



Legislative & Regulatory Update

1st Quarter 2012

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LEGISLATIVE & REGULATORY UPDATE

Some of the most notable activity this quarter came in the field of mobile payments, with congressional hearings held in the House and the Senate, as well as a workshop announcement from the Federal Trade Commission. The Senate also held a hearing on prepaid cards.

Congress continued work on data security bills, introducing yet two more bills with the intent of building consensus towards passage of a legislative package of data security provisions.

Federal Legislative and Regulatory Actions

6050W/1099 Merchant Reporting

Internal Revenue Service

2012-04-04: *IRS previewed changes to Form 1099-K for 2012*

The IRS held a meeting to preview proposed changes to the Form 1099-K for tax year 2012 and to gather stakeholder feedback on the proposed changes.

ETA Action: ETA staff and Government Relations committee members attended the meeting and subsequently discussed the proposed changes with the GR committee. Follow-up communication with the IRS may occur.

Consumer Financial Protection Bureau

Congress

2012-03-26: *House passes CFPB confidentiality bill*

CFPB Director Richard Cordray stated that he would support a legislative fix of what he called “an oversight” in the Dodd-Frank Act. The House passed the uncontroversial measure (see below) by a voice vote. It is expected to pass easily in the Senate, where Sens. Tim Johnson and Richard Shelby have introduced an identical measure.

2012-02-01: *House and Senate companion CFPB confidentiality bills introduced*

S.2055 and H.R.3871, titled the Proprietary Information Protection Act of 2012, were introduced to clarify that privileged information turned over to the CFPB would not constitute a waiver of attorney-client privilege. Without this legislation, a bank could be subpoenaed and the information could potentially be used against them in a lawsuit.

ETA Action: The Association participates in a working group directed by the U.S. Chamber of Commerce addressing this, and other, issues involving the CFPB.

Data Security / Breach Notification

Congress

2012-03-27: *SECURE IT Act introduced in the House*

Reps. Bono Mack and Blackburn introduced a companion version of the bill introduced by Sen. McCain, the Strengthening and Enhancing Cybersecurity by Using Research, Education, Information, and Technology (SECURE IT) Act.

2012-03-07: *House Energy and Commerce committee hearing on cybersecurity*

The subcommittee on Communications and Technology heard from a panel of executives from Internet service providers cautioning Congress about enacting cybersecurity legislation that would have government regulate infrastructure operators on security. AT&T Chief Security Officer Edward Amoroso testified that regulation would be futile and inhibit innovation. "Burdening the private sector with the cost of unnecessary and ineffective regulations and processes is contrary to that objective, and will only slow advances in cybersecurity," he said.

2012-03-01: *SECURE IT Act introduced in Senate*

Senator McCain and several Republican Senators introduced S. 2151, the Strengthening and Enhancing Cybersecurity by Using Research, Education, Information and Technology (SECURE IT) Act. This measure is an alternative to the Cybersecurity Act, a bipartisan bill backed by Sens. Lieberman, Collins, and others.

Unlike the Lieberman-Collins bill, the Republican-sponsored SECURE IT Act would not give the Homeland Security Department the power to require that critical computer systems meet minimum security standards. The SECURE IT Act explicitly states that there would be no new government funding to support cybersecurity. Instead, the measure focuses on encouraging private companies to share information about cybersecurity threats with the government and toughening penalties for online crimes.

Upon introduction of the SECURE IT Act, the four sponsors of the Cybersecurity Act said they were eager to work together to bring comprehensive cybersecurity legislation to the Senate floor as soon as possible. However, the next day the four senators issued a statement reemphasizing their support for some enforceable security standards, saying: "We agree with former Homeland Security Secretary Michael Chertoff that risk-based security standards for critical infrastructure must be part of the solution."

What both bills offer is improved sharing of information about cyberthreats between government and business; liability protection for businesses that share cyberthreat information; protection of intellectual property and trade secrets of businesses that share threat information; and updating the Federal Information Security Management Act, the decade-old law known as FISMA that governs federal government IT security.

