

No. S199384

SUPREME COURT
FILED

MAY 14 2012

IN THE SUPREME COURT OF CALIFORNIA

Frederick K. Ohlrich Clerk

Deputy

APPLE INC., a California corporation,

Petitioner,

vs.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent;

DAVID KRESCENT,

individually and on behalf of a class of persons similarly situated,

Real Party in Interest.

Court of Appeal Case No. B238097
Los Angeles Superior Court Civil Case No. BC463305
The Honorable Carl J. West, Presiding

**APPLE INC.'S REQUEST FOR JUDICIAL NOTICE;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT;
DECLARATION OF DANIEL M. KOLKEY**

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APPLE INC.

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APPLE INC.

REQUEST FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 452 and 459 and rule 8.520(g), California Rules of Court, petitioner Apple Inc. (“Apple”) respectfully requests that the Court take judicial notice of the following legislative history references in Apple’s opening brief with respect to Civil Code section 1747.08 of the Song-Beverly Credit Card Act of 1971 and the California Online Privacy Protection Act of 2003 (“COPPA”), codified at Business and Professions Code section 22575 et seq.:

Assembly Bill No. 2920

1. Assembly Committee on Finance & Insurance, Background Summary for AB 2920 (1989-1990 Reg. Sess.) (attached as exhibit A to Kolkey Declaration).
2. Senate Committee on Judiciary, Analysis of AB 2920 (1989-1990 Reg. Sess.) as amended June 27, 1990 (attached as exhibit B to Kolkey Declaration).
3. Enrolled Bill Report on AB 2920 (1989-1990 Reg. Sess.) July 21, 1990) (attached as exhibit C to Kolkey Declaration).

Assembly Bill No. 1477

4. Legislative Counsel’s Digest, Assembly Bill No. 1477 (“AB 1477”), as approved by Governor, Oct. 14, 1991 (1991-1992 Reg. Sess.) (attached as exhibit D to Kolkey Declaration).

Assembly Bill No. 1219

5. Assembly Bill No. 1219 (“AB 1219”), as amended April 25, 2011 (attached as exhibit E to Kolkey Declaration).

6. AB 1219, as amended May 4, 2011 (attached as exhibit F to Kolkey Declaration).

7. Assembly Committee on Judiciary, Analysis of AB 1219 (2011-2012 Res. Sess.) as amended May 4, 2011 (attached as exhibit G to Kolkey Declaration).

8. Concurrence in Senate Amendments to AB 1219 (2011-2012 Res. Sess.), as amended September 1, 2011 (attached as exhibit H to Kolkey Declaration).

9. Assembly Committee on Banking and Finance, Analysis of AB 1219 (2011-2012 Reg. Sess.) as amended April 25, 2011 (attached as exhibit I to Kolkey Declaration).

Assembly Bill No. 68

10. Senate Committee on Judiciary, Analysis of Assembly Bill No. 68 (“AB 68”) (2003-2004 Reg. Sess.) as amended Sept. 3, 2003 (attached as exhibit J to Kolkey Declaration).

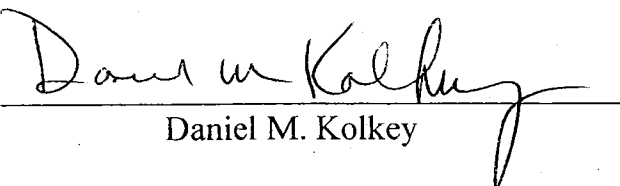
11. Assembly Committee on Judiciary, Analysis of AB 68 (2003-2004 Reg. Sess.) as amended April 2, 2003 (attached as exhibit K to Kolkey Declaration).

These items are appropriate subjects of judicial notice and comply with the criteria for judicial notice under the California Rules of Court as follows:

1. They are admissible legislative history. (See Evid. Code, §§ 452, 459 and the attached memorandum of points and authorities.)
2. They are relevant to this appeal's arguments relating to the interpretation of the Song-Beverly Act. (See Cal. Rules of Court, rule 8.252(a)(2)(A) and the attached memorandum of points and authorities.)
3. These items were not presented to the trial court. (See Cal. Rules of Court, rule 8.252(a)(2)(B).)
4. These items do not relate to proceedings occurring after the judgment that is the subject of this appeal. (Cal. Rules of Court, rule 8.252(a)(2)(C).)

DATED: May 14, 2012

GIBSON DUNN & CRUTCHER LLP

By: 
Daniel M. Kolkey

Attorneys for Petitioner
APPLE INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action concerns Civil Code section 1747.08¹ of the Song-Beverly Credit Card Act (the “Song-Beverly Act”) (§1747 et seq.), which prohibits merchants from recording credit cardholders’ “personal identification information,” including their addresses, in order to complete a credit card transaction.

This motion seeks judicial notice of (1) the legislative history of section 1747.08 in order to assist in this Court’s interpretation of it and (2) the legislative history of the California Online Privacy Protection Act of 2003 (“COPPA”), codified at Business and Professions Code section 22575 et seq., which addresses the same subject matter regarding the collection of “personally identifiable information,” but in the context of “commercial” Web sites.

This proceeding raises the issue of whether the Song-Beverly Act should be applied to online commercial transactions – a type of transaction that neither existed nor was contemplated by the Legislature at the time of the statute’s enactment. As shown in the opening brief, application of the statute to such transactions, which were both unknown at the time of enactment and of an inherently different nature than the brick-and-mortar

¹ Unless specified otherwise, all further statutory references are to the Civil Code.

transactions addressed in section 1747.08, could not possibly effectuate the statute's legislative intent.

The legislative history of section 1747.08 confirms that the Legislature did not intend it to govern online transactions. Instead, the legislative history of section 1747.08 demonstrates that the Legislature was exclusively focused on the collection of personal identification information in *in-person transactions* in the *brick-and-mortar retail* context and intended to effectuate a relatively uncontroversial policy judgment which prohibited a retailer from recording a customer's personal identification information while allowing the retailer to examine the credit card and a photo identification, neither of which are possible in an online commercial transaction . The statutory language reflects this intent.

The legislative history of COPPA, by contrast, demonstrates that the Legislature passed that statute to deal with the online collection of personal identifiable information because it recognized that the state did not have laws in place that governed such conduct. In describing COPPA, the bill's author explained that COPPA was designed to provide customers with sufficient information regarding how their personal identifiable information may be used and to require that the online e-retailers abide by their privacy policies, but did not prohibit the collection of personal identifiable information.

II. ARGUMENT

A. The Legislative History is Admissible.

Evidence Code section 459, subdivision (a), provides that the “reviewing court may take judicial notice of any matter specified in Section 452.” In turn, under Evidence Code section 452, subdivision (c), this Court may take judicial notice of “[o]fficial acts of the legislative . . . department[] . . . of any state of the United States.

In *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26 (“*Kaufman & Broad*”), the court of appeal observed that judicial notice of legislative history is appropriate when a legislative document “shed[s] light on the collegial view of the Legislature as a whole” and therefore constitutes “cognizable, legislative history.” (*Id.* at p. 30.)

Each document referenced herein constitutes a type of document that the courts have recognized as admissible to shed light on the Legislature’s intent. *Kaufman & Broad* “set[s] forth a list of legislative history documents that have been recognized by the California Supreme Court or [the Court of Appeal] as constituting cognizable legislative history,” including Office of Senate Floor analyses, legislative committee reports and analyses, different versions of a bill, and statements by the sponsors or proponents of a bill. (*Kaufman & Broad, supra*, at pp. 31-37.) The

documents specified in Apple's request for judicial notice fall under each of these categories.

First, AB 2920 and AB 1219, as introduced and as amended, are attached as exhibits E and F to the Kolkey Declaration. *Kaufman & Broad* observed that different versions of the bill at issue are cognizable legislative history appropriate for judicial notice. (*Kaufman & Broad, supra*, 188 Cal.App.4th at p. 31, citing *Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062, fn. 5; *People v. Watie* (2002) 100 Cal.App.4th 866, 884; *San Rafael Elementary School Dist. v. State Bd. of Education* (1999) 73 Cal.All.4th 438, 442-443.) Apple requests judicial notice of these documents (exhibits E and F).

Senate and Assembly committee reports and analyses are attached as exhibits A, B, F, H, I, J, and K to the Kolkey Declaration. Legislative committee reports and analyses constitute cognizable legislative history appropriate for judicial notice. (*Kaufman & Broad, supra*, 133 Cal.App.4th at p. 32.) Apple requests judicial notice of these reports and analyses.

Apple also requests judicial notice of the Legislative Counsel's Digest regarding AB 1477, attached as exhibit D to the Kolkey Declaration. The Legislative Counsel's Digest constitutes cognizable legislative history. (*Kaufman & Broad, supra*, 133 Cal.App.4th at p. 35.)

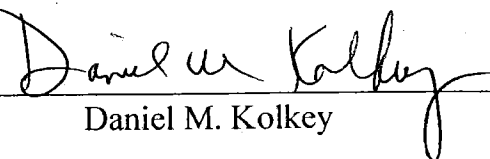
Finally, Apple requests judicial notice of an analysis of the opposition to AB 2920 submitted to by Southern Lumber Company, attached as exhibit C to the Beringer Declaration. “Statements by [s]ponsors, [p]roponents, and [o]pponents,” which are communicated to the legislature, have been recognized as constituting cognizable legislative history proper for judicial notice. (*Kaufman & Broad, supra*, 133 Cal.App.4th at p. 36.) Moreover, written communications made to “either a house of the Legislature or one of its committees” have been found to constitute cognizable legislative history. (*People v. Patterson* (1999) 72 Cal.App.4th 438, 443.)

III. CONCLUSION

For the foregoing reasons, Apple respectfully requests that this Court take judicial notice of the documents that are the subject of this motion.

DATED: May 14, 2012

GIBSON DUNN & CRUTCHER LLP

By: 
Daniel M. Kolkey

Attorneys for Petitioner
APPLE INC.

DECLARATION OF DANIEL M. KOLKEY

I, Daniel M. Kolkey, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and am a partner in the law firm of Gibson, Dunn & Crutcher LLP, attorneys for petitioner Apple Inc. ("Apple") in this action. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would testify competently thereto.

2. I am informed and believe and thereon allege that attorneys with my firm, who are representing Apple in this matter, caused the Legislative Intent Service, Inc. to be retained by my firm to obtain the legislative history for Assembly Bills Nos. 2920, 1477, and 1219. I am also informed and believe that attorneys with my firm, who are representing Apple in this matter, obtained the legislative history for Assembly Bill 68 through Westlaw. The attached documents (exhibits A through K) specified in paragraphs 3 through 14 herein are true and correct copies of legislative history provided to my firm by the Legislative Intent Service or Westlaw.

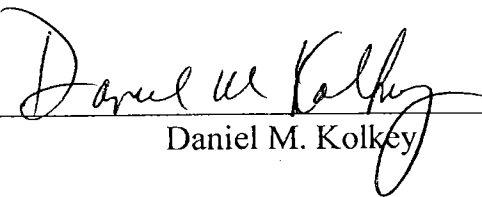
3. Attached hereto as exhibit A is a true and correct copy of the Assembly Committee on Finance & Insurance's Background Summary for AB 2920.

4. Attached hereto as exhibit B is a true and correct copy of the Senate Committee on Judiciary's Analysis of AB 2920 as amended June 27, 1990.
5. Attached hereto as exhibit C is a true and correct copy of the Enrolled Bill Report on AB 2920.
6. Attached hereto as exhibit D is a true and correct copy of Assembly Bill No. 1477, as approved by the Governor.
7. Attached hereto as exhibit E is a true and correct copy of Assembly Bill No. 1219 ("AB 1219"), as amended April 25, 2011.
8. Attached hereto as exhibit F is a true and correct copy of AB 1219, as amended May 4, 2011.
9. Attached hereto as exhibit G is a true and correct copy of the Assembly Committee on Judiciary's Analysis of Assembly Bill No. 1219 ("AB 1219") (2011-2012 Res. Sess.), as amended May 4, 2011.
10. Attached hereto as exhibit H is a true and correct copy of the Concurrence in Senate Amendments to AB 1219 as amended September 1, 2011.
11. Attached hereto as exhibit I is a true and correct copy of the Assembly Committee on Banking and Finance's Analysis of AB 1219 (2011-2012 Reg. Sess.) as amended April 25, 2011.

12. Attached hereto as exhibit J is a true and correct copy of the Senate Committee on Judiciary's Analysis of Assembly Bill No. 68 ("AB 68") (2003-2004 Reg. Sess.) as amended Sept. 3, 2003.

13. Attached hereto as exhibit K is a true and correct copy of the Assembly Committee on Judiciary's Analysis of AB 68 (2003-2004 Reg. Sess.) as amended April 2, 2003.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on this 14th day of May 2012 in San Francisco, California.



Daniel M. Kolkey

PROOF OF SERVICE

I, Teresa Motichka, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of 18 and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 555 Mission Street, Suite 3000, San Francisco, CA 94105. On May 14, 2012, I served the within:

APPLE INC'S REQUEST FOR JUDICIAL NTOICE

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown in the following manner:

SEE ATTACHED SERVICE LIST

X **BY OVERNIGHT DELIVERY:** I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date for collection for overnight delivery. I am familiar with Gibson, Dunn & Crutcher's practice in its above-described San Francisco office for the collection and processing of correspondence for distributing by Federal Express, UPS, and/or U.S. Postal Service Overnight Mail; pursuant that practice, envelopes placed for collection at designated locations during designated hours are deposited at the respective office that same day in the ordinary course of business.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing documents(s) were printed on recycled paper, and that this Certificate of Service was executed by me on May 14, 2012, at San Francisco, California.


