# BANKING LEGISLATION & Policy

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## Recent Developments

### Visa and MasterCard Antitrust Case Goes To Trial

After nearly two years of pre-trial motions and discovery, the antitrust lawsuit filed by the Department of Justice (DOJ) against Visa and MasterCard entered its trial phase on June 12, 2000. The case centers on DOJ claims that a number of practices have stifled competition between the two brands. Specifically, the DOJ cites: 1) the card associations' duality agreement, whereby member banks may offer both cards; 2) the requirement that participating merchants accept both brands; 3) the substantial overlap in the card associations' boards of directors; and 4) the exclusivity clauses in the organizations' bylaws, which prohibit member banks from issuing the credit cards of other brands, such as American Express or Discover.

The DOJ further contends that this noncompetitive environment has retarded innovations such as smart cards (credit cards that contain a computer chip) and encryption technology for Internet transactions, thereby harming consumers. MasterCard and Visa contend that the delays in bringing these innovations to market were due to economic considerations. For example, they maintain that an already-installed base of card-swipe machines at retailers undermined the economic logic of aggressively pushing smart-card technology. Furthermore, they argue that competing brands—such as American Express and Discover—have sufficient access to consumers without their cards being offered through MasterCard and Visa member banks. According to MasterCard and Visa, consumers operate in a highly competitive industry in which it is possible to shop around for open-end credit programs best suited to their needs.

The case, *United States v. VISA U.S.A. Inc., VISA International Corp., MasterCard International Inc.*, is being heard in the United States District Court for the Southern District of New York.

**CONTENTS**

*Enacted Legislation*

**1. Millennium Digital Commerce Act (S. 761).** Introduced by Senator Abraham (R-MI) on March 25, 1999.

Status: Signed into law by the President on June 30, 2000, as Public Law 106-229. Senate agreed to the Conference Report on June 16, 2000. House agreed to the Conference Report on June 14, 2000.

This law allows for the greater use of electronic records in commercial activities by giving electronic documents and signatures the same legal standing as their written counterparts. The law prohibits legal bias against a contract simply because the document or signature is in electronic form. Where a statute or regulation requires that a consumer receive some notice or disclosure in writing, the consumer must give affirmative consent to receiving the information in electronic form. To do so, the consumer must demonstrate that he or she is able to access the information electronically, for example, by responding to an e-mail that contains an attached document. Where a statute or regulation calls for the retention or presentation of a contract, an electronic record of the contract would satisfy this requirement. The electronic record of the contract would need to be accessible to all parties entitled to have access to the document.

The law specifically states that it applies to insurance activities. Insurance agents or brokers are protected from liability arising from a deficiency in the agreed-upon electronic procedures of a contract if the agent or broker: 1) did not engage in negligent or reckless behavior; 2) was not involved in the development of the electronic procedure; and 3) did not deviate from the agreed-upon electronic procedures.

The states have the right to modify any of the above language by enacting the Uniform Electronic Transaction Act (UETA) or by passing individual legislation that specifically refers to the Millennium Digital Commerce Act. UETA was drafted in 1999 by the National Conference of Commissioners on Uniform State Laws as a way of standardizing the states' legal treatment of electronic records and signatures. For some types of transactions, the states may continue to favor paper documents. For example, documentation addressing wills, family law, repossession of property, and eviction notices would need to be delivered in written format if required by state law. These exceptions would be reviewed by the Secretary of Commerce after three years to determine whether they are needed to protect consumers.

The law gives federal and state agencies the right to promulgate regulations interpreting and enacting the language of this act. In general, agencies cannot impose further requirements or favor a specific technology for creating, storing, or communicating electronic records or signatures. The law also gives the Secretary of Commerce broad authorization to take actions to facilitate the development of interstate and foreign commerce by reducing or eliminating impediments to commerce in electronic signatures.

Finally, the new law makes provisions for transferable records—electronic versions of instruments defined as notes under the Uniform Commercial Code (UCC). Such instruments include commercial letters of credit. For these transferable records, a single authoritative version must exist and the holder of this version is the owner of the security.