2012-02-14: *Cybersecurity Act of 2012 introduced in Senate*

S.2105, the Cybersecurity Act of 2012, was introduced by Sen. Lieberman, has a bipartisan list of cosponsors and the support of the Obama Administration. This bill would direct the Secretary of Homeland Security (DHS), in consultation with owners and operators of critical infrastructure, the Critical Infrastructure Partnership Advisory

Council, and other federal agencies and private sector entities, to: (1) to conduct a top-level assessment of cybersecurity risks to determine which sectors face the greatest immediate risk, and conduct, on a sector-by-sector basis, cyber risk assessments of the critical infrastructure; (2) establish a procedure for the designation of critical infrastructure; (3) identify or develop risk-based cybersecurity performance requirements; and (4) implement cyber response and restoration plans. This bill would have government agencies set forth proscribed requirements for securing critical infrastructure, including notification of cyber risks and threats and reporting of significant cyber incidents affecting critical infrastructure. The bill would also establish a National Center for Cybersecurity and Communications within DHS, headed by a Senate-confirmed director, to coordinate federal efforts to battle cybersecurity threats.

Federal Communications Commission

2012-03-22: *FCC advisory committee proposes guidelines for companies to protect networks*

These new voluntary guidelines contrast with pending legislation in the Senate that would empower the Homeland Security Department to set mandatory security standards for critical networks. The FCC committee recommended that Internet providers educate consumers about how to prevent their computers from being infected and used as “botnets” in attacks on websites and should also offer assistance for consumers whose computers have already been infected. The guidelines call for Internet providers use a security extension DNSSEC to detect if a user is being redirected to a fraudulent website. The committee called on network operators to develop and adopt new technologies to combat Internet route hijacking. FCC Chairman Genachowski said the guidelines will beef up cybersecurity without invading individuals’ privacy. Major Internet service providers including AT&T, CenturyLink, Comcast, Cox, Sprint, Time Warner Cable and Verizon promised to follow the recommendations. Industry groups praised the FCC for developing voluntary, rather than mandatory, security standards.

Dodd-Frank Implementation

Treasury Department

2012-04-03: *Final rule released to determine financially risky non-bank firms*

The Financial Stability Oversight Council (FSOC) approved a rule that would subject entities classified as “systemically-important nonbanks” to supervision by the Federal Reserve Board.

The rule includes a three-stage process in designating nonbank firms as systemically important financial institutions. The council will use several criteria to make its initial identification: all nonbank firms must have at least \$50 billion of global total consolidated assets to be potentially considered systemically risky; if a firm meets that test, then it must also meet at least one of the following thresholds: \$20 billion in total debt outstanding, a minimum leverage ratio of 15 to 1, or \$30 billion in gross notional credit default swap outstanding to trigger a closer look by regulators.

Regulators cautioned that it would make determinations on a case-by-case basis. “The Council does not believe that a determination can be reduced to a formula,” the rule

said. Rather, each identification process will be made based on “a company-specific evaluation” and will take into account qualitative and quantitative information the council feels is important for each company.

Mobile Payments

Congress

2012-03-29: *Senate Banking Committee holds hearing on mobile payments*

The committee held a hearing entitled: “Developing the Framework for Safe and Efficient Mobile Payments.” Witnesses were Sandra F. Braunstein, Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System; and Kenneth C. Montgomery, First Vice President and Chief Operating Officer, Federal Reserve Bank of Boston. In somewhat unusual fashion, the hearing lasted less than one hour and was attended by Chairman Johnson, Ranking Member Shelby, and Senator Warner. Senator Shelby commented that he hadn’t known how PayPal worked until just the previous weekend when a friend used it to send money.

2012-03-22: *House Financial Services Committee holds hearing on mobile wallets*

The House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit, held hearing titled: “The Future of Money: How Mobile Payments Could Change Financial Services.” The panel of witnesses agreed that consumers may shy away from large-scale use of mobile payments until an updated regulatory framework is established to convince them that their financial assets and data are secure.

Witnesses were: Richard Oliver, Executive Vice President, Federal Reserve Bank of Atlanta; Troy Leach, Chief Technology Officer, PCI Security Standards Council; Ed McLaughlin, Chief Emerging Payments Officer for Global Products and Solutions, MasterCard Worldwide; Randy Vanderhoff, Executive Director, Smart Card Alliance; and Suzanne Martindale, Attorney, Consumers Union.

Federal Trade Commission

2012-04-26: *FTC to host workshop on mobile payments*

The workshop will examine the use of mobile payments in the marketplace and how emerging technology impacts consumers. The event will include consumer advocates, industry representatives, government regulators, technologists, and academics to examine a wide range of issues, including the technology and business models used in mobile payments, the consumer protection issues raised, and the experiences of other nations where mobile payments are more common. The workshop will be open to the public and webcast.