Teresa Motichka

SERVICE LIST

VIA FEDERAL EXPRESS

Edwin Schreiber, Esq.
THE LAW OFFICES OF SCHREIBER
& SCHREIBER
16501 Ventura Boulevard, Suite 401
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Tel: (818) 789-2577

Representing: **Brian Luko**, individually
and on behalf of a class of person
similarly situated;
David Krescent, individually and on
behalf of a class of person similarly
situated

Sheldon Eisenberg, Esq.
Kristopher S. Davis, Esq.
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1800 Century Park East, Suite 1400
Los Angeles, California 90067
Tel: (310) 203-4000

Representing: **eHarmony, Inc.**

William A. Delgado, Esq.
Eileen M. Ahern, Esq.
WILLENKEN WILSON LOH &
DELGADO LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, California 90071
Tel: (213) 955-9240

Representing: **Ticketmaster L.L.C.**

ASSEMBLY COMMITTEE ON FINANCE AND INSURANCE
Patrick Johnston, Chairman

BACKGROUND INFORMATION REQUEST

Measure: AB 2920

Author: Assemblyman Areias

1. Origin of the bill:

- a. Who is the source of the bill? What person, organization, or governmental entity requested introduction?
Based upon similar legislation in the state of New York. The member is the sponsor.
- b. Has a similar bill been before either this session or a previous session of the legislature? If so, please identify the session, bill number and disposition of the bill.
None that we are aware of
- c. Has there been an interim committee report on the bill? If so, please identify the report.
No

2. What is the problem or deficiency in the present law which the bill seeks to remedy?
(Please see attached background summary)

3. Please attach copies of any background material in explanation of the bill, or state where such material is available for reference by committee staff.
Contact: Kurt Evans -- Assemblyman Areias' Office -- 5-7380

4. Please attach copies of letters of support or opposition from any group, organization, or governmental agency who has contacted you either in support or opposition to the bill.

5. If you plan substantive amendments to this bill prior to hearing, please explain briefly the substance of the amendments to be prepared.
Has not been determined at this time

6. List the witnesses you plan to have testify.
To be determined.

LEGISLATIVE INTENT SERVICE (800) 666-1917



RETURN THIS FORM TO: ASSEMBLY COMMITTEE ON FINANCE AND INSURANCE
Phone 445-9160

BACKGROUND SUMMARY FOR AB 2920

General Provisions

- o Prohibits retailers who accept credit cards for the purchase of goods and services from requiring consumers to write on the credit card transaction form any personal information, including the consumer's telephone number or address, that is not required by the credit card issuer to complete the transaction.
- o Permits exceptions to this prohibition where such personal information is necessary for shipping, delivery or installation of the purchased merchandise, or for special orders.
- o Subjects violators of this prohibition to civil penalties of up to \$250 for the first offense and up to \$1,000 for each subsequent offense.

General Background

Credit cards afford many benefits to consumers. They reduce the need to carry cash while shopping, provide the means to obtain emergency funds, produce records of expenditures, and help card holders build a credit history.

In today's marketplace, a vast majority of retail sellers of goods and services accept credit cards as a means of payment. In addition to serving as a device to make purchases for which payment may be spread out over time, credit cards afford consumers convenience and safety, in that with a credit card, consumers do not have to carry cash.

Retailers who accept credit cards are required, when processing credit card transactions, to follow specific written operating procedures established by Visa, MasterCard, American Express, and other credit card companies. These operating procedures require a retailer to complete a credit card sales slip form, upon presentation of a credit card, which must be signed by the card holder. A true and complete copy of this sales slip must be given to the card holder.

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The retailer is required to include on the form the sales date and an adequate description of the goods sold or services rendered. Often, retailers have a dollar "floor limit" of a certain amount that can be spent with a credit card. If the amount of the transaction is for an amount above the assigned "floor limit," the retailer also is required to contact the credit card issuer's authorization center and obtain approval for the sale. The retailer is required to write the approval code number in the appropriate place on the sales slip.

No further card holder information is required by credit card issuers to complete credit card transactions. Retailers submit and receive payments for sales slips from credit card issuers when the operating procedures have been duly followed.

The Problem

Despite these credit card transaction procedures, many retailers routinely require consumers to provide additional personal information, such as home addresses and telephone numbers, on credit card sales slip forms. In fact, a number of retailers have begun to use credit card transaction forms with a designated space for addresses and telephone numbers printed right on them. Consumers are led to mistakenly believe that such additional information is a necessary condition to complete the credit card transaction, when, in fact, it is not.

Retailers acquire this additional personal information for their own business purposes -- for example, to build a mailing list which they can subsequently use for their own in-house marketing efforts, or sell to direct-mail specialists or to others.

None of the major credit card companies -- Visa, MasterCard, American Express, Diner's Club, Discover, etc. -- require such additional card holder information to complete a credit card transaction because this information already has been obtained by the credit card company when the consumer applied for the credit card.

Although the operating rules of Visa, MasterCard, American Express, and other credit card companies do not prevent a retailer from asking for personal information, their operating rules specify that a retailer cannot refuse a consumer sale just because the consumer refuses to provide this information on a credit card transaction form.

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The Issue of Privacy

When credit cards were first introduced, the idea was to expedite commercial transactions between consumers and retailers who were otherwise completely unfamiliar with each other. If a consumer could establish his or her credit-worthiness first -- with his or her bank, for example -- the bank would issue a credit card. The consumer could then, theoretically, make purchases at virtually any commercial establishment with only a minimum of bother.

In practice, it often does not work that way. Credit card consumers should be entitled to the same privacy rights as those enjoyed by cash consumers, except to the extent required by credit card issuers to permit a retailer to complete a transaction.

AB 2920 seeks to protect the personal privacy of consumers who use credit cards to purchase goods or services by prohibiting retailers from requiring consumers to provide addresses, telephone numbers and other personal information that is unnecessary to complete the transaction and that the retailer does not need.

The legislation is modeled after a measure that has become law in the state of New York.

Charge Backs: General Summary

Some retailers seek to justify the acquisition of personal identification information to help them deal with possible "charge backs," particularly in those circumstances in which the total dollar amount of the transaction falls below the consumer's assigned floor limit and authorization is not required from the credit card issuer. However, in all charge back situations, information relating to the address and telephone number of the consumer is not necessary.

Furthermore, under the operating rules of most credit card companies, there are no circumstances, once the sale has been completed, under which a retailer is required to locate a card holder.



Charge Backs: Credit Card Problems

A charge back may occur for a number of reasons, the most common of which results from a problem with the consumer's credit card. In this particular case, if the transaction is correctly processed, the retailer is relieved of further financial liability by the card holder's bank. If there is a problem, such as a card holder exceeding his or her credit limit, the card-issuing bank absorbs the risk. The retailer gets paid anyway irregardless of whether the sale is above or below the retailer's assigned floor limit; so there is no need for the retailer to contact the card holder.

Some retailers justify the acquisition of the card holder's telephone number to help them locate the card holder if the retailer does not obtain all of the information that is necessary to process the transaction at the time of the sale. It is important to point out it is the retailer's responsibility to ensure that the credit card transaction is correctly processed, not the consumer's. A consumer's privacy should not be jeopardized simply because the retailer cannot process the transaction correctly at the point of sale.

Charge Backs: Product Problems

A charge back may occur because of a problem with the product purchased by the consumer. It is important to point out that in 99.9 percent of these cases, it is the consumer who contacts the retailer first and initiates the resolution of the problem, not the other way around.

If the retailer accepts the defective product back from the consumer and agrees to a refund, the retailer does a reversal, which is processed through the retailer's bank. In most cases, the charge never appears on the consumer's credit card statement. If it does, a phone call by the card holder to the card-issuing bank would inform the consumer that the correction had been made.

If is a dispute between the consumer and the merchant, there is a procedure available to the consumer to dispute the charge and have it removed from his or her bill. Credit card disputes are resolved through a process that involves the retailer's bank, the card-issuing bank and the credit card company. In such disputes, there are no circumstances under which the retailer would need to contact the consumer directly.



Charge Backs: Billing Errors

A charge back may occur because of a billing error on the part of the retailer. This usually involves an incorrect charge or double-billing.

Again, in 99.9 percent of these cases, it is the consumer who discovers the error first and initiates the resolution of the problem, not the retailer. The error usually is noticed when the consumer receives his or her credit card statement in the mail. At that time, the consumer contacts the card-issuing bank, which resolves the problem with the retailer's bank.

If the retailer happens to discover the billing error first, the retailer should contact his or her bank, not the consumer. It is the retailer's bank that will then be responsible for resolving the problem. If the problem is corrected within the timeframe of the billing cycle, the double charge will not appear on the consumer's credit card statement. If it does, the consumer can contact the card-issuing bank to find out that the correction had been made.

In all billing error charge back situations, there is no need for the retailer to contact the consumer directly.

Floor Limits

In sales above the retailer's assigned floor limit, the retailer must seek authorization to be assured of the consumer's credit-worthiness prior to completing the transaction. However, there is nothing to preclude a retailer from seeking authorization in those circumstances in which the total dollar amount of the transaction falls below the consumer's assigned floor limit, if the retailer is concerned about charge backs and a particular consumer's credit-worthiness.

Floor limits are set by the credit card issuer in agreement with the retailer. Floor limits may vary from retailer to retailer, depending upon the type of business, location of the business, the credit card issuer's experience with the business in terms of theft and fraud, time of year, and other factors.

Retailers are charged for authorizations by the credit card issuer. The amount of this charge is negotiated between the credit card issuer and the retailer. It is based upon a fixed percentage of the total purchase price of each individual consumer credit card transaction, not per authorization.

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This means the retailer pays the authorization charge irregardless of whether the amount of the purchase is above or below the retailer's assigned floor limit. Therefore, there is no additional charge to the retailer to seek authorization for purchases below the floor limit, even though the credit card issuer requires it only for purchases above the limit.

Lost Credit Cards

Some retailers seek to justify the acquisition of personal identification information to help them locate consumers when they mistakenly leave their credit cards at the store. If this occurs, the retailer should call his or her bank and provide the appropriate information regarding the consumer's credit card. The retailer's bank then contacts the card-issuing bank, which in turn notifies the consumer. The retailer does not need the consumer's telephone number and address in order to locate the consumer to return a lost card.

Furthermore, the rare occurrence of left-behind credit cards does not justify a retailer's policy of requiring all credit card customers to provide such personal information on the credit card transaction form.

Requesting Personal Information

AB 2920 would not prevent retailers from soliciting, on a voluntary basis, a consumer's address and telephone number for a store's mailing list. It does, however, justly prohibit the obtaining of additional personal information on credit card sales slips under retailers' false pretenses that the credit card transaction cannot or will not be completed without it.

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SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1989-90 Regular Session

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AB 2920 (Areias)
As amended June 27
Hearing date: July 3, 1990
Civil Code
ART

CREDIT CARDS: PERSONAL INFORMATION

HISTORY

Source: Author

Prior Legislation: None

Support: Attorney General's Office; San Francisco District
Attorney's Office; Consumer Action; Bankcard Holders
of America; American Express Company

Opposition: Southern Lumber Company

Assembly Floor vote: Ayes 50 - Noes 14

KEY ISSUE

SHOULD RETAILERS OR OTHERS WHO ACCEPT CREDIT CARDS AS PAYMENT BE PROHIBITED FROM REQUESTING A CUSTOMER'S PERSONAL IDENTIFICATION INFORMATION AS A CONDITION OF ACCEPTING THE CREDIT CARD PAYMENT?

PURPOSE

Existing law does not authorize a person to, or forbid a person from, requiring a customer to provide a telephone number or other information on a transaction form as a prerequisite for using a credit card to pay for a transaction.

This bill would prohibit a person who accepts a credit card as payment for transaction from:



- (a) requiring a cardholder to write personal identification information on a credit card form as a condition of accepting the credit card for payment;
- (b) requiring a cardholder to provide personal identification information, which the person accepting the card writes on the credit card form, as a condition of accepting the credit card for payment;
- (c) using a credit card form with preprinted spaces for cardholder personal identification information.

This bill defines "Personal identification information" as cardholder information that does not appear on the credit card, such as the cardholder's telephone number and address.

This bill would exempt from the prohibitions information about a cardholder required for a special purpose, such as for the shipment, delivery, servicing or installation of merchandise, or for special orders. In addition, it will not apply to cash advance transactions or to personal identification information required by the card issuer.

This bill would provide a civil penalty of \$250 for the first violation and \$1,000 for subsequent violations which may be collected in an action by the person paying with the credit card. This bill would also authorize the Attorney General, a district attorney or city attorney to bring an action to collect the penalty. The penalty collected by state, city or county shall be payable to the general fund of whichever governmental entity brought the action.

This bill would also authorize the Attorney General, a district attorney or city attorney to bring an action to enjoin violations.

COMMENT

1. Background

Credit cards afford many benefits to consumers. They reduce the need to carry cash while shopping, provide the means to obtain emergency funds, produce records of expenditures, and help cardholders build a credit history.

In today's marketplace, a vast majority of retail sellers of goods and services accept credit cards as a means of payment. In addition to serving as a device to make purchases for which payment may be spread out over time, credit cards afford consumers convenience and safety, in that with a credit card, consumers do not have to carry cash.

(More)



Retailers who accept credit cards are required, when processing credit card transactions, to follow specific written operating procedures established by Visa, MasterCard, American Express, and other credit card companies. These operating procedures require a retailer to complete a credit card sales slip form, upon presentation of a credit card, which must be signed by the cardholder. A true and complete copy of this sales slip must be given the the cardholder.

The retailer is required to verify the identification of the cardholder by comparing the signature on the credit card transaction form with the signature on the back of the credit card.

The retailer also is required to include on the form the sales date and an adequate description of the goods sold or services rendered.

Often, retailers have a dollar "floor limit" of a certain amount that can be spent with a credit card. If the amount of the transaction is for an amount above the assigned "floor limit," the retailer also is required to contact the credit card issuer's authorization center and obtain approval for the sale. The retailer is required to write the approval code number in the appropriate place on the sales slip.

No further cardholder information is required by credit car issuers to complete credit card transactions. Retailers submit and receive payments for sales slips from credit card issuers when the operating procedures have been duly followed.

2. Stated need for the bill

The author of this bill, who is also the sponsor, states that this bill is needed to protect the personal privacy of consumers who pay for merchandise, services, etc. with credit cards. This bill will prohibit merchants, and other persons, from requiring information that merchants, banks or credit card companies do not require or need.