*New Legislation*

**1. Freedom From Behavioral Profiling Act of 2000 (S. 2360).** Introduced by Senator Shelby (R-AL) on April 5, 2000.

Status: Referred to the Committee on Banking, Housing, and Urban Affairs. Related Bills: H.R. 3320, S. 1903, S. 1924, and S. 2513.

This bill would extend the privacy provisions of the Gramm-Leach-Bliley Act (GLB) to include the identity of third parties with whom customers carry out certain financial transactions. Specifically, the bill would prohibit a financial institution from disclosing the identity of a party: 1) from whom a consumer has received a payment or fund transfer; 2) to whom a consumer has made a check payment or similar transfer; or 3) with whom a consumer has engaged in a credit transaction, unless the customer explicitly consents to the disclosure.

In contrast to the other privacy provisions of GLB, which state only that a customer may refuse to permit disclosure (opt-out), this provision would require the customer's affirmative consent (opt-in).

**2. Loan Applicant Privacy Protection Act (H.R. 4164).** Introduced by Representative Bachus (R-AL) on April 4, 2000.

Status: Referred to the Committee on Banking and Financial Services.

This bill would prohibit noting an applicant's race, color, religion, national origin, or sex on nonmortgage credit applications. The Federal Reserve Board is currently considering a proposal to permit the voluntary collection of such data.

**3. Bank Reserves Modernization Act of 2000 (H.R. 4209).** Introduced by Representative Kelly (R-NY) on April 6, 2000.

Status: Ordered reported from the Committee on Banking and Financial Services on May 17, 2000. Related Bills: H.R. 4427, H.R. 1435, H.R. 1585, H.R. 3611, and S. 576.

This bill would permit the payment of interest on reserves held at Federal Reserve Banks by depository institutions. The Federal Reserve System could set the interest rate no higher than the general level of short-term interest rates.

**4. Identity Theft Prevention Act of 2000 (H.R. 4311).** Introduced by Representative Hooley (D-OR) on April 13, 2000.

Status: Referred to the Committee on Banking and Financial Services. Related Bill: S. 2328.

This bill would amend several consumer protection statutes to help prevent identity fraud in consumer credit transactions. The Truth in Lending Act would be amended to require credit card issuers to respond to a change of address notification from a consumer by sending confirmation of the change to the consumer's new and former address within 10 days. A second confirmation would be required if a request for an additional card is made within 30 days of a change of address request.

The bill would require a credit bureau to notify a card issuer if the address on a new card application does not match the address in the consumer's file. Credit bureaus would also be required to place a fraud alert in the consumer's file at a consumer's request. The alert would inform potential creditors that the consumer does not authorize any extension of credit unless specific oral authorization is obtained through a telephone number designated by the consumer. The bureaus would also be required, upon any consumer's request, to provide him or her with one free credit report during any 12-month period.

In addition, the bill would require individual reference service providers to disclose to a consumer the nature and content of all information collected in the consumer's file. The disclosure would also need to be accompanied by a clear and simple explanation of the information coded in the file. Individual reference service providers are entities that engage in the practice of creating, assembling, evaluating, or supplying to others certain types of information about an individual such as birth date, criminal history, income level, and mother's maiden name.

**5. Financial Consumer's Bill of Rights (H.R. 4332).** Introduced by Representative Schakowsky (D-IL) on April 13, 2000.

Status: Referred to the Committee on Banking and Financial Services and the Committee on Commerce.

The bill would place limitations on certain fees charged by banks. First, ATM surcharging—the practice of terminal owners' charging noncustomers for the use of their terminals—would be barred. Second, the Federal Reserve, on an annual basis, would be required to compute the average cost incurred by banks when processing a check for which there are insufficient funds. Banks would be prohibited from charging more than double that amount. Financial institutions would also be required to allow consumers at least three free teller transactions per month.

The bill would prohibit the use of binding arbitration clauses in consumer credit contracts as a means of resolving disputes. Parties could agree to binding arbitration after a dispute arises.

The bill would amend the Gramm-Leach-Bliley Act's privacy provisions. Among other amendments, a financial institution would be barred from disclosing nonpublic financial information to its affiliates without the affirmative consent of the consumer; that is, the consumer must opt-in. Currently, consumers need not give explicit consent to information sharing, and information transfers between a financial institution and its affiliates are not subject to current privacy provisions.

