

115TH CONGRESS  
1ST SESSION

# S. 2188

To amend the Fair Credit Reporting Act to provide protections for consumers after a data breach at a consumer reporting agency, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

DECEMBER 4, 2017

Mr. MENENDEZ introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

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## A BILL

To amend the Fair Credit Reporting Act to provide protections for consumers after a data breach at a consumer reporting agency, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Consumer Data Pro-  
5 tection Act”.

6 **SEC. 2. DATA SECURITY.**

7 (a) IN GENERAL.—The Fair Credit Reporting Act  
8 (15 U.S.C. 1681 et seq.) is amended by inserting after  
9 section 605B (15 U.S.C. 1681c–2) the following:

1 **“SEC. 605C. DATA SECURITY AT CONSUMER REPORTING**  
2 **AGENCIES.**

3 “(a) DEFINITIONS.—In this section—

4 “(1) the term ‘affected individual’ means an in-  
5 dividual, the sensitive personal information of whom  
6 is lost, stolen, or accessed without authorization be-  
7 cause of a data breach;

8 “(2) the term ‘appropriate committees of Con-  
9 gress’ means—

10 “(A) the Committee on the Judiciary of  
11 the Senate;

12 “(B) the Committee on Banking, Housing,  
13 and Urban Affairs of the Senate;

14 “(C) the Committee on the Judiciary of  
15 the House of Representatives; and

16 “(D) the Committee on Financial Services  
17 of the House of Representatives;

18 “(3) the term ‘covered action’ means an action  
19 that restricts the legal rights available to a con-  
20 sumer, including—

21 “(A) requiring the consumer to—

22 “(i) waive the right of the consumer  
23 to—

24 “(I) file a civil action in an ap-  
25 propriate court; or

1                   “(II) bring, or participate in, a  
2                   class action; or

3                   “(ii) engage in settlement negotiations  
4                   before bringing an action under subsection  
5                   (c)(3); and

6                   “(B) offering a financial inducement in ex-  
7                   change for the consumer waiving any right of  
8                   the consumer;

9                   “(4) the term ‘credit freeze’—

10                   “(A) except as provided in subparagraph  
11                   (B), means a restriction placed on the consumer  
12                   report of a consumer at the request of the con-  
13                   sumer, or a personal representative of the con-  
14                   sumer, that prohibits a consumer reporting  
15                   agency from releasing the consumer report for  
16                   any purpose; and

17                   “(B) with respect to the consumer report  
18                   of a consumer, shall not apply to the use of the  
19                   consumer report by—

20                   “(i) a person, or a subsidiary, affil-  
21                   iate, agent, subcontractor, or assignee of  
22                   the person, with which the consumer has,  
23                   or before assignment had, an account, con-  
24                   tract, or debtor-creditor relationship for  
25                   the purposes of—

1                   “(I) reviewing the active account;

2                   or

3                   “(II) collecting the financial obli-  
4                   gation owed on the account, contract,  
5                   or debt;

6                   “(ii) any person acting under a court  
7                   order, warrant, or subpoena;

8                   “(iii) a Federal, State, or local gov-  
9                   ernment or an agent or assignee of a Fed-  
10                  eral, State, or local government;

11                  “(iv) any person for the sole purpose  
12                  of providing a credit monitoring or identity  
13                  theft protection service to which the con-  
14                  sumer has subscribed;

15                  “(v) any person for the purpose of  
16                  providing a consumer with a copy of the  
17                  consumer report, credit score, or edu-  
18                  cational credit score of the consumer upon  
19                  request by the consumer;

20                  “(vi) any person or entity for insur-  
21                  ance purposes, including use in setting or  
22                  adjusting a rate, adjusting a claim, or un-  
23                  derwriting; and

24                  “(vii) any person acting under an au-  
25                  thorization from a consumer to use the

1 consumer report of the consumer for em-  
2 ployment purposes;

3 “(5) the term ‘data breach’ means the loss,  
4 theft, or other unauthorized access, other than ac-  
5 cess that is incidental to the scope of employment,  
6 of data containing sensitive personal information, in  
7 electronic or printed form, that results in the poten-  
8 tial compromise of the confidentiality or integrity of  
9 the data; and

10 “(6) the term ‘sensitive personal information’  
11 means, with respect to an individual, information—

12 “(A) about the individual relating to the  
13 education, financial transactions, medical his-  
14 tory, criminal history, or employment history of  
15 the individual; and

16 “(B) that can be used to distinguish or  
17 trace the identity of the individual, including  
18 the name, social security number, date and  
19 place of birth, mother’s maiden name, and bio-  
20 metric records of the individual.