3. The Problem

In credit card transaction procedures, many retailers routinely require consumers to provide additional personal information, such as home addresses and telephone numbers, on credit card sales slip forms. In fact, a number of retailers have begun to use credit card transaction forms with a designated space for addresses and telephone numbers printed right on them. Consumers are led to mistakenly believe that such additional information is a necessary condition to complete the credit card transaction, when, in fact, it is not.



Retailers acquire this additional personal information for their own business purposes -- for example, to build mailing and telephone lists which they can subsequently use for their own in-house marketing efforts, or sell to direct-mail or tele-marketing specialists, or to others.

In one case, consumers began receiving direct mail solicitations from a particular retail store within a week after making credit card purchases at that store. In a second case, a consumer with an unlisted telephone number began receiving telephone solicitations soon after making a credit card purchase for theater tickets. In both cases, the consumers were required to provide telephone numbers as a condition of acceptance of their credit cards.

None of the major credit card companies -- Visa, MasterCard, American Express, Diner's Club, Discover, etc. -- require such additional cardholder information to complete a credit card transaction because this information already has been obtained by the credit card company when the consumer applied for the credit card.

Although the operating rules of Visa, MasterCard, American Express, and other credit card companies do not prevent a retailer from asking for personal information, their operating rules specify that a retailer cannot refuse a consumer sale just because the consumer refuses to provide this information on a credit card transaction form.

4. The Issue of Privacy

When credit cards were first introduced, the idea was to expedite commercial transactions between consumers and retailers who were otherwise completely unfamiliar with each other. If a consumer could establish his or her credit-worthiness first -- with his or her bank, for example -- the bank would issue a credit card. The consumer could then, theoretically, make purchases at virtually any commercial establishment with only a minimum of bother.

In practice, it often does not work that way. Credit card consumers should be entitled to the same privacy rights as those enjoyed by cash consumers, except to the extent required by credit card issuers to permit a retailer to complete a transaction.

In one case, a consumer paid for goods at a department store with a credit card and was required by the store clerk to write her telephone number on the credit card transaction form. Two days later, she received a telephone call from the store clerk who had sold her the merchandise asking her out on a date.

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5. Charge-Backs

Some retailers seek to justify the acquisition of personal identification information to help them deal with possible "charge-backs," particularly in those circumstances in which the total dollar amount of the transaction falls below the consumer's assigned floor limit and authorization is not required from the credit card issuer. However, in all charge-back situations, information relating to the address and telephone number of the consumer is not needed.

Furthermore, under the operating rules of most credit card companies, there are no circumstances, once the sale has been completed, under which a retailer is required to locate a cardholder.

6. Product Problems

A charge-back may occur because of a problem with the product purchased by the consumer. It is important to point out that in 99.9 percent of these cases, it is the consumer who contacts the retailer first and initiates the resolution of the problem, not the other way around.

If the retailer accepts the defective product back from the consumer and agrees to a refund, the retailer does a reversal, which is processed through the retailer's bank. In most cases, the charge never appears on the consumer's credit card statement. If it does, a phone call by the cardholder to the card-issuing bank would inform the consumer that the correction had been made.

If there is a dispute between the consumer and the merchant, there is a procedure available to the consumer to dispute the charge and have it removed from his or her bill. Credit card disputes are resolved through a process that involves the retailer's bank, the card-issuing bank and the credit card company. In such disputes, there are not circumstances under which the retailer would need to contract the consumer directly.

7. Billing Errors

A charge-back may occur because of a billing error on the part of the retailer. This usually involves an incorrect charge or double-billing.

Again, in 99.9 percent of these cases, it is the consumer who discovers the error first and initiates the resolution of the problem, not the retailer. The error usually is noticed when



the consumer receives his or her credit card statement in the mail. At that time, the consumer contacts the card-issuing bank, which resolves the problem with the retailer's bank.

If the retailer happens to discover the billing error first, the retailer should contact his or her bank, not the consumer. It is the retailer's bank that will then be responsible for resolving the problem. If the problem is corrected within the timeframe of the billing cycle, the double charge will not appear on the consumer's credit card statement. If it does, the consumer can contact the card-issuing bank to find out that the correction had been made.

In all billing error charge-back situations, there is no need for the retailer to contact the consumer directly.

8. Floor Limits

In sales above the retailer's assigned floor limit, the retailer must seek authorization to be assured of the consumer's credit-worthiness prior to completing the transaction. However, there is nothing to preclude a retailer from seeking authorization in those circumstances in which the total dollar amount of the transaction falls below the consumer's assigned floor limit, if the retailer is concerned about charge-backs and particular consumer's credit-worthiness.

Floor limits are set by the credit card issuer in agreement with the retailer. Floor limits may vary from retailer to retailer, depending upon the type of business, location of the business, the credit card issuer's experience with the business in terms of theft and fraud, time of year, and other factors.

Retailers are charged for authorizations by the credit card issuer. The amount of this charge is negotiated between the credit card issuers and the retailer. It is based upon a fixed percentage of the total purchase price of each individual consumer credit card transaction, not per authorization.

This means the retailer pays the authorization charge regardless of whether the amount of the purchase is above or below the retailer's assigned floor limit. Therefore, there is not additional charge to the retailer to seek authorization for purchases below the floor limit, even though the credit card issuer requires it only for purchases above the limit.

9. Lost Credit Cards

Some retailers seek to justify the acquisition of personal identification information to help them locate consumers when they mistakenly leave their credit cards at the store. If this

(More)



occurs, the retailer should call his or her bank and provide the appropriate information regarding the consumer's credit card. The retailer's bank then contacts the card-issuing bank, which in turn notifies the consumer. The retailer does not need the consumer's telephone number and address in order to locate the consumer to return a lost card.

Furthermore, the rare occurrence of left-behind credit cards does not justify a retailer's policy of requiring all credit card customer to provide such personal information on the the credit card transaction form.

10. Practical Effect

This bill does not prohibit a merchant from requesting personal information from a credit card user and the user voluntarily providing the information. However, the merchant cannot condition credit card use on the customer providing the information under this bill. Furthermore, customers may be unaware of their rights under this bill and be pressured by merchants to provide the information.



ENROLLED BILL REPORT

Analyst: Gale Baker
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AGENCY: State and Consumer Services Agency	BILL NUMBER: AB 2920
DEPARTMENT: Department of Consumer Affairs	AUTHOR: Areias

Bill Summary

This bill would prohibit anyone who accepts credit cards from requiring the cardholder to provide any "personal identification information" to be recorded on the credit card transaction form or otherwise, as a condition of accepting the credit card. "Personal identification information" means information on the cardholder such as the cardholder's address and telephone number, other than information on the credit card. The bill also would prohibit the use of credit card forms with preprinted spaces designated for filling in any personal identification information.

The above prohibitions would not apply to cash advance transactions or to personal identification information that the person accepting the credit card is contractually obligated to provide in order to complete the transaction, or where the information is required for a special purpose incidental to but related to the transaction, such as for shipping, servicing, delivery or installation of the goods or for special orders.

Violations would be subject to a civil penalty of up to \$250 for the first violation and \$1,000 for subsequent violations in an action brought by the cardholder, the Attorney General, district attorney or city attorney. No penalty would be assessed for unintentional violations resulting from a bona fide error made despite the defendant's maintenance of procedures reasonably adopted to avoid the error. The penalty would be paid to the cardholder or to the general fund of the state, city or county, whichever brings the action. The Attorney General, district attorney or city attorney also would be authorized to sue to enjoin violations or obtain temporary restraining orders.

Background

Many retailers who accept credit cards have started requesting credit cardholders to include their address and/or telephone number on the charge slip. Many consumers dislike providing the information and consider it an invasion of privacy, but do it because they assume that the information is required by the card issuer or merchant for the credit card transaction and that the credit card transaction will be denied by the retailer or card issuer if they refuse.

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VOTE:	Assembly Partisan	Senate Partisan
	R D	R D
Floor:	50-14 (Conc. 49-22)	Floor: 30-0
Policy Committee:	13-1	Policy Committee: 8-0
Fiscal Committee:	18-3	Fiscal Committee: 28.8 Cal. <i>pe-11</i>

RECOMMENDATION TO GOVERNOR:
 SIGN VETO NO POSITION DEFER TO OTHER AGENCY

DEPARTMENT DIRECTOR: <i>Claudia Fortz</i>	DATE: JUL 21 1990	AGENCY SECRETARY: <i>Quina S Taylor</i>	DATE: 8/22/90
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Retailers often claim they need this information as protection in case the clerk does not get a clear imprint from the card on the sales slip and the charge is refused, but many consumers and consumer groups consider the practice an invasion of privacy. Bankcard Holders of America, a consumer group, argues that in many cases, protection against bad imprints is not the real reason retailers want that information, because the credit card issuer guarantees payment to the retailer if proper procedures are followed (even if the consumer does not pay the credit card company). Instead, they argue that many retailers collect this information to compile in-house marketing lists or sell the information to direct-mail marketers.

The California Retailers Association confirmed to the department that this is sometimes the reason. The California Restaurant Association in addition stated to the department that merchants no longer need this personal information for security or other reasons and that the practice is "outdated."

Credit card issuers do not require this personal information in order to process the credit card transaction, since consumers provide their address and home telephone number to the card issuer when they apply for credit. In fact, in its merchant agreements, VISA (and reportedly, MasterCard) prohibits retailers who accept their cards from refusing a sale because the cardholder declines to provide this information.

It is also argued that noting the address and/or telephone number on a credit card slip can promote fraud, because others can use the information in conjunction with the credit card number to order goods by phone or mail and charge it to the cardholder. Also, it is possible for someone to use this personal information to apply for other sources of credit in the cardholder's name. By the time the subterfuge is discovered, the consumer's credit and credit history could be severely damaged.

The department has received numerous telephone calls from consumers on this issue, probably due to a national television program in Fall 1989 advising consumers not to give their telephone numbers in credit card transactions, and by an article in the Los Angeles Times on April 8, 1990.

This bill is modeled after recent New York legislation.

Specific Findings

This bill would only prohibit requiring consumers to produce personal identification information as a condition of accepting a credit card; it would not prevent retailers from asking for the information. The California Retailers Association indicated to the department when the bill was first introduced that it had no problem with the bill, "as long as they could continue to ask for the information." We therefore suspect that many retailers will continue to ask for the information, since they will not be prohibited from merely "asking," and unless they know otherwise, consumers may continue to give it because they may assume they have to.

As discussed in Background, VISA and, perhaps, other credit card issuers already prohibit retailers from refusing a sale because the cardholder declines to give a phone number or other personal information. This contractual prohibition, however, does not prevent retailers from asking for the information. Therefore, the bill will probably not significantly alter existing practices unless consumers are made aware of their right to refuse to give the information.



However, making consumers aware of their rights under this bill should pose no problem. This issue is clearly of major interest to consumers, as evidenced by the numerous calls to our office and to legislators' offices. It has also received a lot of attention in the media. We believe that if this bill becomes law, word will spread quickly and the goal of this bill (to protect consumers from unwarranted invasions of privacy and potential credit card fraud) will be achieved.

Fiscal Impact

None to the department.

Argument

Proponents: Author (sponsor)
Attorney General
Bankcard Holders of America
Consumer Action
District Attorney, San Francisco

Opponents: Southern Lumber Company (San Jose)

"Watch" American Express
California Retailers Association
California Restaurant Association

"Neutral" California Bankers Association
Department of Consumer Affairs

Other: VISA and MasterCard are "supportive" of the bill but have not registered formal support

The purpose of this bill is to protect consumers from unwarranted invasions of privacy -- i.e., having to provide personal information in credit card transactions where it is not needed by the card issuer for the transaction to be processed.

Southern Lumber Company, San Jose, opposes the bill and argues that consumers' phone numbers or addresses are helpful because often, consumers leave their credit cards with the company and the company then has a way to contact them. Southern Lumber also states that sometimes, the company makes a mistake in the customer's favor and if the company has the consumer's phone number or address it can notify the customer that he or she has a credit coming. Southern Lumber states that it does not use phone numbers and addresses for any other purposes. (We contacted the company prior to submitting this enrolled bill report; the company stated that it is not "strongly opposed" to this bill and understands its purpose, but just believes that the author should "go after the perpetrators" of credit card fraud instead.)

The bill received a number of negative Republican votes on the Assembly floor. The minority consultants' analysis recommended an "oppose" position, arguing that while there are some occasional abuses, credit instruments are like checks (so merchants are entitled to personal information), and consumers can refuse to provide the information anyway. (The votes for the bill were not strictly partisan; there were 10 Republican "Aye" votes on the Assembly floor.)

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Recommendation

SIGN. This bill would give consumers the right to refuse to provide personal identification information (e.g., their address and/or telephone number) in credit card transactions, if the information is not required by the credit card issuer for the credit card transaction to be processed. This bill has received a lot of attention from the media and from individual consumers who consider the practice an invasion of privacy. Once consumers become aware of their right to refuse to give such information, they will be able to exercise this right in their credit card transactions, and the goal of the bill will be achieved.

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LEGISLATIVE INTENT SERVICE



An act to amend Sections 1725 and 1747.8 of the Civil Code, relating to consumers, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor October 14, 1991. Filed with Secretary of State October 14, 1991.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1477, Areias. Credit cards and negotiable instruments: identification.

(1) Existing law prohibits, with limited exceptions, any person accepting a negotiable instrument as payment for goods or services from, among other things, requiring as a condition of acceptance that the person paying with the negotiable instrument provide a credit card as a means of identification, or for any other purpose, and from recording the credit card number. Existing law, however, permits a merchant to request that a purchaser display a credit card as an indicia of creditworthiness or financial responsibility, or as an additional identification, provided the credit card number is not recorded.

This bill would provide that the above provisions apply only to retail transactions, and would recast the definition of credit card for the purposes of these provisions. It would clarify that a retailer may request, but not require, a purchaser to voluntarily display a credit card for the purposes described above, as long as the number is not recorded, and would clarify that a retailer may require and record the purchaser's name, address, and telephone number. The bill would require retailers that request display of a credit card to inform customers that displaying a credit card is not required for check writing, either by posting a prescribed notice or by training and requiring clerks to so inform customers. The bill would also make related and conforming changes.

