

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1587 (Ting)
Version: July 6, 2023
Hearing Date: July 11, 2023
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Financial transactions: firearms merchants: merchant category code

DIGEST

This bill requires financial institutions that facilitate payment card transactions to implement a merchant category code for firearms merchants.

EXECUTIVE SUMMARY

When a merchant enters into contracts to allow it to accept credit cards, debit cards, or prepaid cards, the merchant will be assigned a merchant category code (MCC) to be used by the entities processing the card-based transactions. MCCs are a standardized set of codes used by all major U.S. financial institutions, and help the financial institutions keep track of transactions as well as categorize purchases for purposes like credit card rewards. In September 2022, the international entity that promulgates the MCCs adopted a new MCC for firearms and ammunitions merchants. In short order, several states passed laws prohibiting the use of the firearms MCC and U.S. financial institutions halted their plans to implement the MCC.

This bill requires the MCC for firearms to be used for firearms merchants located in California. The bill provides for a two-phased rollout: payment card networks shall make the MCC available to merchant acquirers by July 1, 2024, and then merchant acquirers must assign the code to firearms merchants by March 1, 2025. "Firearms merchants" are merchants whose highest sales value comes from firearms, firearm accessories, or ammunition, based on information provided to the merchant acquirer. The California Department of Justice may enforce the bill's requirements against a noncompliant payment card network or merchant acquirer in a civil action, after providing the violator with notice and a 30-day period in which to cure the violation. According to the author and sponsors, this bill will help prevent gun violence by allowing financial institutions to recognize purchase activity that may indicate a purchaser is engaging in firearms-related crimes. The author has agreed to a minor

amendment to clarify how a merchant's sales should be tabulated to qualify as a "firearms merchant."

This bill is sponsored by Brady California and the Brady Campaign, and is supported by Everytown for Gun Safety and Women for American Values and Ethics. This bill is opposed by the California Rifle & Pistol Association, Inc., Gun Owners of California, and the National Rifle Association. The Senate Banking and Financial Institutions Committee passed this bill with a vote of 5-2.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Defines "ammunition" as:
 - a) For most purposes, one or more loaded cartridges consisting of a primed case, propellant, and with one or more projectiles, but excluding blanks. (Pen. Code, § 16150(a).)
 - b) For purposes of persons prohibited from owning a firearm, including, but not limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, ammunition feeding device, or projectile capable of being fired from a firearm with a deadly consequences, but excluding blanks. (Pen. Code, § 16150(b).)
- 2) Defines "firearm" as:
 - a) For purposes of part 6 of the Penal Code, a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by force of an explosion or other form of combustion. (Pen. Code, § 16520(a).)
 - b) For purposes of various provisions relating to protective orders and firearms transactions, to include the frame or receiver of the weapon, including both a completed frame or receiver, or a firearm precursor part. (Pen. Code, § 16520(b).)
- 3) Requires firearms to be centrally registered at the time of transfer or sale by way of transfer forms centrally compiled by the California Department of Justice (DOJ); DOJ must keep a registry of information relating to the firearm owner, the source of the firearm, and the transaction, as specified. (Pen. Code, §§ 11106.)
- 4) Requires DOJ, upon receiving the required information regarding a firearms purchase, to examine its records to determine whether the purchaser is prohibited from possessing, receiving, owning, or purchasing a firearm under existing law. (Pen. Code, § 28220.)
- 5) Requires the DOJ to electronically approve the purchase or transfer of ammunition pursuant to an eligibility check based on information provided at the time of purchase or transfer. (Pen. Code, §§ 30352, 30370.)

This bill:

