitive media market, legitimately use personal information as the lifeblood to obtain and retain subscribers. Keeping the personal information of customers on file also allows readers to readily access and purchase single stories about important events they want as keepsakes and photographs of their kids who are featured in an issue. This will further harm newspapers and in some cases where a newspaper is already struggling, could be the death blow that puts them out of business."*

### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
- 3) The measure may open the door for online retailers who sell downloadable products to ask for any information if they use the information solely for fraud, theft, identity theft, or criminal activity, or enforcement of terms of sale. What does enforcement of terms of sale mean and is this provision a potential loophole because who make these determinations?
- 4) Since the Court's ruling in the *Apple* case, have online retailers who sell downloadable products changed their behavior? Are online retailers who sell downloadable products

collecting more information than is necessary to complete the transaction since the court ruling?

*Recommended Amendments & Double Referral*

This measure is double-referred to the Assembly Judiciary Committee. Should this measure pass out of the Assembly Banking & Finance Committee, it will be heard in the Assembly Judiciary Committee on Tuesday, June 24 at 9am. Due to this timeframe, amendments will be adopted in the Assembly Judiciary Committee.

The author has proposed author's amendments that will be taken in the Assembly Judiciary Committee. These amends attempt to clarify the author's intent of the measure as related to the credit card holder setting up an account when purchasing a downloadable product.

REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (Sponsor)  
UFCW Western States Council (Sponsor)  
American Civil Liberties Union of California (ACLU)  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Alliance for Retired Americans  
California Public Interest Research Group (CALPIRG)  
California Teamsters Public Affairs Council  
CALPIRG  
Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America

Opposition

California Bankers Association (CBA)  
California Chamber of Commerce  
California Credit Union League (CCLU)  
California Independent Bankers (CIB)  
California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
Internet Coalition  
Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
  - a) Limits the PII collected for the purpose of establishing maintaining or updating the account or to process a credit card transaction.
- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
  - i) That providing the information is not required to complete the transaction;
  - ii) The purpose of the request; and,
  - iii) The intended use of the information.

- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

*Need for the bill*

According to the Author, "*Consumer privacy protections are particularly crucial in the digital age, where the collection and retention of personal information has made it possible for*



*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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.

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"Personal Identification Information" Under Song-Beverly-Pineda: In 2011 the California Supreme Court confronted the question of what constitutes "personal identification information" under the 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 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."

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

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In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

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REGISTERED SUPPORT / OPPOSITION:

Support

Consumer Federation of California (Sponsor)  
UFCW Western States Council (Sponsor)  
American Civil Liberties Union of California (ACLU)  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Alliance for Retired Americans  
California Public Interest Research Group (CALPIRG)  
California Teamsters Public Affairs Council  
CALPIRG  
Christ Our Redeemer (COR)  
Christ Our Redeemer AME Church of Irvine  
Consumer Action  
Consumer Attorneys of California  
Consumer Watchdog  
Ecumenical Center for Black Church Studies  
Engineers and Scientists of CA  
International Longshore & Warehouse Union  
Jesse Miranda Center for Hispanic Leadership  
Los Angeles Latino Chamber of Commerce  
National Asian American Coalition (NAAC)  
National Hispanic Christian Leadership Conference  
Orange County Interdenominational Alliance  
Privacy Activism  
Privacy Rights Clearinghouse  
Professional and Technical Engineers  
United Food & Commercial Workers Western States Council  
UNITE-HERE  
Utility Workers Union of America

Opposition

California Bankers Association (CBA)  
California Chamber of Commerce  
California Credit Union League (CCLU)  
California Independent Bankers (CIB)  
California Retailers Association (CRA)  
CTIA – The Wireless Association  
Direct Marketing Association  
Internet Coalition  
Los Angeles Area Chamber of Commerce  
Motion Pictures Association of America  
State Privacy and Security Coalition  
TechAmerica  
TechNet

Analysis Prepared by: Kathleen O'Malley / B. & F. / (916) 319-3081

Date of Hearing: June 23, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

SB 383 (Jackson) – As Amended: June 15, 2014

SENATE VOTE: 21-13

SUBJECT: Credit Cards: personal information.