(2) Existing law prohibits, with certain exceptions, any person, firm, partnership, association, or corporation which accepts credit cards, from requiring as a condition of acceptance of a credit card, that the cardholder write or provide personal identification information for notation on the credit card transaction form or otherwise. Personal identification information is defined to include the cardholder's address and telephone number.

This bill would provide that the merchant in such a transaction may neither request personal identification information, nor require that information as a condition to acceptance of the card, for purposes of notation. It would specify that the merchant may require reasonable forms of identification, including a driver's license,



provided that no information contained thereon is recorded on the credit card transaction form or otherwise. This bill would also make related and conforming changes.

(3) This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 1725 of the Civil Code is amended to read: 1725. (a) Unless permitted under subdivision (c), no person accepting a negotiable instrument as payment in full or in part for goods or services sold or leased at retail shall do any of the following:

(1) Require the person paying with a negotiable instrument to provide a credit card as a condition of acceptance of the negotiable instrument, or record the number of the credit card.

(2) Require, as a condition of acceptance of the negotiable instrument, or cause the person paying with a negotiable instrument to sign a statement agreeing to allow his or her credit card to be charged to cover the negotiable instrument if returned as no good.

(3) Record a credit card number in connection with any part of the transaction described in this subdivision.

(4) Contact a credit card issuer to determine if the amount of any credit available to the person paying with a negotiable instrument will cover the amount of the negotiable instrument.

(b) For the purposes of this section, the following terms have the following meanings:

(1) "Check guarantee card" means a card issued by a financial institution, evidencing an agreement under which the financial institution will not dishonor a check drawn upon itself, under the terms and conditions of the agreement.

(2) "Credit card" has the meaning specified in Section 1747.02, and does not include a check guarantee card or a card that is both a credit card and a check guarantee card.

(3) "Negotiable instrument" has the meaning specified in Section 3104 of the Commercial Code.

(4) "Retail" means a transaction involving the sale or lease of goods or services or both, between an individual, corporation, or other entity regularly engaged in business and a consumer, for use by the consumer and not for resale.

(c) This section does not prohibit any person from doing any of the following:

(1) Requiring the production of reasonable forms of positive identification, other than a credit card, which may include a driver's license or a California state identification card, as a condition of acceptance of a negotiable instrument.

(2) Requesting, but not requiring, a purchaser to voluntarily display a credit card as an indicia of creditworthiness or financial responsibility, or as an additional identification, provided the only

information concerning the credit card which is recorded is the type of credit card displayed, the issuer of the card, and the expiration date of the card. All retailers that request the display of a credit card pursuant to this paragraph shall inform the customer, by either of the following methods, that displaying the credit card is not a requirement for check writing:

(A) By posting the following notice in a conspicuous location in the unobstructed view of the public within the premises where the check is being written, clearly and legibly: "Check writing ID: credit card may be requested but not required for purchases."

(B) By training and requiring the sales clerks or retail employees requesting the credit card to inform all check writing customers that they are not required to display a credit card to write a check.

(3) Requesting production of, or recording, a credit card number as a condition for cashing a negotiable instrument that is being used solely to receive cash back from the person.

(4) Requesting, receiving, or recording a credit card number in lieu of requiring a deposit to secure payment in event of default, loss, damage, or other occurrence.

(5) Requiring, verifying, and recording the purchaser's name, address, and telephone number.

(6) Requesting or recording a credit card number on a negotiable instrument used to make a payment on that credit card account.

(d) This section does not require acceptance of a negotiable instrument whether or not a credit card is presented.

(e) Any person who violates this section is subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for a first violation, and to a civil penalty not to exceed one thousand dollars (\$1,000) for a second or subsequent violation, to be assessed and collected in a civil action brought by the person paying with a negotiable instrument, by the Attorney General, or by the district attorney or city attorney of the county or city in which the violation occurred. However, no civil penalty shall be assessed for a violation of this section if the defendant shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error made notwithstanding the defendant's maintenance of procedures reasonably adopted to avoid such an error. When collected, the civil penalty shall be payable, as appropriate, to the person paying with a negotiable instrument who brought the action or to the general fund of whichever governmental entity brought the action to assess the civil penalty.

(f) The Attorney General, or any district attorney or city attorney within his or her respective jurisdiction, may bring an action in the superior court in the name of the people of the State of California to enjoin violation of subdivision (a) and, upon notice to the defendant of not less than five days, to temporarily restrain and enjoin the violation. If it appears to the satisfaction of the court that the defendant has, in fact, violated subdivision (a), the court may issue

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an injunction restraining further violations, without requiring proof that any person has been damaged by the violation. In these proceedings, if the court finds that the defendant has violated subdivision (a), the court may direct the defendant to pay any or all costs incurred by the Attorney General, district attorney, or city attorney in seeking or obtaining injunctive relief pursuant to this subdivision.

(g) Actions for collection of civil penalties under subdivision (e) and for injunctive relief under subdivision (f) may be consolidated. SEC. 2. Section 1747.8 of the Civil Code is amended to read:

1747.8. (a) Except as provided in subdivision (c), no person, firm, partnership, association, or corporation which accepts credit cards for the transaction of business shall do any of the following:

(1) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to write any personal identification information upon the credit card transaction form or otherwise.

(2) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise.

(3) Utilize, in any credit card transaction, a credit card form which contains preprinted spaces specifically designated for filling in any personal identification information of the cardholder.

(b) For purposes of this section "personal identification information," means 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.

(c) Subdivision (a) does not apply in the following instances:

(1) When the credit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence.

(2) Cash advance transactions.

(3) When the person, firm, partnership, association, or corporation accepting the credit card is contractually obligated to provide personal identification information in order to complete the credit card transaction.

(4) When personal identification information 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.

(d) This section does not prohibit any person, firm, partnership, association, or corporation from requiring the cardholder, as a condition to accepting the credit card as payment in full or in part for goods or services, to provide personal identification information for

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identification, which may include a driver's license or a California state identification card, provided that none of the information contained thereon is written or recorded on the credit card transaction form or otherwise.

(e) Any person who violates this section shall be subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for the first violation and one thousand dollars (\$1,000) for each subsequent violation, to be assessed and collected in a civil action brought by the person paying with a credit card, by the Attorney General, or by the district attorney or city attorney of the county or city in which the violation occurred. However, no civil penalty shall be assessed for a violation of this section if the defendant shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error made notwithstanding the defendant's maintenance of procedures reasonably adopted to avoid such an error. When collected, the civil penalty shall be payable, as appropriate, to the person paying with a credit card who brought the action, or to the general fund of whichever governmental entity brought the action to assess the civil penalty.

(f) The Attorney General, or any district attorney or city attorney within his or her respective jurisdiction, may bring an action in the superior court in the name of the people of the State of California to enjoin violation of subdivision (a) and, upon notice to the defendant of not less than five days, to temporarily restrain and enjoin the violation. If it appears to the satisfaction of the court that the defendant has, in fact, violated subdivision (a), the court may issue an injunction restraining further violations, without requiring proof that any person has been damaged by the violation. In these proceedings, if the court finds that the defendant has violated subdivision (a), the court may direct the defendant to pay any or all costs incurred by the Attorney General, district attorney, or city attorney in seeking or obtaining injunctive relief pursuant to this subdivision.

(g) Actions for collection of civil penalties under subdivision (e) and for injunctive relief under subdivision (f) may be consolidated. SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

It is imperative to provide clarification as to the intent of existing California law, to allow retailers to be able to effectively comply with the law's provisions and avoid undue civil penalties. It is therefore necessary that this act take effect immediately.

AMENDED IN ASSEMBLY APRIL 25, 2011

AMENDED IN ASSEMBLY MARCH 29, 2011

CALIFORNIA LEGISLATURE—2011—12 REGULAR SESSION

ASSEMBLY BILL

No. 1219

Introduced by Assembly Member Perea

February 18, 2011

An act to amend Section ~~1747.01~~ 1747.08 of the Civil Code, relating to credit cards.

LEGISLATIVE COUNSEL'S DIGEST

AB 1219, as amended, Perea. Credit cards: ~~federal conformance~~ *personal information.*

Existing state and federal law regulate the provision of credit and the use of credit cards. Existing state law prohibits a person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business from requesting or requiring the cardholder to provide personal identification information, which is then recorded, as a condition to accepting the credit card as payment in full or in part for goods or services, but provides various exceptions to this prohibition.

This bill would condition the prohibition described above upon the cardholder physically presenting a credit card with a properly functioning magnetic stripe or other electronically readable device.

~~Existing law declares the intent of the Legislature that specified state laws regulating credit cards that are similar to the federal Truth in Lending Act be interpreted to essentially conform to the Truth in Lending Act and any rule, regulation, or interpretation promulgated under that act by the Board of Governors of the Federal Reserve System. Existing federal law creates the Bureau of Consumer Financial~~

Protection, which is charged with implementing and enforcing federal consumer financial laws:

This bill would delete the reference to the intent of the Legislature, described above, and instead provide that specified state law regulating credit cards shall be interpreted to conform with the Truth in Lending Act and any rule, regulation, or interpretation promulgated under that act by the Board of Governors of the Federal Reserve System. The bill would also provide that these provisions shall be interpreted to be in conformance with any rule, regulation, or interpretation of the Truth in Lending Act promulgated by the Bureau of Consumer Financial Protection.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1747.08 of the Civil Code is amended to
2 read:

3 1747.08. (a) Except as provided in subdivision (c), ~~no~~ if a
4 cardholder physically presents a credit card to an employee,
5 authorized agent, or representative of a person, firm, partnership,
6 association, or corporation as payment, and the credit card has
7 a properly functioning magnetic stripe or other electronically
8 readable device, the person, firm, partnership, association, or
9 corporation that accepts credit cards for the transaction of business
10 shall *not* do any of the following:

11 (1) Request, or require as a condition to accepting the credit
12 card as payment in full or in part for goods or services, the
13 cardholder to write any personal identification information upon
14 the credit card transaction form or otherwise.

15 (2) Request, or require as a condition to accepting the credit
16 card as payment in full or in part for goods or services, the
17 cardholder to provide personal identification information, which
18 the person, firm, partnership, association, or corporation accepting
19 the credit card writes, causes to be written, or otherwise records
20 upon the credit card transaction form or otherwise.

21 (3) Utilize, in any credit card transaction, a credit card form
22 which contains preprinted spaces specifically designated for filling
23 in any personal identification information of the cardholder.

1 (b) For purposes of this section “personal identification
2 information,” means information concerning the cardholder, other
3 than information set forth on the credit card, and including, but
4 not limited to, the cardholder’s address and telephone number.

5 (c) Subdivision (a) does not apply in the following instances:

6 (1) If the credit card is being used as a deposit to secure payment
7 in the event of default, loss, damage, or other similar occurrence.

8 (2) Cash advance transactions.

9 (3) If the person, firm, partnership, association, or corporation
10 accepting the credit card is contractually obligated to provide
11 personal identification information in order to complete the credit
12 card transaction or is obligated to collect and record the personal
13 identification information by federal law or regulation.

14 (4) If personal identification information is required for a special
15 purpose incidental but related to the individual credit card
16 transaction, including, but not limited to, information relating to
17 shipping, delivery, servicing, or installation of the purchased
18 merchandise, or for special orders.

19 (d) This section does not prohibit any person, firm, partnership,
20 association, or corporation from requiring the cardholder, as a
21 condition to accepting the credit card as payment in full or in part
22 for goods or services, to provide reasonable forms of positive
23 identification, which may include a driver’s license or a California
24 state identification card, or where one of these is not available,
25 another form of photo identification, provided that none of the
26 information contained thereon is written or recorded on the credit
27 card transaction form or otherwise. If the cardholder pays for the
28 transaction with a credit card number and does not make the credit
29 card available upon request to verify the number, the cardholder’s
30 driver’s license number or identification card number may be
31 recorded on the credit card transaction form or otherwise.

32 (e) Any person who violates this section shall be subject to a
33 civil penalty not to exceed two hundred fifty dollars (\$250) for the
34 first violation and one thousand dollars (\$1,000) for each
35 subsequent violation, to be assessed and collected in a civil action
36 brought by the person paying with a credit card, by the Attorney
37 General, or by the district attorney or city attorney of the county
38 or city in which the violation occurred. However, no civil penalty
39 shall be assessed for a violation of this section if the defendant
40 shows by a preponderance of the evidence that the violation was

1 not intentional and resulted from a bona fide error made
2 notwithstanding the defendant's maintenance of procedures
3 reasonably adopted to avoid that error. When collected, the civil
4 penalty shall be payable, as appropriate, to the person paying with
5 a credit card who brought the action, or to the general fund of
6 whichever governmental entity brought the action to assess the
7 civil penalty.

8 (f) The Attorney General, or any district attorney or city attorney
9 within his or her respective jurisdiction, may bring an action in
10 the superior court in the name of the people of the State of
11 California to enjoin violation of subdivision (a) and, upon notice
12 to the defendant of not less than five days, to temporarily restrain
13 and enjoin the violation. If it appears to the satisfaction of the court
14 that the defendant has, in fact, violated subdivision (a), the court
15 may issue an injunction restraining further violations, without
16 requiring proof that any person has been damaged by the violation.
17 In these proceedings, if the court finds that the defendant has
18 violated subdivision (a), the court may direct the defendant to pay
19 any or all costs incurred by the Attorney General, district attorney,
20 or city attorney in seeking or obtaining injunctive relief pursuant
21 to this subdivision.

22 (g) Actions for collection of civil penalties under subdivision
23 (e) and for injunctive relief under subdivision (f) may be
24 consolidated.

25 (h) The changes made to this section by Chapter 458 of the
26 Statutes of 1995 apply only to credit card transactions entered into
27 on and after January 1, 1996. Nothing in those changes shall be
28 construed to affect any civil action which was filed before January
29 1, 1996.