21 “(b) DATA BREACHES AT CONSUMER REPORTING  
22 AGENCIES.—With respect to a data breach at a consumer  
23 reporting agency, the consumer reporting agency—

24 “(1) shall notify—

1           “(A) not later than 2 days after the date  
2           on which the consumer reporting agency dis-  
3           covers the data breach—

4                   “(i) the Federal Trade Commission;

5                   “(ii) the Bureau; and

6                   “(iii) appropriate law enforcement and  
7           intelligence agencies, as identified by the  
8           Secretary of Homeland Security; and

9           “(B) subject to paragraph (2), not later  
10          than 3 days after the date on which the con-  
11          sumer reporting agency discovers the data  
12          breach, and as quickly and efficiently as is  
13          practicable, each affected individual with re-  
14          spect to the data breach;

15          “(2) may receive an extension of the deadline  
16          described in paragraph (1)(B) if the Federal Trade  
17          Commission and the intelligence agencies identified  
18          under paragraph (1)(A)(iii) determine that there is  
19          a national security concern that requires granting  
20          such an extension;

21          “(3) shall, upon request by any affected indi-  
22          vidual with respect to the data breach, provide, with-  
23          out charge to the affected individual and during the  
24          lifetime of the affected individual—

1           “(A) a credit freeze, including the cost re-  
2 relating to imposing, lifting, or permanently re-  
3 moving a credit freeze, with respect to the con-  
4 sumer report of the affected individual at any  
5 consumer reporting agency described in section  
6 603(p); and

7           “(B) credit monitoring services for the af-  
8 fected individual at any consumer reporting  
9 agency described in section 603(p); and

10          “(4) shall, in consultation with the Bureau, es-  
11 tablish a consumer assistance unit—

12           “(A) that shall—

13               “(i) be carried out, and paid for, by  
14 the consumer reporting agency; and

15               “(ii) provide assistance, free of charge  
16 and for a period of 10 years beginning on  
17 the date on which the consumer reporting  
18 agency submits the notifications required  
19 under paragraph (1)(A), to any affected  
20 individual who wants to dispute an item in  
21 the file of the affected individual that was  
22 entered into that file after the date on  
23 which the data breach occurred; and

24           “(B) with respect to which the consumer  
25 reporting agency shall, as soon as practicable

1 after the date on which the consumer assistance  
2 unit is established, notify each affected indi-  
3 vidual with respect to the data breach by mail  
4 and e-mail.

5 “(c) ENFORCEMENT.—

6 “(1) IN GENERAL.—Subject to subtitle B of the  
7 Consumer Financial Protection Act of 2010 (12  
8 U.S.C. 5511 et seq.), the Federal Trade Commission  
9 or the Bureau may bring a civil action to recover a  
10 civil penalty in an appropriate district court of the  
11 United States against any person that negligently,  
12 knowingly, or willingly causes a data breach at a  
13 consumer reporting agency.

14 “(2) PENALTY AMOUNT.—

15 “(A) IN GENERAL.—In a successful action  
16 brought under paragraph (1), the person  
17 against which the action is brought shall be lia-  
18 ble for a civil penalty of not more than—

19 “(i) \$2,500 for each affected indi-  
20 vidual with respect to the data breach  
21 caused by the person; and

22 “(ii) \$25,000,000 in total.

23 “(B) CONSIDERATIONS.—In determining  
24 the amount of a civil penalty in a successful ac-  
25 tion brought under paragraph (1), the court



1 shall consider, with respect to the person  
2 against which the action is brought—

3 “(i) the degree of culpability of the  
4 person;

5 “(ii) any history of similar prior con-  
6 duct by the person;

7 “(iii) the ability of the person to pay;

8 “(iv) the effect of the penalty on the  
9 ability of the person to continue to do busi-  
10 ness; and

11 “(v) any other factor as justice may  
12 require.

13 “(3) PRIVATE CAUSE OF ACTION.—

14 “(A) DEFINITION.—In this paragraph, the  
15 term ‘actual loss’ means the total cost to an af-  
16 fected individual as a result of a data breach at  
17 a consumer reporting agency, including—

18 “(i) the costs incurred by the affected  
19 individual—

20 “(I) in responding to the data  
21 breach; and

22 “(II) as a result of—

23 “(aa) reviewing accounts of  
24 the affected individual for fraud-  
25 ulent charges;

1                   “(bb) closing accounts of the  
2                   affected individual that may have  
3                   been compromised by the data  
4                   breach; and

5                   “(cc) imposing credit freezes  
6                   and obtaining credit monitoring  
7                   services; and

8                   “(ii) any revenue lost, or cost or con-  
9                   sequential damage incurred, by the af-  
10                  fected individual relating to the interrup-  
11                  tion of the ability of the affected individual  
12                  to obtain credit.