SUMMARY: Expands the Song-Beverly Credit Card Act to online transactions involving an electronic downloadable product. Specifically, this bill:

- 1) Permits a person or entity to require a cardholder, as a condition of accepting a credit card as payment in full or in part in an online transaction involving an electronic downloadable product, to provide personal identification information (PII) if used solely for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 2) Requires the person or entity accepting the credit card for an online transaction involving an electronic downloadable product to destroy or dispose of the PII in a secure manner after it is no longer needed for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 3) Prohibits the person or entity from aggregating the PII with any other PII and also prohibits the person or entity from sharing PII with any other person, firm, partnership, association, or corporation unless it is required to do so by state or federal law, or is contractually obligated to share the information with another entity to verify the information, complete the transaction, or for the detection, investigation, or prevention of fraud, theft, identity theft, or criminal activity, or for enforcement of terms of sale.
- 4) Allows a person or entity that provides an electronic downloadable product to require a consumer to establish an account as a condition for the purchase of an electronic downloadable product. In addition, requires a consumer to provide PII to establish, maintain, or update that account.
  - a) Limits the PII collected for the purpose of establishing maintaining or updating the account or to process a credit card transaction.
- 5) Allows a cardholder to provide PII by opting in to the collection and use of that information if he or she is notified of the following at the same time the cardholder is completing a transaction or establishing an account:
  - i) That providing the information is not required to complete the transaction;
  - ii) The purpose of the request; and,
  - iii) The intended use of the information.

- a) Requires the person or entity to provide the cardholder with an opportunity to opt out of the collection of the information before the online transaction involving an electronic downloadable product is completed.
- 6) Defines an “online transaction involving an electronic downloadable product” as a credit card transaction for a product, service, subscription, or any other consideration, in which the product, service, subscription, or consideration is provided by means of a download to a computer, telephone, or other electronic device.
- 7) Makes various findings and declarations.

#### EXISTING LAW

- 1) Requires through the California Online Privacy Protection Act, that an operator of a commercial Internet Web site or online service that collects PII about individual consumers residing in California who use or visit its commercial Internet Web site or online service to conspicuously post its privacy policy on its Internet Web site, or in the case of an operator of an online service, make that policy available to consumers in accordance with state law. [Business and Professions Code Sec. 22575 (a).]
- 2) 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 PII 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]

FISCAL EFFECT: None.

COMMENTS:

SB 383 is in response to a 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. The *Apple* decision highlights the need for California privacy laws to be updated from the "brick and mortar" world to the 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 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. The worry surrounding the 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. It is presumed that due to the court's decision online merchants selling digital goods no longer need to worry about the Act.

*Need for the bill*

According to the Author, "*Consumer privacy protections are particularly crucial in the digital age, where the collection and retention of personal information has made it possible for*

*individuals to unlawfully obtain millions of records during a single breach of a company's computer systems. SB 383 states the intent of the legislature to re-establish privacy protections for online credit card transactions involved downloadable products. Specifically, this bill closes a loophole in the Song Beverly Credit Card Act, which was created after a State Supreme Court ruling that found that these protections do not apply to certain online transactions.*

### *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 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 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 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.

*Capp v. Nordstrom* No. 13-660-MCE-AC, 2013 WL 5739102 (E.D. Cal. Oct. 21, 2013)

In a recent case, once again surrounded around California's Song Beverly Credit Card Act, *Capp v. Nordstrom*, the District Court for the Eastern District of California clarified one more point about the Song-Beverly Act: requests for customers' email addresses are prohibited requests for PII.

In the *Nordstrom* case, Plaintiff Robert Capp, as the representative of a putative class, asserted a Song-Beverly claim against retailer Nordstrom, Inc. Mr. Capp made a purchase at a Nordstrom store and paid for the purchase with his credit card. After Mr. Capp swiped his card, the Nordstrom cashier asked Mr. Capp to enter his email address so that he could receive his receipt by email. Mr. Capp stated that he believed that "he was required to provide his email address information in order to complete the transaction and receive his receipt." Mr. Capp completed the transaction, and received a receipt by email. According to the complaint, Mr. Capp began receiving unsolicited promotional emails from Nordstrom on an almost daily basis, and claimed that he saw an increase in email traffic from other retailers, leading him to believe that Nordstrom shared his email address to others without his permission. Mr. Capp sued, claiming that Nordstrom's request for his email address constituted a violation of the Song-Beverly Act. Nordstrom moved to dismiss the claims arguing that an email address does not qualify as "personal identification information" under the Song-Beverly Act. In deciding this issue of first impression, the court relied on *Pineda v. Williams-Sonoma Stores, Inc.* The court stated: "Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, sending him a receipt, and then using the address for another reason, to send promotional emails and to resell that information to other companies—directly implicates the purposes of the statute as articulated by the California Supreme Court in *Pineda*." Ultimately, the court held that a customer's email address is "personal identification information" under the Song-Beverly Act.