30 SECTION 1. ~~Section 1747.01 of the Civil Code is amended~~
31 ~~to read:~~

32 ~~1747.01. The provisions of this title as to which there are~~
33 ~~similar provisions in the federal Truth in Lending Act, as amended~~
34 ~~(15 U.S.C. 1601, et seq.), shall be interpreted by anyone construing~~
35 ~~them to conform with the Truth in Lending Act and any rule,~~
36 ~~regulation, or interpretation promulgated thereunder by the Board~~
37 ~~of Governors of the Federal Reserve System, or any rule,~~
38 ~~regulation, or interpretation of the act promulgated by the Bureau~~
39 ~~of Consumer Financial Protection, and any interpretation issued~~
40 ~~by an official or employee of the Federal Reserve System or the~~

- 1 Bureau of Consumer Financial Protection duly authorized to issue
- 2 that interpretation.

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AMENDED IN ASSEMBLY MAY 4, 2011
AMENDED IN ASSEMBLY APRIL 25, 2011
AMENDED IN ASSEMBLY MARCH 29, 2011
CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 1219

Introduced by Assembly Member Perea

February 18, 2011

An act to amend Section 1747.08 of the Civil Code, relating to credit cards.

LEGISLATIVE COUNSEL'S DIGEST

AB 1219, as amended, Perea. Credit cards: personal information.

Existing state and federal law regulate the provision of credit and the use of credit cards. Existing state law prohibits a person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business from requesting or requiring the cardholder to provide personal identification information, which is then recorded, as a condition to accepting the credit card as payment in full or in part for goods or services, but provides various exceptions to this prohibition. *Existing law excepts from this prohibition the instance when the person or entity accepting the card is contractually obligated to provide personal identification information in order to complete the transaction or is obligated to collect and record the identification information by federal law. Existing law also permits a person or entity accepting a credit card to record the cardholder's driver's license number or identification card number 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.*

This bill would condition the prohibition described above upon the cardholder physically presenting a credit card with a properly functioning magnetic stripe or other electronically readable device. *The bill would except from the prohibition described above the instance when the person or entity accepting the card uses the personal information for prevention of fraud, theft, or identity theft and would specify that state law obligations are also permissible reasons to collect and record personal information. The bill would delete the authorization of a person or entity accepting a credit card to record the cardholder's driver's license number or identification card number if the cardholder pays for the transaction with a credit card number and does not make the credit card available. The bill would also make a statement of intent with regard to certain of these provisions.*

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1747.08 of the Civil Code is amended
2 to read:
3 1747.08. (a) Except as provided in subdivision (c), if a
4 cardholder physically presents a credit card to an employee,
5 authorized agent, or representative of a person, firm, partnership,
6 association, or corporation as payment, and the credit card has a
7 properly functioning magnetic stripe or other electronically
8 readable device, the person, firm, partnership, association, or
9 corporation that accepts credit cards for the transaction of business
10 shall not do any of the following:
11 (1) Request, or require as a condition to accepting the credit
12 card as payment in full or in part for goods or services, the
13 cardholder to write any personal identification information upon
14 the credit card transaction form or otherwise.
15 (2) Request, or require as a condition to accepting the credit
16 card as payment in full or in part for goods or services, the
17 cardholder to provide personal identification information, which
18 the person, firm, partnership, association, or corporation accepting
19 the credit card writes, causes to be written, or otherwise records
20 upon the credit card transaction form or otherwise.

1 (3) Utilize, in any credit card transaction, a credit card form
2 which contains preprinted spaces specifically designated for filling
3 in any personal identification information of the cardholder.

4 (b) For purposes of this section "personal identification
5 information," means information concerning the cardholder, other
6 than information set forth on the credit card, and including, but
7 not limited to, the cardholder's address and telephone number.

8 (c) Subdivision (a) does not apply in the following instances:

9 (1) If the credit card is being used as a deposit to secure payment
10 in the event of default, loss, damage, or other similar occurrence.

11 (2) Cash advance transactions.

12 (3) ~~If the~~ *any of the following applies:*

13 (1) *The person, firm, partnership, association, or corporation*
14 *accepting the credit card is card:*

15 (A) *Is contractually obligated to provide personal identification*
16 *information in order to complete the credit card transaction or is*
17 *transaction.*

18 (B) *Uses the personal information solely for prevention of fraud,*
19 *theft, or identity theft or uses the personal information for any of*
20 *these purposes concurrently with a purpose permitted under*
21 *paragraph (4).*

22 (C) *Is obligated to collect and record the personal identification*
23 *information by federal or state law or regulation.*

24 (4) If personal identification information is required for a special
25 purpose incidental but related to the individual credit card
26 transaction, including, but not limited to, information relating to
27 shipping, delivery, servicing, or installation of the purchased
28 merchandise, or for special orders.

29 (d) This section does not prohibit any person, firm, partnership,
30 association, or corporation from requiring the cardholder, as a
31 condition to accepting the credit card as payment in full or in part
32 for goods or services, to provide reasonable forms of positive
33 identification, which may include a driver's license or a California
34 state identification card, or where one of these is not available,
35 another form of photo identification, provided that none of the
36 information contained thereon is written or recorded on the credit
37 card transaction form or otherwise. ~~If the cardholder pays for the~~
38 ~~transaction with a credit card number and does not make the credit~~
39 ~~card available upon request to verify the number, the cardholder's~~

1 ~~driver's license number or identification card number may be~~
2 ~~recorded on the credit card transaction form or otherwise.~~

3 (e) Any person who violates this section shall be subject to a
4 civil penalty not to exceed two hundred fifty dollars (\$250) for the
5 first violation and one thousand dollars (\$1,000) for each
6 subsequent violation, to be assessed and collected in a civil action
7 brought by the person paying with a credit card, by the Attorney
8 General, or by the district attorney or city attorney of the county
9 or city in which the violation occurred. However, no civil penalty
10 shall be assessed for a violation of this section if the defendant
11 shows by a preponderance of the evidence that the violation was
12 not intentional and resulted from a bona fide error made
13 notwithstanding the defendant's maintenance of procedures
14 reasonably adopted to avoid that error. When collected, the civil
15 penalty shall be payable, as appropriate, to the person paying with
16 a credit card who brought the action, or to the general fund of
17 whichever governmental entity brought the action to assess the
18 civil penalty.

19 (f) The Attorney General, or any district attorney or city attorney
20 within his or her respective jurisdiction, may bring an action in
21 the superior court in the name of the people of the State of
22 California to enjoin violation of subdivision (a) and, upon notice
23 to the defendant of not less than five days, to temporarily restrain
24 and enjoin the violation. If it appears to the satisfaction of the court
25 that the defendant has, in fact, violated subdivision (a), the court
26 may issue an injunction restraining further violations, without
27 requiring proof that any person has been damaged by the violation.
28 In these proceedings, if the court finds that the defendant has
29 violated subdivision (a), the court may direct the defendant to pay
30 any or all costs incurred by the Attorney General, district attorney,
31 or city attorney in seeking or obtaining injunctive relief pursuant
32 to this subdivision.

33 (g) Actions for collection of civil penalties under subdivision
34 (e) and for injunctive relief under subdivision (f) may be
35 consolidated.

36 (h) The changes made to this section by Chapter 458 of the
37 Statutes of 1995 apply only to credit card transactions entered into
38 on and after January 1, 1996. Nothing in those changes shall be
39 construed to affect any civil action which was filed before January
40 1, 1996.

1 (i) It is the intent of the amendments made by the act adding
2 this subdivision to clarify existing law. These clarifying
3 amendments continue to protect personal identification information
4 while allowing and recognizing the legitimate business need for
5 a person, firm, partnership, association, or corporation that
6 accepts credit cards for the transaction of business to use personal
7 identification information to appropriately process and complete
8 all components of customer transactions and to protect consumers
9 against criminal activity, such as identity theft, which is currently
10 the largest source of consumer complaints to the Federal Trade
11 Commission. These amendments recognize, in part, legitimate
12 business practices designed to address the increased potential for
13 identity theft that results if the cardholder is not present or if the
14 credit card does not function correctly.

Date of Hearing: May 10, 2011

ASSEMBLY COMMITTEE ON JUDICIARY

Mike Feuer, Chair

AB 1219 (Perea) – As Amended: May 4, 2011

SUBJECT: CREDIT CARD TRANSACTIONS: PERSONAL INFORMATION

KEY ISSUES:

- 1) SHOULD THE STATUTE THAT PROHIBITS A RETAILER FROM COLLECTING A PERSON'S PERSONAL INFORMATION AS A CONDITION OF ACCEPTING A CREDIT CARD BE AMENDED, SO AS TO EXPRESSLY PERMIT A BUSINESS TO REQUEST PERSONAL INFORMATION IF IT IS NEEDED SOLELY FOR PURPOSE OF PREVENTING FRAUD AND IDENTITY THEFT?
- 2) SHOULD THE ABOVE-REFERENCED STATUTE BE LIMITED TO INSTANCES IN WHICH A CARDHOLDER "PHYSICALLY PRESENTS" THE CARD, THEREBY REMOVING FROM ITS PROVISIONS THE GROWING NUMBER OF REMOTE AND ON-LINE TRANSACTIONS?

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

SYNOPSIS

The author originally introduced this bill in response to a California Supreme Court decision holding that a zip code is "personal identification information" with the meaning of the Song-Beverly Credit Card Act and that its holding applied retroactively to uses of the zip code prior to the ruling. In short, a retailer who believed that a zip code was not included within the meaning of "personal identification information," and perhaps even relying on prior courts finding the same, could be liable for civil penalties for information collected prior to the Supreme Court decision. The California Retailers Association, the sponsor of this bill, claims that about 150 lawsuits have been filed against retailers in the wake of the Supreme Court decision, including against gas stations that collect zip codes for fraud prevention purposes. However, while the court ruling may have been the catalyst, in its current form the bill does not directly address the decision. Instead, the bill currently in print would amend the Song-Beverly Credit Card Act in a manner that would restrict its application to instances in which a card is "physically presented" to a retailer, apparently with the intent of allowing retailers to collect personal information for fraud prevention purposes where the card is not physically presented, as in an on-line or other electronic transaction. The bill in print would also expressly state that a retailer may collect personal identification information for purposes of preventing fraud, theft, and identity theft. However, as noted in the analysis, the current version of the bill sweeps too broadly in effectively removing on-line and telephonic transactions from the scope of the existing law's protection; and the provision that authorizes the collection of information for purposes of fraud and theft prevention does not adequately limit the use and retention of information collected. Therefore, the Committee analysis recommends a number of amendments so that the bill does not, unintentionally, undermine the important consumer protections of the Song-Beverly Act.

SUMMARY: Amends existing law to expressly permit a retailer who accepts credit cards to request, or require as a condition of acceptance, a cardholder to provide personal identification information, so long as the request is solely for the purpose of preventing fraud, theft, and identity theft. Specifically, this bill:

- 1) Provides that if a cardholder physically presents a credit card to an employee, authorized agent, or representative of a person, firm, partnership, association, or corporation as payment, and the credit card has a properly functioning magnetic stripe or other electronically readable device, the person, firm, partnership, association, or corporation shall not do any of the following:
 - a) Request, or require as a condition to accepting the credit card as payment in full or in part for goods and services, the cardholder to write any personal identification information upon the credit card form or otherwise.
 - b) Request, or require as a condition to accepting the credit card as payment in full or in part for goods and services, the cardholder to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise.
 - c) Utilize, in any credit card transaction, a credit card form which contains preprinted spaces specifically designated for filling in personal identification information.
- 2) Provides that the above restrictions do not apply if the person or entity uses the information solely for the prevention of fraud, theft, or identity theft, or uses the personal information for any of these purposes concurrently with another permitted purpose, as specified.
- 3) Deletes a provision of existing law that permitted the person or entity that accepts the credit card to request and record a cardholder driver's license or identification number if the cardholder does not make the credit card available upon request.
- 4) States that the bill is intended to clarify existing law and, declares generally, that these clarifying amendments protect personal identification information while allowing and recognizing legitimate business needs for a person or entity that accepts credit cards.

EXISTING LAW:

- 1) Provides that no person or entity that accepts credit cards for the transaction of business shall do any of the following:
 - a) Request, or require as a condition to accepting the credit card as payment for goods or services, that the cardholder write any personal identification information on the credit card transaction form or otherwise.
 - b) Request, or require as a condition of accepting the credit card as payment for goods or services, that the cardholder provide personal identification information, which the person or entity accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise.

- c) Use a credit card form which contains preprinted spaces for specifically designated for filling in any personal identification information of the cardholder. (Civil Code Section 1747.08 (a).)
- 2) Provides that the above restrictions do not apply in the following instances:
 - a) If the credit card is being used as deposit to secure payment in the event of default, loss, damages, or similar occurrence.
 - b) Cash advance transactions.
 - c) If the person or entity accepting the credit card is contractually obligated to provide personal identification information in order to complete the credit card transaction or is obligated to collect the personal identification information by a federal law or regulation.
 - d) If the personal identification information 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. (Civil Code Section 1747.08 (c).)
 - 3) Defines "personal identification information" to mean 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. (Civil Code Section 1747.08 (b).)
 - 4) Specifies that the above provisions do not prohibit a person or business from requiring a cardholder, as a condition of accepting the card, to provide reasonable forms of positive identification, such as a driver's license or other photo identification, provided that none of the information recorded thereon is written or recorded on the credit card transaction form or otherwise. Provides that if the cardholder does make the credit card available upon request to verify the number, the cardholder's driver's license or identification card number may be recorded on the credit card transaction form or otherwise. (Civil Code Section 1747.08 (d).)
 - 5) Makes any person who violates this section subject to a civil penalty not to exceed \$250 for the first offense and not to exceed \$1000 for each subsequent violation, to be assessed and collected in an action brought by the cardholder, or by the Attorney General, or by the district attorney or city attorney of the county or city in which the violation occurred, and permits the Attorney General, or any district attorney or city attorney, to bring an action for injunctive relief, as specified. (Civil Code Section 1747.08 (e)-(g).)

