



# Congressional Review

*Legislators pass merchant reporting and lay groundwork for other action*

By David Goch and Mary Bennett

With the 2008 election looming, Congress has largely finished work for the year and for the current term. And with one major exception, federal legislators spent most of their efforts laying the groundwork on payments industry legislation for the next Congress, which convenes in early 2009.

The big exception, of course, was inclusion of the IRS merchant reporting requirement in legislation shoring up the housing and mortgage industries, which passed both houses in late 2007 and was signed into law July 30. The Electronic Transactions Association (ETA), along with many other industry groups like the American Banking Association and the U.S. Chamber of Commerce, vigorously opposed the reporting requirement and succeeded in making some changes, despite the huge election-year momentum in favor of the housing bailout legislation.

Congress made little progress on legislative proposals dealing with data security breach notification, interchange regulation, repeal of the Internet gambling law, and other credit card or payment-related topics, but may have set the stage for more rapid movement in 2009 by holding hearings and circulating draft legislation on many of these issues. Like the IRS reporting legislation, any or all of these issues could emerge as serious legislation without much warning.

## IRS Reporting Legislation

On July 30, President Bush signed into law the American Housing Rescue and Prevention Act of 2008. Under that law, acquirers will have to send a report each year to the IRS listing each merchant by taxpayer ID and the total amount of credit and debit card transactions processed for each listed merchant. Merchants also will receive an individual report from acquirers, showing their an-



nual transaction total. The same requirement applies to third-party network transactions, such as those via PayPal or Google Checkout, which do not involve payment cards. In certain cases, the reporting entity will have to impose backup withholding on settlements with merchants in addition to the reporting requirement.

The burden of collecting the necessary information and delivering these annual reports falls on the payment settlement entity. In most cases involving credit or debit cards, this entity is the bank or other organization contractually obligated to make payment in settlement of a payment card transaction (the "merchant acquiring entity"). For third-party network transactions, however, responsibility for reporting falls on the "central" organization obligated to make payment to payees of the network (the "third-party settlement organization").

Further, if reportable transactions contain more than one payee, and the transaction is ultimately settled through an intermediary, then the intermediary party is considered the payee and is also considered the payment settlement entity with regard to the final settlement of the transaction with the participating payee (the merchant). When an electronic payment facilitator or any other third party makes payment on behalf of a settlement entity, the facilitator/third party is responsible for reporting.

A "reportable transaction" is any payment card transaction—regardless of

whether the card is physically present—and any third-party network transaction (ACH, PayPal, Google Checkout, etc.). Each transaction reporting the gross amount paid to a merchant must also be tagged with the merchant's name, address, and taxpayer ID number (TIN). The requirement applies only to organizations that have more than 200 reportable transactions and more than \$20,000 in reportable transactions in a given year.

Perhaps most troubling is that the payment settlement entity will have to verify a business's TIN. If it doesn't, or if it reports an incorrect TIN, the law requires withholding 28 percent of the money that is due to the business while the situation is resolved.

The U.S. Treasury Department soon will begin writing regulations to implement the law, a process in which ETA will participate and will monitor closely.

## Interchange and Card Fees

Payments professionals should expect interchange to continue to receive a great deal of attention—and be the subject of one or more legislative proposals. The following recent actions have implications for the industry:

- The Credit Card Fair Fee Act of 2008, introduced by House Judiciary Committee Chairman John Conyers (D-Michigan), is not expected to pass in 2008, but very likely will be reintroduced to the next Congress. The bill allows merchants to negotiate with Visa or MasterCard on the rates and terms of access to the interchange system with limited antitrust immunity. In July, the Committee passed a manager's amendment and the bill was reported favorably, along with amendments that benefit the payments industry. The first eliminated a provision that would have created a three-judge panel to preside over interchange rate negotiations. The second amendment



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would prohibit antitrust immunity for any merchants or electronic payment providers that engage in an unlawful boycott.

- On June 6, Sen. Richard Durbin (D-Illinois), a member of the Senate Judiciary Committee, introduced legislation allowing businesses to negotiate directly with credit card companies to reduce interchange fees. Similar to the Conyers bill, Durbin's bill would enable retailers to collectively negotiate with providers of any electronic payment system with significant market power (at least 20 percent of the credit and debit card market) over the fees and terms of access to that system. If the retailers and providers do not reach a voluntary agreement, the matter would be brought before a panel of three expert judges appointed by the Department of Justice Antitrust Division and the Federal Trade Commission.
- On June 11, Rep. Peter Welch (D-Vermont) introduced the Credit Card Interchange Fees Act, which would force credit card companies to disclose all interchange rates, as well as give the FTC and the Federal Reserve Board the

ability to review and possibly reform interchange rates and terms. The bill would require all credit card terms and conditions be made available to businesses using electronic payments and primarily concentrates on interchange fees. It also would empower the FTC and the Federal Reserve to promulgate any necessary regulations that would keep interchange rates, as well as their accompanying rules and conditions, from becoming anticompetitive. Additionally, the bill would prohibit any additional fees on merchants for rewards cards, would allow merchants to give discounts to consumers who pay in cash, and would ban penalties for small businesses that process a low number of transactions.

- In early August, members of the Senate Small Business and Entrepreneurship Committee asked the GAO to investigate the structure of credit card interchange fees used to reimburse credit card companies for processing card transactions. Noting that these fees are a hot topic of debate, Senators Benjamin Cardin (D-Maryland), Olympia Snowe (R-Maine), and Tom Harkin

(D-Iowa) noted that while credit card companies contend that both consumers and businesses receive great benefits from the current system, merchants are concerned that card issuers are pushing the cost incentives and rewards programs onto businesses and consumers through the interchange fees.

Much of what Congress will do (or not do) when it convenes in January will be influenced significantly by the outcome of next month's general election. Democrats are expected to increase their majorities in both houses, which may make it easier for politically popular bills to pass quickly. And should Democrats also control the White House, vetoes of popular legislation almost certainly will be fewer.

To keep track of ETA's advocacy efforts, visit [www.electran.org](http://www.electran.org). **TT**

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