### *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."

### *Related Legislation*

AB 844 permits the operator of a commercial Internet Web site or online service that collects 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. Pending in the Senate Banking and Financial Institutions Committee.

### *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.

### *Arguments in Support*

*According to the Consumer Federation of California, SB 383 provides consumers with modest privacy protection when making an online transaction involving a downloadable product. This bill allow a business to gather any personally identifiable information from a customer, who is making an online transaction for a downloadable product, as long as that information is only used for the detection, investigation, or prevention of fraud, identity theft or other criminal activity, or to enforce the terms of the transaction. SB 383 also clarifies that a business may request the consumer to voluntarily opt-in to information gathering for other purposes, as long as business explains the intended use for that personally identifiable information.*

*According to the Consumer Attorneys of California, "instead of permitting limited data collection for fraud prevention, as the legislature did when enacted the gas station amendment, the Court voided Son Beverly in its entirety for certain online transactions. Under this ruling,*

*online merchants may demand personal information without limit from credit card holders and use information gathered for marketing, creation of customer dossiers, for sale to third parties, or other purposes. SB 383 strikes a balance between consumer privacy and crime prevention.*

### *Arguments in Opposition*

*According to the Los Angeles Area Chamber of Commerce, "While we appreciate that SB 383 attempts to address consumer privacy concerns, it only creates complex and confusing regulations that hinder Internet-based shopping and services. For example, in order to comply with SB 383, California based businesses would potentially have to create a two-tiered online system, one tailored to California customers and other tailored to non-California customers. California customers would need to enter more personal information before completing their purchase. The creation of an unequal payment and service systems means added costs and inefficiencies to businesses because of the need to adopt their online system to gather the additional California customer's information and subsequently dispose of that information after a given date, as proposed in the bill."*

*According to the California Newspaper Publishers Association, "SB 383 would impose a significant burden if not outright prohibition on the use of personal information that rewards customer loyalty by making it convenient for readers and subscribers to access downloadable content about their communities. Newspapers, in order to survive in today's hyper competitive media market, legitimately use personal information as the lifeblood to obtain and retain subscribers. Keeping the personal information of customers on file also allows readers to readily access and purchase single stories about important events they want as keepsakes and photographs of their kids who are featured in an issue. This will further harm newspapers and in some cases where a newspaper is already struggling, could be the death blow that puts them out of business."*

### *Questions*

- 1) While the *Apple* court case only pertained to downloadable products, the court stated as a whole that the Song-Beverly Credit Card Act was out of touch with the internet era. This measure takes a piecemeal approach because it only pertains to online downloadable products, should the legislature consider taking a bigger approach and apply the same protections to all online transactions similar to AB 844? Splitting up an online shopping experience for a consumer based on whether they purchase a downloadable product or physical item may cause more confusion for the consumer and the online retailer.
- 2) This measure attempts to update credit card privacy protections over the internet but does not address the issue of online purchases made by a debit card. Will this measure steer online retailers to set up a new platform for debit cards?
- 3) The measure may open the door for online retailers who sell downloadable products to ask for any information if they use the information solely for fraud, theft, identity theft, or criminal activity, or enforcement of terms of sale. What does enforcement of terms of sale mean and is this provision a potential loophole because who make these determinations?
- 4) Since the Court's ruling in the *Apple* case, have online retailers who sell downloadable products changed their behavior? Are online retailers who sell downloadable products

collecting more information than is necessary to complete the transaction since the court ruling?

*Recommended Amendments & Double Referral*

This measure is double-referred to the Assembly Judiciary Committee. Should this measure pass out of the Assembly Banking & Finance Committee, it will be heard in the Assembly Judiciary Committee on Tuesday, June 24 at 9am. Due to this timeframe, amendments will be adopted in the Assembly Judiciary Committee.

The author has proposed author's amendments that will be taken in the Assembly Judiciary Committee. These amends attempt to clarify the author's intent of the measure as related to the credit card holder setting up an account when purchasing a downloadable product.

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