Consumers who opt-in to an institution's information-sharing program would have the right to review and dispute any data the institution makes available for sharing. These rules would also apply to institutions using customer information for their own marketing purposes. The bill would also criminalize the act of obtaining or attempting to obtain customer information from a financial institution by presenting false credentials or providing false information.

**6. Consumer Financial Privacy Act (H.R. 4380).** Introduced by Representative LaFalce (D-NY) on May 4, 2000.

Status: Referred to the Committee on Banking and Financial Services and the Committee on Commerce. Related Bills: H.R. 3320, S. 1903, S. 1924, S. 2513 and H.R. 4585.

This bill would amend the Gramm-Leach-Bliley Act by modifying existing financial information privacy statutes (see **Summary of Federal Regulations** for a rule codifying these statutes). Privacy regulations would be extended to information transfers between a financial institution and its affiliates. Current privacy statutes address only information shared with nonaffiliated third parties.

The bill would establish an opt-in standard for certain types of personally identifiable information, in contrast to the blanket opt-out standard under current statutes. Specifically, a financial institution would have to secure a consumer's explicit consent before sharing individualized customer transaction information gained during the course of providing service. For instance, customers who pay their bills on the Internet could not have their payment records transferred without their prior consent. The opt-in requirement would also extend to the transfer of aggregate lists of consumers containing or derived from individually identifiable health information.

Financial institutions could not obtain health information about a consumer from a third party, affiliated or otherwise, in order to decide whether to provide a financial product or service to the consumer except with the consumer's consent. The bill also strengthens the Federal Trade Commission's and individual states' powers to enforce privacy policies.

**7. Internet Gambling Funding Prohibition Act (H.R. 4419).** Introduced by Representative Leach (R-IA) on May 10, 2000.

Status: Referred to the Committee on Banking and Financial Services and the Committee on the Judiciary.

This bill would prohibit the acceptance of credit cards, electronic fund transfers, and checks or other negotiable instruments payable through a financial institution for the purpose of Internet gambling. The Secretary of the Treasury would be instructed to vote against IMF or World Bank disbursements to countries that permit United States citizens and residents to use the payment system to participate in Internet gambling. The bill would also instruct the Secretary and Chairman of the Board of Governors to take action denying access to the payment system to financial institutions chartered in such countries.

**8. Federal Deposit Insurance Corporation Adjustment Act (H.R. 4467).** Introduced by Representative Hefley (R-CO) on May 16, 2000.

Status: Referred to the Committee on Banking and Financial Services. Related Bills: S. 2589, H.R. 4487, H.R. 4603, H.R. 4674, S. 2798, and S. 2837.

This bill would provide for cost of living adjustments to Federal Deposit Insurance coverage. The insurance amount would be adjusted every three years based upon the cost of living adjustment as determined by the Internal Revenue Service.

**9. First Accounts Act of 2000 (H.R. 4490).** Introduced by Representative LaFalce (D-NY) on May 18, 2000.

Status: Referred to the Committee on Banking and Financial Services. Related Bills: S. 2592 and H.R. 4584.

This bill would require the Department of the Treasury to establish a program to promote: 1) greater accessibility of financial services to low- and moderate-income people; 2) the development of new financial products and services that meet the needs of low- and moderate-income people; and 3) the education of low- and moderate-income people on the availability and usefulness of financial products and services.

The Treasury would be specifically authorized to provide both technical and financial assistance to depository institutions in order to provide low-cost, approved financial services and products to eligible consumers. The Treasury would also be authorized to partner with community groups and depository institutions in order to provide financial education seminars.

**10. Consumer Automobile Lease Advertising Improvement Act (H.R. 4540).** Introduced by Representative LaFalce (D-NY) on May 25, 2000.

Status: Referred to the Committee on Banking and Financial Services.

This bill would amend the Consumer Credit Protection Act (CCPA) by modifying its lease disclosure requirements. The bill would increase from $25,000 to $50,000, the maximum consumer obligation threshold for a contract to be considered a lease and thus be subject to the protections afforded by the CCPA. The $50,000 ceiling would also become indexed to annual changes in the Consumer Price Index.