COMMENTS: Originally enacted in 1971, the Song-Beverly Credit Card Act (Civil Code Section 1747.01 *et seq.*) regulates the issuance and use of credit cards and the respective rights and responsibilities of cardholders and retailers. Most notably for purposes of this bill, the Act prohibits a retailer from requesting, or requesting as a condition of acceptance of a credit card, that the cardholder provide the retailer with "personal identification information," 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 also carves out many 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. A person or business that violates these provisions 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. Civil penalties may not exceed \$250 for a first offense and \$1000 for each subsequent offense. The purpose of the Act is to protect a consumer's privacy and to address the "the misuse of personal identification information for, inter alia, marketing purposes." (*Absher v. Autozone, Inc.* (2008) 164 Cal. App. 4th 332, 345.) The exemptions in the Act recognize instances in which a business may have a legitimate interest in requiring personal identification information.

The Pineda Decision: A recent opinion by 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 Song-Beverly Act. Both the trial court and the Court of Appeal sided with the retailer, finding that a zip code, without any other component of the address, was too general to be considered "personal identification information." 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." (*Id.* at 531.)

In addition to finding that a zip code was "personal identification information" within the meaning of the Act, the *Pineda* court also expressly rejected the defendant's claim that the opinion should only be applied prospectively. The defendant argued that, since retailers may have reasonably assumed prior to this decision that a zip code was not personal identification information – an assumption shared, after all, by prior courts – that it would be unfair to hold retailers liable for information collected before the *Pineda* decision. The Court, however, was "not persuaded," noting that the statute provided constitutionally adequate notice of the prohibited activity, including express reference to an address as an example of personal identification information.

Proponents of this bill were especially troubled by the prospect that the *Pineda* ruling applied retrospectively, claiming that it was not self-evident prior to *Pineda* that a zip code, with nothing more, constituted an "address." The author and sponsor contend that, in the wake of the *Pineda* decision, about 150 lawsuits have been filed against businesses that collected zip codes prior to the decision. Although this bill does not now, and never has, purported to overturn the ruling in *Pineda* or restrict its retrospective application, the author and sponsor do hope to ensure that when a business has a legitimate reason for requiring a zip code, the law should expressly recognize its ability to do so.

Proponents arguably overstate the implications of the *Pineda* decision. Although the Court did indeed hold that its interpretation of the statute applied retroactively, the Court only held that a zip code is an address within the meaning of the statute. Whether or not all of the 150 lawsuits cited by the proponents are in fact a response to *Pineda*, is debatable, but even as characterized by the proponents those suits could easily be dismissed under existing law. For example, proponents cite cases in which gas stations have been sued for requesting zip codes, even though existing law already provides an exemption where a business is contractually required to collect the information, as is true with gas stations. Moreover, it is the Committee's understanding that in the overwhelming majority of cases, the gas retailer does not actually collect the information; rather, the information goes directly from the gas pump to the bank, which verifies that the zip code entered corresponds with the address on the account. Similarly, many proponents claim that the decision will permit suits against on-line retailers who need to request the zip code, along with the cardholder's name and complete address, in order to ship the goods purchased. But, here again, existing law already provides an exemption for shipping, delivery, installation, and servicing of the purchased good. Nothing in the decision changed that. Such lawsuits may be frivolous or ill-advised given the clear language of the statute, but they cannot be fairly attributable to the *Pineda* decision.

Existing Language Arguably Sweeps Too Broadly: Apparently to ensure that retailers could collect zip codes in order to prevent potential fraud when a card is swiped at an outside pump, or ship goods when a product is purchased on-line, the current language of the bill amends existing law to effectively provide that the provision prohibiting the collection of personal identification information to instances in which a cardholder "physically presents" a credit card to a retailer or merchant (page 2, line 4 of the bill in print.) This change to existing law, if allowed to stand, would effectively remove on-line and telephonic transaction from the protection of the existing statute. According to the sponsor, this was not the bill's intent. Therefore, as noted in the proposed amendments below, the Committee strongly recommends that this language come out of the bill.

Retention Issue: This bill would also amend existing law to allow a business to request or require that a cardholder provide personal identification information if the business uses the information "solely for the prevention of fraud, theft, or identity theft," or concurrently for another purpose authorized by the statute (page 3, line 18-21 of the bill in print.) However, this provision does not impose any limits on what the retailer can do with that information once it is collected or how long the information may be retained. Therefore, as noted in the amendments listed below, the Committee strongly recommends that a clause be added to this provision stating that the information may only be recorded, stored, or retained to the extent necessary to effectuate the authorized purpose and thereafter deleted, discarded, or destroyed.

Additional Express Exemptions. In addition to providing an express exemption for fraud or theft prevention, the author and sponsor also seek exemptions in instances in which a cardholder either does not have the card physically present or where the card is not functioning properly. The bill currently includes this provision in subdivision (a), along with the language restricting the scope of the statute to an instance in which the card is "physically presented." Because the Committee would propose deleting all of the language added to subdivision (a) and restoring the original language, the Committee suggests that it would be more appropriate to include this provision in subdivision (c), which creates exemptions to the general rule. Specifically, there are two distinct instances which the author seeks to address: (1) Where the holder of a "proprietary credit card" (e.g. a Macy's card) does not have the card on his or her person and the merchant

that issued the card needs to look up the account number; and (2) Where the card's magnetic stripe is not functioning properly and the merchant wishes to write down the needed information on a credit card form. As noted in the amendments below, the Committee strongly recommends that these authorizations be permitted but properly qualified so that the information collected is only to the extent necessary to effectuate the transaction.

Intent language is arguably too broad and possibly unnecessary: Finally, in addition to the substantive amendments, this bill adds intent language to state that this bill seeks to clarify existing law. The intent language adds that these clarifying amendments will protect personal identification information while at the same time permitting businesses to use personal identification information for legitimate business purposes. However, the general language setting forth these purposes is potentially broader than what the bill permits. Therefore, as noted in the amendments, the Committee strongly recommends that the author delete this language and simply state that the bill recognizes the need to collect information for "the purposes authorized by this section."

Requesting Information after a Transaction has been Completed: One issue which the author and stakeholders may wish to consider, should the bill moves forward, concerns the extent to which a retailer may "request" a customer's personal information *once the credit card transaction has been completed*. Existing law is somewhat ambiguous on this point, due in part to an ambiguously placed comma. Specifically, existing law provides that a retailer may not "*request, or require as a condition to accepting the credit card as payment in full or in part for goods or services,*" that the cardholder must provide personal information. Because of the comma separating "request" from "or require as a condition," it is not entirely clear whether the "conditioning" language was meant to apply to both the "requesting" and the "requiring" of the information, or if it only applies to the "requiring." In other words, the language could arguably be read to mean that while a retailer may not "require" the information "as a condition" of accepting the card, it may not "request" the information at all. The sponsors have informed the Committee that this language leaves it unclear as to whether a retailer could request personal information after the transaction has been completed, when there would be no implication that the request is in any way related to the retailer's willingness to accept the credit card. For example, retailers not infrequently ask customers if they would like to write their name and address on a mailing list to receive a catalog or information about upcoming or time-limited offers. Such requests would not appear to frustrate the spirit of the Song-Beverly Act, so long as the request was made after the transaction. Because this issue was raised too late in the process to consider all of the possible implications of re-crafting this language, this issue is *not* addressed as a recommended committee amendment below; rather, it is something that the author and stakeholders may wish to discuss should the bill move forward.

PROPOSED COMMITTEE AMENDMENTS: For the reasons discussed above, the Committee strongly recommends that the author agree to take the following amendments in this Committee.

Amendment 1

On page 2 line 3 delete "if a" and lines 4 through 7, inclusive, and on line 8 delete "readable device, the" and on line 8 before "person" insert: no

Amendment 2

On page 3 line 13 delete "(1)"

Amendment 3

On page 3 line 18, after "personal" insert: identification

Amendment 4

On page 3 line 21, after "(4)" insert:

, provided that the personal identification information is only recorded, stored, or retained to the extent necessary to effectuate the authorized use or purpose and is thereafter deleted, discarded, or destroyed.

Amendment 5

On page 3, after line 28 insert:

(5) If personal identification information is requested to verify that a person has a proprietary credit card account with the person, firm, partnership, association or corporation and that person does not produce the proprietary credit card at the time of the transaction. For purposes of this paragraph a "proprietary credit card" means a credit card issued by the person, firm, partnership, association, or corporation.

(6) If in a face-to-face transaction the credit card does not have a properly functioning magnetic stripe or is otherwise not electronically readable, the person, firm, partnership, association or corporation may record only the cardholder's name, credit card account number and expiration date; and provided further that the personal identification information that is required is used only to complete the transaction, or for a purpose authorized by this section, and is thereafter deleted, discarded or destroyed.

Amendment 6

On page 5 line 7 after "information" insert: for the purposes authorized by this section.

Amendment 7

On page 5 line 7 delete "to appropriately process and complete," and delete lines 8 through 10, inclusive, and on line 11 delete "Commission"

ARGUMENTS IN SUPPORT: The California Retailers Association (CRA), the sponsor of this bill, argues that "AB 1219 makes several important changes to Song Beverly, which are necessary in light of the California Supreme Court's decision in the *Pineda v. Williams-Sonoma Stores, Inc.* case." CRA claims that since the *Pineda* case was handed down, "over 150 class action suits have been filed against retailers in California." CRA claims that many of these

retailers were collecting information "for legitimate reasons that should be allowable under law," including cases in which on-line retailers needed the zip code for delivery purposes or for reducing "the likelihood of fraud or identity theft." CRA writes that the purpose of the bill is to continue protecting personal identification information while at the same time "recognizing the legitimate business need for a retailer to use [personal identification information] to appropriately process and complete all components of a customer transaction."

The Western States Petroleum Association (WSPA) argues that this legislation will "clarify existing law that the use of zip code data for the purpose of fraud prevention is appropriate and not a violation of law." WSPA notes that class action suits have been filed against WSPA members who requested zip codes for credit card transactions at gas pumps. WSPA writes that this information is collected to help prevent fraud and theft. WSPA adds that the information is never used for marketing purposes and "may only be retained for a limited duration incidental to reconciliation with the issuing bank." Without specific language expressly exempting fraud prevention, WSPA contends, its member companies "may face years of costly litigation."

ARGUMENTS IN OPPOSITION: Privacy Rights Clearinghouse (PRC) argues that "AB 1219 would make two major changes to Song Beverly that would essentially gut the existing statute." First, PRC argues that amending existing law to require a cardholder to "physically present" the card to an "employee, agent, or representative" of the business would make the statute obsolete. PRC argues that limiting the statute to instances in which the card is physically presented would mean that "Song Beverly would no longer cover the vast majority of retail transactions, because typically consumers swipe a card at a point-of-sale terminal without actually presenting the card to a store employee." Second, PRC argues that the proposed amendment to permit the use of personal identification information for prevention of fraud, theft, or identity theft would mean that so long as the merchant claimed to collect the information for *some* purpose related to fraud, it could use the information, once collected, for other purposes. PRC proposes that this language should be narrowed to state that the retailer may request the information "solely" for purposes of fraud or theft prevention and that the retailer should not record or maintain the information except as needed for the authorized purpose. Because the concerns raised by PRC appear to be addressed by the recommended Committee amendments, it is not clear whether the PRC would remove its opposition if the author agrees to take those amendments.

Expressions of Concern: The Consumer Attorneys of California (CAOC) originally opposed this bill for substantially the same reasons articulated by PRC. However, CAOC has notified the Committee that it wishes to remain neutral on the bill so long as the author agrees to continue working with the Committee and opponents to amend the bill along the lines recommended in this analysis. CAOC particularly wishes to see the author restrict the use and retention of the information in a manner consistent with the authorized purpose for collecting the information.

REGISTERED SUPPORT / OPPOSITION:

Support

California Retailers Association (sponsor)
California Chamber of Commerce
California Business Properties Association
California Grocers Association
California Independent Oil Marketers Association

California Restaurant Association
Civil Justice Association of California
Direct Marketing Association
First Data
International Council of Shopping Centers
Western States Petroleum Association

Opposition

Privacy Rights Clearinghouse

Analysis Prepared by: Thomas Clark / JUD. / (916) 319-2334

REPLACE: 09/08/11 Changes per consultant.

CONCURRENCE IN SENATE AMENDMENTS

AB 1219 (Perea)

As Amended September 1, 2011

2/3 vote. Urgency

ASSEMBLY: 75-1 (June 3, 2011)

SENATE: 35-0 (September 7, 2011)

Original Committee Reference: B. & F.

SUMMARY: Provides clarification for those instances when an entity that accepts credit cards may not request certain types of personal identification information (PII) to complete the transaction. Specifically, this bill creates 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.

The Senate amendments provide for a definition of "retail motor fuel dispenser" and "retail motor fuel payment island automated cashier" to provide clarification of instances when zip code information may be requested to complete a credit card transaction. The amendments also add an urgency clause.

EXISTING LAW:

- 1) Provides that under the Song-Beverly Credit Card Act of 1971 (Credit Card Act) (Civil Code Section 1747 et seq.), no person, firm, partnership, association or corporation that accepts credit cards shall do any of the following:
 - a) Require, or request, as condition of accepting the credit card, the cardholder to write any PII identification information 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 identification information which the entity accepting the card would then write or record upon the credit transaction form or otherwise [Section 1747.08a(2)]; or,
 - c) Utilize in any credit card transaction, a credit card form that contains preprinted spaces for PII identification information of the cardholder [Section 1747.08a(3)].
- 2) Specifies that the prohibitions in a), b), and c) above 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 PII information in order to complete the transaction, or is obligated to collect and record the PII identification information by federal law or regulation [Section 1747.08(3)]; or,
 - d) 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 identification information 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 [Section 1747.08(4)d].
 - 5) Defines "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].

AS PASSED BY THE ASSEMBLY, the bill was substantially similar to the bill currently under consideration.

FISCAL EFFECT: None

COMMENTS: The need for this bill arises from *Pineda v. Williams-Sonoma Stores, Inc.*, (2011) 51 Cal.4th 524, in which the California Supreme Court ruled that a consumer's ZIP code is PII under the Credit Card Act, and as such, falls under the restricted uses contained within the statute. Prior to addressing how this bill would address this issue, it is important to provide background on the case.

Pineda v. Williams-Sonoma Stores, Inc.