13                  “(B) CAUSE OF ACTION.—

14                  “(i) IN GENERAL.—An affected indi-  
15                  vidual may bring an action in an appro-  
16                  priate district court of the United States  
17                  against any person that negligently, know-  
18                  ingly, or willingly caused a data breach at  
19                  a consumer reporting agency in which the  
20                  sensitive personal information of the af-  
21                  fected individual was lost, stolen, or  
22                  accessed without authorization.

23                  “(ii) DAMAGES.—In a successful ac-  
24                  tion brought by an affected individual

1 under clause (i), the affected individual  
2 may recover—

3 “(I) the greater of—

4 “(aa) the actual loss to the  
5 affected individual with respect  
6 to the data breach described in  
7 that clause; or

8 “(bb) \$1,000 in liquidated  
9 damages;

10 “(II) punitive damages, as the  
11 court may allow; and

12 “(III) the costs of the action, to-  
13 gether with reasonable attorney’s fees,  
14 as determined by the court.

15 “(d) REVIEW OF COMPLIANCE WITH STANDARDS  
16 FOR SAFEGUARDING CUSTOMER INFORMATION.—

17 “(1) DEFINITION.—In this subsection, the term  
18 ‘covered person’ has the meaning given the term in  
19 section 1002 of the Consumer Financial Protection  
20 Act of 2010 (12 U.S.C. 5481).

21 “(2) EXAMINATION.—The Bureau may examine  
22 any consumer reporting agency that is a covered  
23 person subject to supervision under section 1024 of  
24 the Consumer Financial Protection Act of 2010 (12  
25 U.S.C. 5514) for compliance by that agency with the

1 standards established by the Federal Trade Commis-  
2 sion under section 501(b) of the Gramm-Leach-Bli-  
3 ley Act (15 U.S.C. 6801(b)).

4 “(e) PROTECTION OF LEGAL RIGHTS OF CON-  
5 SUMERS.—A consumer reporting agency may not take a  
6 covered action—

7 “(1) as a condition of providing any service or  
8 product to, or on behalf of, a consumer; and

9 “(2) that relates to the rights of a consumer  
10 after a data breach at the consumer reporting agen-  
11 cy in which the sensitive personal information of the  
12 consumer is lost, stolen, or accessed without author-  
13 ization.

14 “(f) ANNUAL STUDY AND REPORT.—

15 “(1) IN GENERAL.—Beginning in the first full  
16 year after the date of enactment of this section, and  
17 annually thereafter, the Bureau and the Federal  
18 Trade Commission, in consultation with the Attor-  
19 ney General, shall conduct a study regarding the  
20 costs to affected individuals from data breaches at  
21 consumer reporting agencies, including—

22 “(A) the economic costs to those affected  
23 individuals;

24 “(B) the effects on—

1           “(i) the ability of those affected indi-  
2           viduals to obtain credit and housing; and

3           “(ii) the reputations of those affected  
4           individuals; and

5           “(C) the costs relating to the emotional  
6           and psychological stress of those affected indi-  
7           viduals from having the sensitive personal infor-  
8           mation of those affected individuals lost, stolen,  
9           or accessed without authorization.

10          “(2) SUBMISSION TO CONGRESS.—Not later  
11          than 30 days after the date on which each study  
12          conducted under paragraph (1) is completed, the  
13          Bureau and the Federal Trade Commission shall  
14          submit to the appropriate committees of Congress a  
15          report that contains the results of the study.

16          “(3) CONTENTS.—Each study conducted under  
17          paragraph (1) and each report submitted under  
18          paragraph (2) shall contain a survey of affected indi-  
19          viduals who were contacted for the purposes of con-  
20          ducting the study.

21          “(4) AUTHORITY.—In conducting any study  
22          under paragraph (1), the Bureau, the Federal Trade  
23          Commission, and the Attorney General may compel  
24          a consumer reporting agency to disclose nonpropri-  
25          etary information.

1       “(g) RULE OF CONSTRUCTION.—Nothing in this sec-  
2 tion may be construed as modifying, limiting, or super-  
3 seding any provision of State law if the protection that  
4 the provision of State law provides to consumers is greater  
5 than the protection provided to consumers under this sec-  
6 tion.”.

7       (b) TECHNICAL AND CONFORMING AMENDMENT.—  
8 The table of contents for the Fair Credit Reporting Act  
9 (15 U.S.C. 1681 et seq.) is amended by inserting after  
10 the item relating to section 605B the following:

“605C. Data security at consumer reporting agencies.”.

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