Television lease advertisements would be required to clearly communicate, both audibly and visually, that a lease contract is being advertised. The bill would also extend current rules on lease advertising to include all media, including Internet web pages and e-mail. Advertisements would need to state the number of available vehicles to which the advertised payment applies.

To simplify lease comparisons, the bill sets forth a model formula (to be promulgated by the Board of Governors) for determining lease payment amounts. The formula would be based on the total capitalized cost of the vehicle advertised, a lease term of 24 months, and a mileage allowance of 12,000 miles. The automobile dealer would also be required to disclose customer incentives available for each vehicle model.

**11. Congressional Regulatory Review Reform Act of 2000 (S. 2670).** Introduced by Senator Thomas (R-WY) on June 6, 2000.

Status: Referred to the Committee on Banking, Housing, and Urban Affairs.

This bill would require congressional approval before major rules promulgated by federal agencies can take effect. The legislation refers to those rules that would likely result in: 1) an annual effect on the economy in excess of $100 million; 2) increased costs or prices for consumers, individual industries, federal or local government agencies, or geographic regions; or 3) adverse effects on competition, employment, productivity, or the ability for a domestic enterprise to compete with foreign enterprises. The bill would exempt rules put forth under the Telecommunications Act of 1996.

**12. Fair Credit Reporting Act Amendments of 2000 (H.R. 4644).** Introduced by Representative Ford (D-TN) on June 13, 2000.

Status: Referred to the Committee on Banking and Financial Services.

This bill would require the credit bureaus to supply one free credit report each year at a consumer's request. The report would need to contain all information associated with the consumer, including credit or risk scores accompanied by a description of the factors involved in computing the score. The bill would also require the credit bureau to remove from the report a small debt charge-off of less than $100 after three years if the consumer has completed a financial management course within the three-year period and if he or she has not had a previous small debt charge-off.

***Pending Legislation***

**1. International Counter-Money Laundering Act of 2000 (H.R. 3886).** Introduced by Representative Leach (R-IA) on March 9, 2000.

Status: Ordered reported from the Committee on Banking and Financial Services on June 8, 2000. Related Bills: H.R. 2896, H.R. 2905, S. 1663, H.R. 4695, and S. 1920.

This bill would authorize the Secretary of the Treasury, after consultation with the Chairman of the Board of Governors, to prescribe several measures to counter international money laundering activities.

The act specifically authorizes the secretary to require: 1) domestic financial institutions to maintain records or to file reports concerning transactions with certain jurisdictions or institutions; 2) domestic financial institutions to identify the beneficial owner of an account opened by a foreign person; or 3) domestic financial institutions that maintain correspondent accounts in the United States for a foreign financial institution to identify each customer permitted to use the correspondent account.

Finally, the bill would provide immunity from prosecution to any financial institution or employee of a financial institution that informs a government agency of possible violation of the anti-money laundering law.

**2. Business Checking Modernization Act (H.R. 4067).** Introduced by Representative Metcalf (R-WA) on March 23, 2000.

Status: Received in the Senate on April 12, 2000. Passed in the House on April 11, 2000. (See *Banking Legislation and Policy*, First Quarter 2000, for a summary of H.R. 4067, as introduced.) Related Bill: S. 576.

## SUMMARY OF FEDERAL REGULATIONS

### Board of Governors of the Federal Reserve System

*Truth in Lending* (5/24/2000)

The BOG gave notice of proposed rulemaking that would make revisions to the disclosure requirements for credit card applications and solicitations conducted through direct mail or other communication mediums.

The rule would subject the annual percentage rate (APR) for purchase transactions to a minimum type size of 18 points. This APR would also need to appear separately from other APRs—such as introductory rates or penalty rates. The disclosure table would need to use at least 12-point type in order to automatically fulfill the requirement that a disclosure statement be readily noticeable. The table would be considered sufficiently prominent if it were located on the same page as an application or solicitation reply form. The table could also be placed on a separate insert as long as the insert was referenced on the application or reply form.

The proposed rule would also require that the table continue to provide details about increases in the APR triggered by late payments or other events. However, to reduce clutter, the triggering event(s) would need to appear outside the table. Finally, the Board is seeking comment on whether additional information such as APRs and transaction fees on balance transfers or cash advances should be included in the table. Comments were due July 18, 2000. For further information, see 65 *Federal Register*, pp. 33499-504. (Regulation Z).