- 1) Defines the following relevant terms:
 - a) "Ammunition" has the same meaning as in Penal Code section 16150(b).
 - b) "Firearm" has the same meaning as in Penal Code section 16520(a) and (b).
 - c) "Firearm accessory" means an attachment or device designed or adapted to be inserted into, affixed onto, or used in conjunction with a firearm that is designed, intended, or functions to alter or enhance the firing capabilities of a firearm, the lethality of the firearm, or a shooter's ability to hold and use a firearm.
 - d) "Firearms merchant" means a business licensed in California as a firearms dealer or ammunition vendor, for which the highest sale value is, or is expected to result from, the sale in California of firearms, firearm accessories, or ammunition in aggregate, as stated by the business to its merchant acquirer in the ordinary course of business.
 - e) "Merchant acquirer" means an entity that establishes a relationship with a merchant for the purposes of processing credit, debit, or prepaid transactions.
 - f) "Payment card network" means an entity that provides services that route transactions between bank participants to conduct debit, credit, or prepaid transactions for the purpose of authorization, clearance, or settlement.
- 2) Requires a payment card network, by July 1, 2024, to make the MCC for firearms and ammunitions businesses established by the International Organization for Standardization on September 9, 2022, available for merchant acquirers that provide payment services for firearms merchants.
- 3) Requires a merchant acquirer, by March 1, 2025, to assign to a firearms merchant the MCC for firearms and ammunitions businesses established by the International Organization for Standardization on September 9, 2022.
- 4) Provides that the Attorney General has the exclusive authority to enforce 2)-3), as follows:
 - a) Not later than the 30th day before bringing an action, the Attorney General must give written notice to the person or entity identifying the violation.
 - b) The recipient of the notice has 30 days to cure the notice and provide the Attorney General with notice that the violation was cured, including supporting documentation and confirmation that internal policies were changed to prevent a recurrence of violations in the future.
 - c) If the recipient does not cure, the Attorney General may bring a civil action in court.
 - d) If the court finds that the person or entity has violated the requirements, the court shall award (1) a civil penalty of \$10,000 for each violation; (2) injunctive relief to prevent the person or entity from committing further

violations; and (3) reasonable attorney fees and costs incurred in investigating and bringing the action.

- 5) Provides that a waiver of 1)-4) is contrary to public policy and is void and unenforceable.

COMMENTS

1. Author's comment

According to the author:

AB 1587 requires banks and credit card companies to implement the newly developed merchant category code (MCC) by the International Organization for Standardization (ISO) to California businesses that have, or are expected to have, the highest sales volume of firearms, firearms accessories, or ammunition. The bill is in line with the State's goal to prioritize gun violence prevention by providing financial entities with a tool that can help identify suspicious behavior such as gun trafficking.

2. What are MCCs?

The International Organization for Standardization (ISO) helpfully states on its website that they "develop and publish international standards."¹ One of the ISO's standardized frameworks is a set of numeric codes for that credit card companies and similar entities use to categorize the merchants from whom cardholders make purchases, known as merchant category codes (MCCs).² MCCs are used by U.S. credit card networks to, among other things, sort out rewards based on the category of spending – for example, a card that offers more cash back on groceries will be looking out for purchases made at stores with the MCC 5411, "Grocery Stores, Supermarkets."³ There are MCCs for a remarkable range of merchant types, including "Wig and Toupee Stores,"⁴ "Record Stores" (which may also rent video tapes),⁵ "Timeshares,"⁶ and "Massage Parlors."⁷

¹ ISO, Home, <https://www.iso.org/home.html>. It's not a typo: the ISO goes by "ISO" even though it doesn't match the initials in its name because, as an international body, there is no way to pick an acronym without favoring a particular language; instead, they go by "ISO," derived from the Greek "isos," meaning "equal." (ISO, About us, <https://www.iso.org/about-us.html>.) All links in this analysis are current as of July 7, 2023.

² ISO, Online Browsing Platform, ISO 18245:2023(en) Retail financial services – Merchant category codes, <https://www.iso.org/obp/ui/en/#iso:std:iso:18245:ed-2:v1:en>.

³ See, e.g., Citi, Merchant Category Codes Manual, p. 6; Visa, Visa Merchant Data Standards Manual (Apr. 2023), p. 62.

⁴ Visa Merchant Standards Manual, *supra*, at p. 69.

⁵ *Id.* at p. 72.

⁶ *Id.* at p. 86.

⁷ *Id.* at p. 89.

The analysis of the Senate Banking and Financial Institutions Committee for this bill, which is incorporated herein by reference, goes into greater detail about the specifics of credit card transactions and the complexity of how payments are actually processed. Suffice it to say here, MCCs are set by the ISO and put in place by the card networks.