The plaintiff sued retailer Williams-Sonoma Stores, Inc., claiming the retailer violated the Credit Card Act during a transaction in which a cashier at the retailer asked the plaintiff for her ZIP code. The plaintiff complied with the request, believing her ZIP code was necessary for completing the transaction. Subsequently, the defendant used computer software to conduct reverse searches and cross checks against databases that contain millions of names, email address, telephone numbers, and street addresses. Using the software, the defendant was able to match the name and ZIP code of the plaintiff to match with her address which was then retained in the defendant's own database used for marketing purpose. Additionally, such information was also sold by the defendant to other businesses. The plaintiff filed a class action alleging that the retailer had violated the Credit Card Act.

The trial court and court of appeal agreed with the defendant that the ZIP code does not constitute PII. The California Supreme Court agreed to take up the issue. The Court concluded

that under the Credit Card Act, PII does include the ZIP code. The Court concluded that because address is a sum of its parts (i.e., name, street, city, ZIP code) in that the ZIP code "is readily understood to be part of an address; when one addresses a letter to another person, a ZIP code is always included. The question then is whether the Legislature...intended to include components of the address. The answer must be yes." Additionally, the Court also found that the broad language used in the statute demonstrated that the Legislature intended the statute to be interpreted broadly.

Discussion.

In the *Pineda* case, the retailer was collecting ZIP codes for marketing purposes and potentially for sale to other businesses. However, the Supreme Court did not address uses of ZIP codes for what could be described as more legitimate purposes. Specifically, ZIP codes are also used for fraud prevention purposes, or at a basic level, as part of the shipping address for an online internet transaction. This bill simply creates an express exemption in current law from the prohibition on collecting zip code information in a retail credit card transaction at a motor fuel dispenser so long as the zip code information is used to prevent fraud, theft or identity theft.

While the courts may determine in current litigation, in response to the *Pineda* case, that such an exemption always existed, this bill creates an express exemption.

Analysis Prepared by: Mark Farouk / B. & F. / (916) 319-3081

FN: 0002847

Date of Hearing: May 2, 2011

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Mike Eng, Chair

AB 1219 (Perea) – As Amended: April 25, 2011

SUBJECT: Credit cards: personal information.

SUMMARY: Provides clarification for those instances when an entity that accepts credit cards may not request certain types of personal information to complete the transaction. Specifically, this bill:

- 1) Specifies that if a cardholder physically presents a credit card to an employee, authorized agent, or representative of a person, firm, partnership, association, or corporation as payment, and the card functions properly, then the entity accepting the card may not request, nor record certain types of personal information from the consumer.

EXISTING LAW

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

The need for this bill arises from the *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524 (Cal. 2011) case in which the California Supreme Court ruled that a consumer's ZIP code is personal identification information under the Credit Card Act, and as such, falls under the restricted uses contained within the statute. Prior to addressing how this bill would address this issue, it is important to provide background on the case.

Pineda v. Williams-Sonoma Stores

The plaintiff sued retailer Williams-Sonoma Stores, Inc., claiming that the retailer violated the Credit Card Act during a transaction in which a cashier at the retailer asked the plaintiff for her ZIP code. The plaintiff complied with the request, believing that her ZIP code was necessary for completing the transaction. Subsequently, the defendant used computer software to conduct reverse searches and cross checks against databases that contain millions of names, email address, telephone numbers, and street addresses. Using the software, the defendant was able to match the name and ZIP code of the plaintiff to match with her address which was then retained in the defendant's own database used for marketing purpose. Additionally, such information was also sold by the defendant to other businesses. The plaintiff filed a class action alleging that the retailer had violated the Credit Card Act.

The trial court and Court of Appeal agreed with the defendant that ZIP code does not constitute "personal identification information." The California Supreme Court agreed to take up the issue. The court concluded that under the Credit Card Act, "personal identification information" does include ZIP. The court concluded that because "address" is a sum of its parts (name, street, city, ZIP) in that ZIP "is readily understood to be part of an address; when one addresses a letter to another person, a ZIP code is always included. The question then is whether the Legislature...intended to include components of the address. The answer must be yes." Additionally, the court also found that the broad language used in the statute demonstrated that the Legislature intended the statute to be interpreted broadly.

Subsequent to this decision, hundreds of lawsuits have been filed against retailers for violating the Credit Card Act in collecting ZIP codes for a variety of purposes.

Arguments in support.

Several groups, including the California Retailers Association write in support of the bill:

Since the Pineda decision was handed down, over 150 class action suits have been filed against retailers in California. Many of those retailers were collecting zip codes for legitimate reasons that should be allowable under the law. For example, some retailers have been sued simply for collecting zip codes when the customer placed an order online and the zip code was needed for delivery. Others have been sued when they were only collecting the zip code in order to reduce the likelihood of fraud or identity theft.

The purpose of AB 1219 is to continue to limit the collection of PII while still allowing and recognizing the legitimate business need for a retailer to use PII to appropriately process and complete all components of customer transaction. AB 1219 will also help protect against criminal activity, such as identity theft, which is currently the number one source of consumer complaints to the Federal Trade Commission. AB 1219 will help address the potential for identity theft in situations where the person or functioning card is not present.

Arguments in opposition.

The Consumer Attorneys of California write in opposition:

The retailers do not need personal identifying information—instead they use it for marketing or to sell to marketers, a very profitable endeavor for the retailer, but one that puts the consumer at risk. Retailers use customized computer software to perform reverse searches from databases that contain millions of names, e-mail addresses, telephone numbers, and street addresses. The information is then used to create customer records for business purposes, like mailing lists for in-house marketing efforts, or it is sold to direct-mailing specialists. The contents of these records can be viewed, printed, and sold by the store. In a nutshell, they make money off of your personal information.

- *Pineda v. Williams Sonoma was correctly decided and protects the intent of the statute and the privacy interests of consumers.*

Pineda, a unanimous California Supreme Court decision, held that Williams Sonoma had violated the Beverly Song Credit Card Act when it asked customers for their zip codes during a credit card purchase. This decision clarified the law, as the legislative history was perfectly clear that such identifying information was included in the prohibition of requesting personal identifying information.

The retailers now claim that they will be subject to extreme penalties under the law as they had continued to violate the law until the decision was issued. The bill's sponsors want AB 1219 to include language that the decision would be prospective only.

First, the allegation that the sky will fall if the decision is not applied prospectively only is erroneous. The plain language in the statute clearly limits penalty assessment and gives the judge the discretion on the amount of civil penalties to be awarded to the cardholder for each violation of the statute. Section (e) of the statute states that "any person who violates this

section shall be subject to a civil penalty not to exceed \$250 for the first violation and \$1000 for each subsequent violation." In other words, the judge has complete discretion on how much, the civil penalty should be for violations. Certainly a judge would consider the retailer's claim that it was relying on a lower court decision when it determines how much, if any, assessment should apply.

Second, CAOC has always opposed, and will continue to oppose, any effort to affect pending litigation. It is simply against public policy to legislatively affect a consumer's existing legal right in a manner that retroactively guts a claim. We appreciate the retailer's frankness that this is their main concern, and have met with them several times. However, on this issue, there is no compromise for CAOC.

- CAOC must oppose AB 1219, as amended on April 25, 2011, unless it is amended.

The recently amended language is an attempt to clarify that online transactions are not covered under the bill. However, it is too broad. We agree that in some instances (for example fraud prevention or shipping), the statute doesn't apply. However, this language is not so limited.

For these reasons, CAOC must oppose AB 1219.

Privacy Rights Clearinghouse also writes in opposition to the bill:

The California Legislature recognized the dangers associated with collecting and maintaining consumers' personal identification information by enacting an amendment to the Song Beverly Credit Card Act in 1990 to protect consumers' privacy rights. The Pineda decision clearly re-affirmed the consumer privacy protections of the Song Beverly Credit Card Act.

With the rapid advances in technology in recent years, many retailers have begun collecting customer zip codes during credit card purchase transactions in order to match them to customer names and thereby identify their customers and obtain their home addresses. Using customers' zip codes is an effective subterfuge to obtain their home addresses because consumers are less likely to object to requests for their zip code since they believe it is being used to verify their credit cards. Consumers have become accustomed to this practice at gas stations, where zip codes are required by credit card companies during "pay at the pump" transactions.

Requesting zip codes from customers under the false pretense that zip codes are required to complete credit card transactions, and then utilizing the zip codes, along with the customers' names obtained from their credit cards, to obtain the customers' home addresses, clearly defeats the express purpose of the Song Beverly Credit Card Act.

The rights of consumers whose privacy has been violated must be respected. We urge you to honor the privacy rights of consumers, and allow courts the discretion to determine on case by case basis what remedies, if any, are appropriate for violations of the Song Beverly Credit Card Act.

Discussion.

In the *Pineda* case, the retailer was collecting ZIP codes for marketing purposes and potentially for sale to other businesses. However, the court did not address uses of ZIP codes for what could be described as more legitimate purposes. Specifically, ZIP codes are also used for fraud prevention purposes, or at a basic level, as part of the shipping address for an online internet

transaction. The author of this bill is concerned that the court's decision could be interpreted to disallow legitimate uses of ZIP codes that may actually benefit consumers.

Gas stations have commonly required the input of a zip code when the customer uses a credit card to purchase gas as a form of fraud detection. This process originally was implemented at gas stations with high incidences of fraudulent transactions involving stolen cards, but has migrated to include almost all gas stations. While the protection of personal identification information has been a paramount concern of the California Legislature for many years, so has establishing those parameters in which information is necessary to protect the consumer engaged in various electronic transactions.

Other than fraud prevention, another legitimate use for ZIP code is in an online retail transaction in which the retailer needs the address, including ZIP code of the consumer in order to ship the item. Many retailers have expressed concern, and several lawsuits attest, that the necessity to require an address for shipping is being used as a cause of action in civil litigation.

In order to clarify these issues, this bill provides that the restrictions on collecting personal information within the Credit Card Act only applies to transaction in which the cardholder physically presents the card and it has a functioning magnetic strip or other electronically readable device. Thus far, various interest groups have conducted several meetings to arrive at a solution to this problem that would allow reasonable usage of a ZIP code under specific circumstances.

The bill under consideration is a first attempt to reach a compromise on this issue that is palatable to all parties as the current language in the bill may be too broad to retain essential consumer protections but also allow for legitimate use of ZIP codes. Currently, opponents of the bill find that the language is too broad and would allow use of the use of personal information in circumstances that are not within the intent of the Credit Card Act.

The author of the bill acknowledges that additional clarification of the language will be necessary. Should an appropriate resolution not occur in the future the committee may wish to consider calling this bill back for further review. This bill is double referred to Judiciary.

REGISTERED SUPPORT / OPPOSITION:

Support

California Business Properties Association
California Chamber of Commerce
California Grocers Association
California Retailers Association
Civil Justice Association of California
First Data
International Council of Shopping Centers

Opposition

Consumer Attorneys of California
Privacy Rights Clearinghouse

California Bill Analysis, A.B. 68 Sen., 9/03/2003

California Bill Analysis, Senate Floor, 2003-2004 Regular Session, Assembly Bill 68

September 3, 2003
California Senate
2003-2004 Regular Session

SENATE RULES COMMITTEE

Office of Senate Floor Analyses

THIRD READING

Bill No: AB 68

Author: Simitian (D)

Amended: 9/3/03 in Senate

Vote: 21

SENATE JUDICIARY COMMITTEE: 5-1, 7/8/03

AYES: Escutia, Cedillo, Ducheny, Kuehl, Sher

NOES: Ackerman

NO VOTE RECORDED: Morrow

ASSEMBLY FLOOR: 48-25, 5/12/03 - See last page for vote

SUBJECT: Online Privacy Protection Act of 2003

SOURCE: Author

DIGEST: This bill would require the operator of a web site that collects personally identifiable information to conspicuously post a privacy policy on the web site and comply with that policy. The bill would require the policy to, at a minimum, identify the categories of information collected and how that information may be shared. The bill contains and operative date of July 1, 2004.

Senate Floor Amendments of 9/3/03, (1) extend the grace period for compliance with the bill's requirement that a

privacy policy be posted, from 10 to 30 days, and (2) contain a variety of technical changes to ensure consistency in the use of terms throughout the bill, and clarify that the operator of an online service who makes a privacy policy reasonably accessible has complied with the conspicuous posting equipment.

ANALYSIS: Existing law does not directly regulate the privacy practices of online business entities.

Existing law requires that businesses notify consumers of the unauthorized release of personal information through a security breach.

This bill:

1. Would require the operator of a commercial web site or on line services, that collects personally identifiable information through the Internet about individual consumers residing in California who use or visit its commercial web site or online services, to conspicuously post its privacy policy on the web site, or in the case of an operator of online services, in accordance with other specified provisions of law.
2. Would require that the policy identify the categories of information the web site collects and the persons or entities with whom the operator may share the information. The bill would also require that the policy: (1) disclose whether the operator maintains a process for a user to review and request changes to his or her personally identifiable information, (2) describe the process by which the operator notifies consumers who use or visit the commercial web site, and (3) the effective date of the policy.
3. Would require that the operator or online service that collects personally identifiable information through the web site or online service from individual consumers who use or visit the commercial web site or online service, and who reside in California, shall be in violation of this section if the operator fails to comply with the provisions of Section 22575 or with the provisions of its posted privacy policy in either of the following ways: (a) knowingly and willfully, and (2) negligently and materially.
4. Would define "personally identifiable information" as identifiable information collected online by the operator from that individual and maintained by the operator in an accessible form, including name, address, email address, telephone number, social security number, or any other identifier that permits the physical or online contacting of the individual.
5. Would define "conspicuous posting" as any hyperlink that is so displayed that a reasonable person would notice it. The bill sets forth a variety of methods that would constitute compliance with the conspicuous posting requirement, all of which involve a link from a homepage to the text of the privacy policy.
6. Would define "operator" as any person or entity that owns a commercial web site or online service located on the Internet that collects and maintains personally identifiable information from a consumer residing in California who uses or visits the web site or online service. It does not include any third party that operates, hosts, or manages, but does not own, a web site on online service on the owner's behalf or by processing information on behalf of the owner. The term "consumer" means any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes.
7. Would provide that its posting requirement is not violated unless an operator fails to cure the violation within 30 days of being notified of noncompliance.
8. Provides that the provisions of the bill become operative on July 1, 2004.