### Federal Deposit Insurance Corporation

*Privacy of Consumer Financial Information (6/1/2000)*

The FDIC, together with the Federal Reserve System, Office of the Comptroller of the Currency, and the Office of Thrift Supervision, issued a final rule implementing the consumer financial information privacy statutes contained in the Gramm-Leach-Bliley Act. The new rule is similar to the joint proposal issued on February 22, 2000, but with some changes of substance. Key among these modifications are changes to the regulatory definitions of nonpublic personal information and publicly available information. Publicly available information would be any information that a bank has a reasonable basis for believing has been lawfully made available to the general public from governments, widely distributed media, or disclosures made to the public as a result of a legal statute. This definition is a hybrid of the two alternatives presented in the original proposal. Nonpublic personal information would include both personally identifiable financial information and any list derived from such information. (See *Banking Legislation and Policy*, First Quarter 2000, for a summary of the original proposal.)

In general, the final rule would require a financial institution to provide customers with an initial notice of its privacy policy no later than at the time a customer relationship is established. Consumers—patrons who purchase an institution's products but who do not have a sufficiently strong relationship to be considered customers—must be notified prior to disclosure of nonpublic personal information to a nonaffiliated third party. For joint accounts, only one initial notice is required. In addition to the initial notice, financial institutions are required to send their customers annual privacy notices. The notices should contain information about the categories of nonpublic personal information that a financial institution may collect, the institution's policies with respect to sharing information about former customers, a customer's right to opt-out of the disclosure of nonpublic personal information to nonaffiliated third parties, and any other information that is representative of the institution's privacy policies and practices.

Institutions must provide consumers with a prescribed manner of opting out of the information-sharing arrangement. For joint accounts, each account holder would have the right to opt-out. The institution would retain the right to determine the treatment of the remaining account holder who did not opt-out. The institution may require that customers use prescribed methods, such as a toll-free number or a business reply card to opt-out.

Institutions are allowed to use electronic media to deliver notices so long as they are not the only means of distribution. The institution would be able to satisfy its initial disclosure requirement if, in addition to posting the notice on its web site, it also required the consumer to acknowledge receipt of the initial notice. For the annual notice, an institution may satisfy this requirement if the consumer has agreed to receive notices at the institution's web site and if the disclosure is posted clearly and conspicuously on the site. In general, the rule prohibits the redisclosure of nonpublic financial information received from a financial institution. The general prohibition on the transfer of customer account or access numbers remains from the original proposal but with two main exceptions. Financial institutions are permitted to disclose access numbers to an agent for the purpose of marketing the institution's financial products or services or to a participating institution in an affinity program, where the participants are identified to the consumer at the time he or she enters the program.

Finally, the rule requires financial institutions to bring themselves into full compliance by July 1, 2001. As a result of the delayed implementation date, there are no phase-in periods, and all required opt-out notices and initial notices should be delivered by this date. This rule became effective November 13, 2000. For further information, see 65 *Federal Register*, pp. 35162-236.

**Office of the Comptroller of the Currency**

*Disclosure and Reporting of CRA-Related Agreements (5/19/2000)*

The OCC, together with the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of Thrift Supervision, issued a proposal that would codify a section of the Gramm-Leach-Bliley Act requiring disclosure of CRA-related agreements between depository institutions and non-governmental entities or persons. The rule would require that such agreements be made publicly available and filed with the appropriate regulator of the depository institution.

In general, an agreement would need to be disclosed if it: 1) was in writing; 2) was made in fulfillment of the CRA; 3) involved funds from a depository institution in excess of $10,000 in any year or loans with a total principal value of $50,000 in any year; and 4) involved an insured depository institution or affiliate and a nongovernmental entity or person (NGEP). The proposal exempts from any disclosure requirements individual mortgage loans and loans to individuals, businesses and farms so long as the loans are not made at below-market rates or reloaned to third parties. The rule also exempts any agreement made with an NGEP that has not contacted the institution regarding the CRA. Confidential or proprietary information is also exempted from disclosure.