Prepaid Cards

Congress

2012-03-14 *Senate Banking Committee holds hearing on prepaid cards*

The subcommittee on Financial Institutions and Consumer Protection held a hearing

entitled: “Examining Issues in the Prepaid Card Market,” to explore consumer protection issues associated with prepaid cards. Witnesses were: Lauren Saunders, Managing Attorney, National Consumer Law Center; David Rothstein, Researcher, Policy Matters Ohio; Daniel R. Henry, Chief Executive Officer, NetSpend Holdings, Inc.; Rick Fischer, Partner, Morrison & Foerster; and Jennifer Tescher, President and CEO, Center for Financial Services Innovation (CFSI).

STATE LEGISLATION AND REGULATION

Georgia

2012-03-28: *Georgia Merchant Acquirer Limited Purpose Bank Act signed into law*

HB 898 was introduced on February 3, 2012, considered by the House, amended by the Senate, and signed into law in under 60 days. This bill provides for the organization and control of state-chartered merchant acquirer limited purpose banks.

Iowa

2012-03-21: *Interchange-related bills introduced*

HSB 666 and Senate Study Bill 3193 represent bills to exempt state sales tax from interchange.

Missouri

2012-02-28: *Payment processing contract bill introduced*

HB 1844 would require disclosures on credit card processing service contracts to include: the effective date of the contract, the term of the contract, the amount of any monthly minimum fee or charge for the credit card processing service and the amount of any fee or charge for terminating the contract or agreement, require that the disclosures are printed in eight-point font at a minimum, bar a person or entity that offers credit card processing from charging a fee of more than fifty dollars for terminating a contract for credit card processing service, bar charging a monthly minimum fee under a credit card processing service contract for more than one month after the credit card processing service contract is terminated, and designate a violation as an unfair and deceptive act or practice.

2012-02-27: *House and Senate electronic payment transmission bills introduced*

SB 840 and HB 1679 would require participating businesses to electronically transmit all credit and debit transactions to payment service providers at or near the time of the transaction but not less than once per business day.

Nebraska

2012-02-06: *Surcharge bill amended*

LB719 would provide that “[a]ny surcharge or convenience fee imposed by a state

official or state agency ... shall have the force of law and shall be honored by the credit card or charge card company or third-party merchant bank." The bill was amended in committee to strip provisions authorizing the state to override contractual terms that limit the manner in which surcharges or convenience fees may be imposed.

New Hampshire

2012-02-15: *House terminates consideration of interchange bill*

HB1319 would have limited credit and debit card interchange fees charged to businesses to no more than one percent.

New Jersey

2012-03-21: *Court lifts injunction, retailers could be required to collect zip codes on gift card sales*

A two-year-old injunction against a requirement in 2010 law has recently been lifted and retailers selling gift cards in New Jersey may now be required to collect the zip code of all purchases. The law required retailers to track the cards bought by New Jersey residents and turn over the unused balance to the state after two years. A still-pending federal lawsuit filed by the New Jersey Retail Merchants Association has convinced the courts to throw out some portions of the law but the zip code provision has been upheld. New Jersey retailers are seeking repeal of the measure.

2012-02-06: *Prepaid bill introduced*

S387 would limit fees charged in connection with certain prepaid debit accounts and require access to certain account information. Identical to A2144.

2012-01-17: *Interchange bill introduced*

S944 would prohibit financial institutions from charging any fee on sales and use tax portion of a retail sales transaction.

Rhode Island

2012-04-04: *House Committee on Corporations hearing on card fee bills*

HB 7282 would prohibit a financial institution or credit union from charging a fee for use of a debit card for a purchase or cash withdrawal. HB 7357 would eliminate transaction fees by state chartered financial institutions for the use of ATM cards, credit, and debit cards.

2012-03-13: *Senate Committee on Corporations hearing on card bill*

S2273 is a bill that would prohibit requirements relating to retail display of pricing; allow minimum and maximum amounts for card acceptance; allow merchants to decline certain cards; and other provisions. Similar to H 7675.

South Carolina

2012-03-28 *Debate on surcharge bill postponed*

HB 4269 would allow finance companies to surcharge/tax consumers that pay by card. The bill's sponsor moved to adjourn debate until April 17, 2012.

Vermont

2012-03-21: *House amends, passes bill on home solicitation sales*

H730 would have initially established a new three-year chargeback liability for issuers of credit cards in situations involving home solicitation (telephone) sales; the House amended the bill to make it a one-year liability.

2012-01-03: Bill introduced to study expenses associated with credit/debit payments

S229 would direct the Public Utility Commission to investigate fees and expenses associated with credit/debit card payments and prescribe applicable terms including how such fees and expenses can be recovered and the establishment of a statewide maximum fee if deemed appropriate.