Background

Last year, the Legislature passed AB 2297 (Simitian) which would have required web site operators to post privacy policies and comply with those policies. That bill was vetoed by Governor Davis. This bill seeks to address the concerns stated in the Governor's veto message, which included concerns over ambiguity in AB 2297's definitions and some provisions which the Governor felt would be too burdensome on business.

AB 2297 of 2002 (Simitian), contained provisions similar to this bill. The bill was vetoed by Governor Davis, who wrote that:

While this bill is well intended, it is too vague and does not clearly define what entities are covered. Additionally, the

bill requires an entity posting a privacy policy to post the past three privacy policies it used which will most certainly lead to confusion to consumers attempting to view the privacy policy.

Prior legislation

AB 2297 of 2002 (Simitian) passed the Senate Floor on 8/28/02, 21-17. The bill was vetoed by Governor Davis.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 9/4/03)

American Civil Liberties Union

Privacy Rights Clearinghouse

OPPOSITION: (Verified 9/4/03)

Amazon.com

American Insurance Association

California Chamber of Commerce

Information Technology Association of American (ITAA)

ARGUMENTS IN SUPPORT: According to the Author's office, this bill:

Requires that all individuals or entities that operate a web site or online service that collects personal information through the internet from California residents to conspicuously post a privacy policy stating what information they collect and the categories of individuals with whom they share the information.

This bill also requires that these web site operators follow the policy that they post.

The author's office also states that the bill is needed because:

Many consumers refuse to do business online because they have little protection against abuse. The bill provides meaningful privacy protections that will help foster the continued growth of the internet economy?

Currently, state law is unclear on what recourse individuals have, if any, when somebody chooses not to honor their posted privacy policy. The only sure method of recourse is to literally make a federal case of the matter by filing a complaint with the Federal Trade Commission (FTC). This bill provides for meaningful and accessible enforcement under California law.

Before anyone can feel comfortable regarding what occurs with his or her personal information, he or she must know how it is being used. This bill does just that.

ARGUMENTS IN OPPOSITION: Opponent Amazon.com writes that:

This bill could be the first patch in a crazy quilt of state by state legislative requirements that could be inconsistent or worse, contradictory. National or global entities would find it difficult if not impossible to comply with such a maze of statutory or regulatory requirements.

Since web sites by their very nature are accessible to internet users around the country and around the world, opponents are correct that they may be subject to the laws of many states and nations. If those many states and nations were to enact legislation regarding online privacy, opponents are probably correct in arguing that there will be considerable compliance difficulties. However, the American legal system has developed a complex but thorough

body of law regarding state jurisdiction and conflict of laws that is intended to address such issues. In this regard, commercial web site operators appear to be no different than other national or international business entities that are subject to varying forms of regulation, except that unlike non-internet companies, web site operators tend to operate nationally from the moment they are created.

The California Chamber of Commerce states that:

This bill is unnecessary. According to the Federal Trade Commission, companies conducting 95 percent of all Internet activities already have privacy policies in place. It is impractical to regulate companies doing business with California but located outside the borders of the state.

This bill opens the door to endless lawsuits and harassment for online businesses that contribute much to the economy of the state.

ASSEMBLY FLOOR:

AYES: Berg, Bermudez, Calderon, Canciamilla, Chavez, Chu, Cohn, Corbett, Correa, Daucher, Diaz, Dutra, Dynamally, Firebaugh, Frommer, Goldberg, Hancock, Jerome Horton, Jackson, Kehoe, Koretz, Laird, Leno, Leslie, Levine, Lieber, Liu, Longville, Lowenthal, Matthews, Montanez, Mullin, Nakano, Nation, Negrete McLeod, Nunez, Parra, Pavley, Reyes, Ridley-Thomas, Salinas, Simitian, Steinberg, Vargas, Wiggins, Wolk, Yee, Wesson

NOES: Aghazarian, Bates, Benoit, Bogh, Campbell, Cogdill, Cox, Dutton, Harman, Haynes, Keene, La Malfa, La Suer, Maldonado, Maze, McCarthy, Mountjoy, Nakanishi, Pacheco, Richman, Runner, Samuelian, Spitzer, Strickland, Wyland

RJG:nl 9/4/03 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

CA B. An., A.B. 68 Sen., 9/03/2003

END OF DOCUMENT

California Bill Analysis, A.B. 68 Assem., 4/22/2003

California Bill Analysis, Assembly Committee, 2003-2004 Regular Session, Assembly Bill 68

April 22, 2003
California Assembly
2003-2004 Regular Session

Date of Hearing: April 22, 2003

ASSEMBLY COMMITTEE ON JUDICIARY

Ellen M. Corbett, Chair

AB 68 (Simitian) - As Amended: April 2, 2003

SUBJECT: PERSONALLY IDENTIFIABLE INFORMATION: DISCLOSURE OF ONLINE PRIVACY POLICY

KEY ISSUE: SHOULD COMMERCIAL WEB SITE OPERATORS BE REQUIRED TO POST THEIR PRIVACY POLICIES IN ORDER TO PROVIDE CONSUMERS WITH MORE NOTICE AS TO HOW THEIR PERSONAL AND IDENTIFYING INFORMATION IS BEING USED AND SHARED WITH OTHER ENTITIES?

SYNOPSIS

This bill enacts the Online Privacy Protection Act of 2003, requiring commercial Web site operators to conspicuously post their privacy policies when they collect personally identifiable information about individuals located in California. Among other things, the bill requires the policy to identify the categories of information that the operator collects about individuals and the categories of persons or entities with whom the operator may share the information. The bill, which is substantially similar to the author's AB 2297 of 2002, has been amended to address some concerns expressed by the Governor when he vetoed AB 2297 last year. The analysis suggests an amendment decreasing the time in which an operator must conspicuously post a privacy policy on its Web site after being notified of its failure to post the policy. The bill currently provides for 60 days and the analysis suggests a more appropriate 30-day timeframe.

SUMMARY: Enacts the Online Privacy Protection Act of 2003, requiring disclosure of online privacy policies. Specifically, this bill, among other things:

- 1) Requires an operator of a commercial Web site that collects personally identifiable information about individuals visiting its commercial Web site or online service who are located in California to conspicuously post its privacy policy on the Web site.
- 2) Requires that the privacy policy, among other things:
 - a) Identify the categories of information that the operator collects about individuals and the categories of persons or entities with whom the operator may share the information; and
 - b) Disclose whether or not the operator maintains a process for an individual to review and request changes to his or her personally identifiable information that is collected through the Internet, and if so, include a description of that process.

3) Requires an operator to post or provide, upon request, to an individual the privacy policy that was in effect at the time the user or visitor first disclosed his or her personally identifiable information or initially signed up for the operator's service. The bill specifically provides that this requirement does not create a duty on the part of the operator to reconstruct and post past privacy policies that were in existence prior to the operative date of the bill, or to provide privacy policies that have not been in effect for more than five years.

4) Contains, among others, the following definition: "personally identifiable information" means individually identifiable information about an individual collected online, including any of the following: (1) first and last name; (2) home or other physical address; (3) e-mail address; (4) telephone number; (5) social security number; (6) any other identifier that permits the physical or online contacting of a specific individual; and (7) information about a user that the Web site collects online from the user and combines with a described identifier.

5) Provides that an operator who fails or refuses to conspicuously post a privacy policy on its Web site within 60 days after being notified of its failure to comply is in violation of the bill.

EXISTING LAW requires financial institutions to disclose their policies and practices, at the time of establishing a customer relationship and on an annual basis, including to consumers who conduct their transactions online, with respect to: (1) the categories of persons to whom nonpublic personal information is disclosed; (2) the categories of nonpublic personal information collected by the financial institution; and (3) the policies in place to protect the confidentiality and security of nonpublic personal information. (Gramm-Leach-Bliley Act, P.L. 106-102, section 503. Hereinafter, the Gramm-Leach-Bliley Act or the GLB Act.)

FISCAL EFFECT: The bill as currently in print is keyed non-fiscal.

COMMENTS: This bill enacts the Online Privacy Protection Act of 2003, requiring disclosure of online privacy policies. In support, the author states:

AB [68] requires that all individuals or entities that operate a website or online service that collects personal information through the internet from California residents conspicuously post a privacy policy stating what information they collect and the categories of individuals with whom they [share] the information. Any policy will do. The bill simply requires that an operator have a policy and then follow it. Many consumers refuse to do business online because they have little protection against abuse. This bill provides meaningful privacy protections that will help foster the continued growth of the Internet economy. This bill provides such protection by allowing individuals to rely on a privacy policy posted online.

Comparison of The Measure With AB 2297 (Simitian) of 2002. This bill is substantially similar to AB 2297 of last year. That bill was passed by the Legislature but vetoed by Governor Davis who expressed concern in his veto message that the bill, while "well intended," was "too vague and does not clearly define what entities are covered. Additionally, the bill requires an entity posting a privacy policy to post the past three privacy policies it used which will most certainly lead to confusion to consumers attempting to view the privacy policy."

Entities Covered. With respect to the Governor's concern regarding what entities were covered under AB 2297, while this year's measure specifies that an operator of a commercial Web site must post its privacy policy, the definition of "operator" is identical to the one contained in AB 2297. In response to the Governor's concern on this point, the author states that the "Governor's office expressed concern that after the numerous amendments changing terms and definitions in AB 2297, made to accommodate industry concerns, there were a number of inconsistencies that created confusion in the bill. AB 68 resolves the concern raised in the Governor's veto message by defining the term 'operator' of a commercial website or online service, and consistently using that term throughout the bill. The definition of the term 'operator' mirrors the definition used in the Children's Online Privacy Protection Act (1998) that has become the national standard for such definitions."

Posting of Prior Privacy Policies. Regarding the Governor's concern that AB 2297 required an operator to post prior privacy policies, this year's measure also contains a similar requirement. Under AB 2297, an operator was required to post, or provide upon request, previous privacy policies that were either posted by it in the past two years or that were

retained and remained available for more than two years. In addition, the bill required that a privacy policy provide a hyperlink to at least three of the most recent privacy policies.

In comparison, AB 68 requires that an operator post or provide upon request, the privacy policy that was in effect at the time the user or visitor first disclosed his or her personally identifiable information or initially signed up for the operator's service. The bill does not require a hyperlink to three prior policies. The author believes that this change sufficiently addresses the Governor's concern that the posting of prior policies will "most certainly lead to confusion to consumers attempting to view the privacy policy" because it ties the prior privacy policy to a date certain.

Lengthy "Time to Cure" Provision Potentially Problematic. This bill contains a "time to cure" provision, providing that an operator who fails or refuses to conspicuously post a privacy policy on its Web site within 60 days after being notified of its failure to comply is in violation of the bill. In essence, the bill provides 60 days advance notice before an operator may be deemed to be in violation of the bill's disclosure requirements. This is arguably a lengthy time period. As a result, the Committee may wish to amend the bill to decrease the 60-day time period to 30 days.

Intersection Between the Measure and Gramm-Leach-Bliley. This bill requires an operator of a commercial Web site that collects personally identifiable information about online visitors who are located in California to conspicuously post its privacy policy on the Web site. The bill requires the privacy policy to identify the nature of the information collected and with whom the entity may share the information. A similar requirement currently exists for financial institutions under the Gramm-Leach-Bliley Act.

While this bill does not touch upon the "opt-in" v. "opt-out" debate in the sense that it is primarily a disclosure bill and does not provide consumers the ability to either opt-in to or opt-out of the sharing of their information, it is important to understand the disclosure requirements of the GLB Act with respect to financial institutions since those requirements apply when consumers conduct their transactions online. Under the GLB Act, a financial institution is required to disclose its policies and practices with respect to: (1) the categories of persons to whom nonpublic personal information is disclosed; (2) the categories of nonpublic personal information collected by the financial institution; and (3) the policies that it maintains to protect the confidentiality and security of nonpublic personal information. These disclosures must be made at the time of establishing a customer relationship and on an annual basis. Unlike the GLB Act, however, this bill is not limited to disclosures by financial institutions. Instead, its disclosure requirements apply to all operators of commercial Web sites that collect personally identifiable information about online visitors who are located in California.

Congressional action on the issue. In the past, some have raised concerns that state regulation on this matter raises the potential for differing privacy statutes throughout the United States. In addition, because federal legislation has been introduced to create a national standard for online privacy, the analysis will briefly discuss the Congressional proposals.

First, H.R. 69 by Representative Frelinghuysen enacts the Online Privacy Protection Act of 2003 which, among other things, requires Web site operators to provide notice on the Web site of the identity of the operator, what personal information is collected by the operator, how the operator uses such information, and what information may be shared with other companies. The bill also requires operators to provide a meaningful and simple online process for individuals to consent to or limit the disclosure of personal information for purposes unrelated to those for which such information was obtained. In addition, Senator Feinstein has introduced the Privacy Act of 2003 which makes it unlawful for a commercial entity to collect personally identifiable information and disclose or sell the information to any nonaffiliated third party for marketing purposes unless the commercial entity provides notice to the individual and an opportunity for the individual to opt-out. The measure applies to online communications.

Double referral. This bill has been double referred to the Assembly Business and Professions Committee.

Prior Related Legislation. As noted above, AB 2297 (Simitian) of 2002, which was substantially similar to this bill, was vetoed by Governor Davis.

AB 1793 (Wayne) of 2000, which was amended to declare Legislative intent to enact legislation to protect the privacy of Internet users, died in the Assembly Committee on Consumer Protection, Governmental Efficiency, and Economic Development.

AB 1007 (Wayne) of 1999, which prohibited Internet service provider from disclosing any personally identifying information about a subscriber to a third party for marketing or other purposes without the knowledge and affirmative consent of the subscriber, died in the Assembly Committee on Consumer Protection, Governmental Efficiency, and Economic Development.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file.

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CA B. An., A.B. 68 Assem., 4/22/2003

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