3. Why are we talking about MCCs?

As the Senate Banking and Financial Institutions Committee’s analysis notes, “[t]he adoption of new MCCs by ISO and their implementation by card networks and acquirers is typically a noncontroversial and routine set of activities.” Not this time. In 2022, the ISO approved the creation of a merchant code for gun retailers.⁸ Before that, firearms and ammunition were included under “Durable Goods (Not Elsewhere Classified),” along with fire extinguishers, gas lighting fixtures, and durable gravestones,⁹ or under “Miscellaneous and Specialty Retail Shops,” along with, among other things, atlas and map stores, magic shops, sunglasses stores, and trophy sales.¹⁰

The backlash was swift. As banks began to implement the firearms MCC, attorneys general for 24 states wrote a letter to the CEOs of a number of financial institutions stating that the firearms MCC “unfairly singles out law-abiding merchants and consumers” and would “chill the exercise of a constitutional right without any concomitant benefit”; the letter also warned the CEOs that the attorneys general would “marshal the full scope of our lawful authority to protect our citizens and consumers from unlawful attempts to undermine their constitutional rights.”¹¹ Legislation followed; first Florida, then several other states, passed bills to prohibit the use of an MCC that specifically classifies firearms and ammunition as such.¹² In response to the outcry, major payment networks – including American Express, Mastercard, and Visa – paused their plans to implement the new firearms MCC.¹³

⁸ Kerber, *Global standards body approves new merchant code for gun sellers*, Reuters (Sept. 9, 2022), <https://www.reuters.com/world/exclusive-global-standards-body-approves-new-merchant-code-gun-sellers-2022-09-09/>.

⁹ Visa Merchant Standards Manual, *supra*, at p. 56.

¹⁰ *Id.* at p. 82.

¹¹ Atty. Gen. Skirmetti, et al., letter to Stephen J. Squeri, et al. (Sept. 20, 2022), *available at* <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2022/pr22-36-letter.pdf>.

¹² See Fla. SB 214 (Burgess, Ch. No. 023-79); Tex. HB 2837 (passed Jun. 10, 2023); according to the author, a total of seven states have passed such bills, and four others have measures pending.

¹³ Kerber, *Amex, Mastercard, Visa pause work on new firearms merchant code*, Reuters (Mar. 9, 2023), <https://www.reuters.com/business/finance/mastercard-pause-work-new-payments-code-firearms-sellers-2023-03-09/>.

4. This bill requires financial entities that facilitate card payment transactions to use the MCC for firearms merchants for firearms businesses licensed in California

This bill imposes a two-phased implementation of the ISO's firearms merchant for firearms merchants licensed in California. First, payment card networks must make the MCC available for merchant acquirers that provide payment services for firearms merchants in California by July 1, 2024. Second, merchant acquirers – the entities that establish relationships with merchants for purposes of processing credit, debit, or prepaid transactions – must assign the MCC to firearms merchants in California by March 1, 2025. The determination of who is a “firearms merchant” is based on the merchant's own representation of its sales in the ordinary course of business and is applied only to merchants for whom their highest sales are expected to come from firearms, ammunition, or firearm accessories in the aggregate; a merchant who sells firearms as one component of a larger business, such as Wal-Mart, likely would not be assigned the firearms MCC. The author has agreed to a minor amendment to clarify how a merchant's sales should be tabulated to qualify as a “firearms merchant.”

The bill gives the DOJ the sole authority to enforce the bill's requirements imposed on payment card networks and merchant acquirers. The bill does not authorize the DOJ to take action against a firearms merchant. Before pursuing an action for a violation, the DOJ must give a noncompliant merchant acquirer or payment card network notice and 30 days to cure the violation. If the merchant acquirer or payment card network does not, within 30 days, cure and provide the DOJ proof of the correction – including policy changes made to prevent another violation in the future – the DOJ may file an action in court to recover a civil penalty of \$10,000 per violation, injunctive relief to prevent further violations, and reasonable attorney fees and costs incurred in investigating and bringing the action.

According to the author and sponsors, the use of the firearms MCC will help prevent gun violence, such as by enabling banks to use the firearms MCC to identify persons who intend to commit mass shootings. California, of course, already requires firearm and ammunition sales to be recorded by and registered with the DOJ; given that the firearms MCC does not reveal what items are being purchased, only the nature of the merchant making the sale, the firearms MCC appears to be a less precise tool for identifying firearms transactions than those already in place. Additionally, it appears that the firearms MCC could be easily evaded through measures like going to a store that sells firearms but does not have the firearms MCC (again, such as Wal-Mart), or paying with cash.