Parties to an agreement (depository institutions and NGEPs) would be able to satisfy the public disclosure requirement by placing a copy of the agreement in their CRA public file—if applicable—and by providing copies to interested parties upon request. The party would be able to charge a fee to cover processing costs, and its obligation to make the agreement available to the public would terminate 12 months from the end of the agreement. The rule would also require a depository institution to provide its regulator with a copy of the agreement within 30 days of signing. NGEPs would need to provide the regulator with a copy of the agreement within 30 days of the regulator's request. An NGEP's obligation to make an agreement available to a regulator terminates 12 months after the agreement ends. The public disclosure requirement is applicable only to agreements entered into after November 12, 1999.

The rule would also require parties to file annual reports (fiscal or annual) relating to agreements entered into after May 12, 2000. NGEPs would be required to detail and itemize how they used money received though such agreements during that year. NGEPs could use either of two reporting methods—specific purpose funding or general allocation funding. For monies used for a specific purpose, the NGEP's annual report must provide both a description of each specific purpose and the amount of funds or resources used for that purpose during the year. NGEPs using the general allocation reporting method must report officer compensation, administrative expenses, travel costs, entertainment expenses, consulting fees, and other expenses. Depository institutions would be required to file annual reports with their respective regulators containing information on: 1) the total amount of payments made and received by the institution during the year via agreements covered by the regulation; 2) the description of the conditions on payments made or received by the institution; and 3) the total amount and number of loans, investments, or services provided under an agreement to any person who is not a party to the agreement. The rule would require depository institutions and NGEPs to file an annual report no later than six months from year-end. Comments were due July 21, 2000. For further information, see 65 *Federal Register*, pp. 31962-2002. (Regulation G)

## SUMMARY OF JUDICIAL DEVELOPMENTS

On April 26, 2000, the U.S. Court of Appeals for the Fifth Circuit upheld a lower court decision to allow a debtor to discharge her credit card debt over objections from the card issuer which maintained that the debt was fraudulently procured and therefore ineligible for discharge. The case, *AT&T Universal Card Services v. Mercer*, Fifth Circuit, No. 98-60693, April 26, 2000, centered on a decision by the District Court of Southern Mississippi to allow Constance P. Mercer to discharge certain credit card debts under Chapter 7 of the U.S. Bankruptcy Code. AT&T, the creditor that issued the credit card, argued that the defendant had obtained the credit card by making false representations, and therefore, the debt was nondischargeable under Section 523(a)(2)(A) of the Bankruptcy Code. That clause disallows bankruptcy discharges for money obtained by false pretenses, false representations, or fraud.

The Circuit Court, in agreeing with the lower court, found that since the debt was obtained by the use of a credit card that the defendant was issued through a pre-approval process, there was no explicit representation made by the defendant. "Mercer never solicited the credit card from AT&T; never knew of nor gave her permission for the investigations; and was never asked about her debts, gambling losses, financial condition, or other credit cards being used by her or the balances thereon . . . . AT&T solely relied on its own agents and investigative processes to make(s) its decision." Since the defendant never made a representation to AT&T, AT&T could not validate its claim that the card was issued and the debt was incurred as a result of misrepresentations by the defendant.

The finding has important implications for card issuers, especially those engaged in marketing pre-approved cards to sub-prime borrowers. This ruling clearly imposes the risks of inadequate screening of pre-approved applicants on lenders, rather than on their customers.

## SUMMARY OF THIRD DISTRICT DEVELOPMENTS

**Pennsylvania**

On June 12, 2000, the Pennsylvania House of Representatives passed House Bill 2533. The bill would authorize state-chartered depository institutions to engage in any activity permissible for a national bank or federal savings association—subject to conditions, limitations, or restrictions no greater than those applicable to the federally chartered institutions. The state-chartered institution would need to provide the Pennsylvania Department of Banking with notice 30 days prior to engaging in any activity authorized by this bill. Reporting requirements for state-chartered depository institutions would have to satisfy accounting standards similar to those required by federal banking authorities.

The bill also updates limits on individual loans secured by real estate. The limitations would be based on the term of the loan, the type of real estate involved, and whether private mortgage insurance or another type of guarantee is involved.

Finally, the bill would permit a corporation with fiduciary powers in another state to act as a fiduciary in Pennsylvania, as long as the corporation's home state grants Pennsylvania corporations reciprocal powers.

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