Some of the opposition argues the application of the firearms MCC to merchants violates the Second Amendment to the United States Constitution. They do not point to anything within the text of the Second Amendment suggesting that the “right to keep and bear arms” includes the right to make secret purchases,¹⁴ but instead suggest that

¹⁴ U.S. Const., 2d amend.

the MCC will generally chill gun purchases. Again, given that California already has an extensive firearms and ammunition tracing framework, it is difficult to see how the addition of an MCC identifying firearms merchants would meaningfully change the privacy landscape. Opponents also argue that this bill could create federal preemption or interstate commerce clause issues. Given that there is no federal law on this point yet, the source of the potential preemption is unclear. With respect to interstate commerce, this bill requires only that the MCC be used for firearms merchants located within California, which appears to fall well within the State's prerogative to govern transactions within the state.¹⁵ And to the extent that other states' laws prohibiting the firearms MCC purport to have extraterritorial effect and prohibit the use of the firearms MCC within California, those states' overreach does not constrain California's ability to govern itself.¹⁶

The California Constitution does include a right to own or possess a firearm, but it does protect the right to privacy.¹⁷ For the reasons set forth above, the firearms MCC is unlikely to provide the State with any information about gun purchases it does not already receive through other means, so it does not appear that this particular bill meaningfully changes the privacy landscape. At the same time, this Committee has heard and passed several bills this session that increase consumer data privacy, even for information that the consumer provided to a particular entity.¹⁸ Deputizing financial institutions – implicitly or explicitly – to scour consumer transaction histories for potential criminal conduct is a step in the other direction, and it is not difficult to imagine scenarios – say, involving reproductive health care – for which financial record privacy is imperative. The author correctly notes that federal law already requires financial institutions use consumer data to look for fraud, human trafficking, and terrorism activity, so it may be too late to close Pandora's box.

5. Amendments

As noted above, the author has agreed to a clarifying amendment to make clear that a merchant should be considered a "firearms merchant" if their combined sales of firearms, firearms accessories, and ammunition constitutes, or is expected to constitute, the merchant's highest sales value. The amendment is as follows, with additions in bold/underline and deletions in strikethrough, subject to any nonsubstantive changes the Office of Legislative Counsel may make:

Amendment

At page 3, in lines 14-20, modify the definition of "firearms merchant" to read:

¹⁵ See, e.g., *National Pork Producers Council v. Ross* (2023) 143 S.Ct. 1142, 1156.

¹⁶ *Ibid.*

¹⁷ Cal. Const., art. I, § 1.

¹⁸ E.g., AB 1194 (Wendy Carrillo, 2023); AB 1011 (Weber, 2023); AB 254 (Bauer-Kahan, 2023).

(d) "Firearms merchant" means a business licensed in California as a firearms dealer or ammunition vendor for which the highest sales value is, or is expected to be, from the **combined** sale in California of firearms, firearm accessories, or ammunition ~~in aggregate~~, as stated by the business to its merchant acquirer in the ordinary course of business.

6. Arguments in support

According to Brady California, a sponsor of the bill:

This bill is simple. It would mandate that banks and credit card companies utilize this life saving tool and attach the MCC code to California businesses that have, or are expected to have the highest sales volume, of firearms, firearms accessories, or ammunition. This is consistent with how other MCC codes are used for all other businesses in California, all over the country and all around the world. This will allow financial institutions to identify and report to law enforcement known patterns that are highly suggestive of illegal firearms trafficking – such as repetitive purchases at the same gun store or purchases at multiple gun stores with corresponding cash deposits supplying them with a critical tool to interrupt trafficking rings that flood our communities with guns and violence. This is how we can stop gun violence *BEFORE* it happens.

7. Arguments in opposition

According to the California Rifle & Pistol Association (CRPA):

DOJ will gain no new data that it does not already possess in the status quo through firearms and ammunition purchases. Given the fact that MCCs will not provide any additional information to solve crimes, it appears that the intent is focused on placing law-abiding citizens in harm's way. Imagine a parent supporting their child by making a purchase of shotgun ammunition for competitive shooting at the range and having a completely unwarranted visitation by DOJ agents for doing nothing illegal.

SUPPORT

Brady California (co-sponsor)
The Brady Campaign (co-sponsor)
Everytown for Gun Safety
Women for American Values and Ethics

OPPOSITION

California Rifle & Pistol Association, Inc.

Gun Owners of California
National Rifle Association

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: None known.

PRIOR VOTES:

Senate Banking and Financial Institutions Committee (Ayes 5, Noes 2)
Assembly Floor (Ayes 76, Noes 0)
Assembly Appropriations Committee (Ayes 15, Noes 0)
Assembly Housing and Community Development Committee (Ayes 8, Noes 0)
