

112TH CONGRESS  
1ST SESSION

# S. 1434

To protect information relating to consumers, to require notice of security breaches, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

JULY 28, 2011

Mr. CARPER (for himself and Mr. BLUNT) 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 protect information relating to consumers, to require notice of security breaches, 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 “Data Security Act of  
5 2011”.

6 **SEC. 2. DEFINITIONS.**

7 For purposes of this Act, the following definitions  
8 shall apply:

1           (1) AFFILIATE.—The term “affiliate” means  
2 any company that controls, is controlled by, or is  
3 under common control with another company.

4           (2) AGENCY.—The term “agency” has the same  
5 meaning as in section 551(1) of title 5, United  
6 States Code.

7           (3) BREACH OF DATA SECURITY.—

8           (A) IN GENERAL.—The term “breach of  
9 data security” means the unauthorized acquisition  
10 of sensitive account information or sen-  
11 sitive personal information.

12           (B) EXCEPTION FOR DATA THAT IS NOT IN  
13 USABLE FORM.—

14           (i) IN GENERAL.—The term “breach  
15 of data security” does not include the un-  
16 authorized acquisition of sensitive account  
17 information or sensitive personal informa-  
18 tion that is maintained or communicated in  
19 a manner that is not usable—

20                   (I) to commit identity theft; or

21                   (II) to make fraudulent trans-  
22 actions on financial accounts.

23           (ii) RULE OF CONSTRUCTION.—For  
24 purposes of this subparagraph, information  
25 that is maintained or communicated in a

1 manner that is not usable includes any in-  
2 formation that is maintained or commu-  
3 nicated in an encrypted, redacted, altered,  
4 edited, or coded form.

5 (4) COMMISSION.—The term “Commission”  
6 means the Federal Trade Commission.

7 (5) CONSUMER.—The term “consumer” means  
8 an individual.

9 (6) CONSUMER REPORTING AGENCY THAT COM-  
10 PILES AND MAINTAINS FILES ON CONSUMERS ON A  
11 NATIONWIDE BASIS.—The term “consumer reporting  
12 agency that compiles and maintains files on con-  
13 sumers on a nationwide basis” has the same mean-  
14 ing as in section 603(p) of the Fair Credit Report-  
15 ing Act (15 U.S.C. 1681a(p)).

16 (7) COVERED ENTITY.—

17 (A) IN GENERAL.—The term “covered en-  
18 tity” means any—

19 (i) entity, the business of which is en-  
20 gaging in financial activities, as described  
21 in section 4(k) of the Bank Holding Com-  
22 pany Act of 1956 (12 U.S.C. 1843(k));

23 (ii) financial institution, including any  
24 institution described in section 313.3(k) of

1 title 16, Code of Federal Regulations, as in  
2 effect on the date of enactment of this Act;

3 (iii) entity that maintains or otherwise  
4 possesses information that is subject to  
5 section 628 of the Fair Credit Reporting  
6 Act (15 U.S.C. 1681w); or

7 (iv) other individual, partnership, cor-  
8 poration, trust, estate, cooperative, associa-  
9 tion, or entity that maintains or commu-  
10 nicates sensitive account information or  
11 sensitive personal information.

12 (B) EXCEPTION.—The term “covered enti-  
13 ty” does not include any agency or any other  
14 unit of Federal, State, or local government or  
15 any subdivision of such unit.

16 (8) FINANCIAL INSTITUTION.—The term “fi-  
17 nancial institution” has the same meaning as in sec-  
18 tion 509 of the Gramm-Leach-Bliley Act (15 U.S.C.  
19 6809).

20 (9) SENSITIVE ACCOUNT INFORMATION.—The  
21 term “sensitive account information” means a finan-  
22 cial account number relating to a consumer, includ-  
23 ing a credit card number or debit card number, in  
24 combination with any security code, access code,

1 password, or other personal identification informa-  
2 tion required to access the financial account.

3 (10) SENSITIVE PERSONAL INFORMATION.—

4 (A) IN GENERAL.—The term “sensitive  
5 personal information” means the first and last  
6 name, address, or telephone number of a con-  
7 sumer, in combination with any of the following  
8 relating to such consumer:

9 (i) Social Security account number.

10 (ii) Driver’s license number or equiva-  
11 lent State identification number.

12 (iii) Taxpayer identification number.

13 (B) EXCEPTION.—The term “sensitive per-  
14 sonal information” does not include publicly  
15 available information that is lawfully made  
16 available to the general public from—

17 (i) Federal, State, or local government  
18 records; or

19 (ii) widely distributed media.

20 (11) SUBSTANTIAL HARM OR INCONVEN-  
21 IENCE.—

22 (A) IN GENERAL.—The term “substantial  
23 harm or inconvenience” means—

24 (i) material financial loss to, or civil  
25 or criminal penalties imposed on, a con-

1 consumer, due to the unauthorized use of sen-  
 2 sitive account information or sensitive per-  
 3 sonal information relating to such con-  
 4 sumer; or

5 (ii) the need for a consumer to expend  
 6 significant time and effort to correct erro-  
 7 neous information relating to the con-  
 8 sumer, including information maintained  
 9 by a consumer reporting agency, financial  
 10 institution, or government entity, in order  
 11 to avoid material financial loss, increased  
 12 costs, or civil or criminal penalties, due to  
 13 the unauthorized use of sensitive account  
 14 information or sensitive personal informa-  
 15 tion relating to such consumer.

16 (B) EXCEPTION.—The term “substantial  
 17 harm or inconvenience” does not include—

18 (i) changing a financial account num-  
 19 ber or closing a financial account; or

20 (ii) harm or inconvenience that does  
 21 not result from identity theft or account  
 22 fraud.

23 **SEC. 3. PROTECTION OF INFORMATION AND SECURITY**  
 24 **BREACH NOTIFICATION.**

25 (a) SECURITY PROCEDURES REQUIRED.—

1           (1) IN GENERAL.—Each covered entity shall  
2           implement, maintain, and enforce reasonable policies  
3           and procedures to protect the confidentiality and se-  
4           curity of sensitive account information and sensitive  
5           personal information which is maintained or is being  
6           communicated by or on behalf of a covered entity,  
7           from the unauthorized use of such information that  
8           is reasonably likely to result in substantial harm or  
9           inconvenience to the consumer to whom such infor-  
10          mation relates.

11          (2) LIMITATION.—Any policy or procedure im-  
12          plemented or maintained under paragraph (1) shall  
13          be appropriate to the—

14                 (A) size and complexity of a covered entity;

15                 (B) nature and scope of the activities of  
16                 such entity; and

17                 (C) sensitivity of the consumer information  
18                 to be protected.

19          (b) INVESTIGATION REQUIRED.—

20                 (1) IN GENERAL.—If a covered entity deter-  
21                 mines that a breach of data security has or may  
22                 have occurred in relation to sensitive account infor-  
23                 mation or sensitive personal information that is  
24                 maintained or is being communicated by, or on be-

1 half of, such covered entity, the covered entity shall  
2 conduct an investigation—

3 (A) to assess the nature and scope of the  
4 breach;

5 (B) to identify any sensitive account infor-  
6 mation or sensitive personal information that  
7 may have been involved in the breach; and

8 (C) to determine if such information is  
9 reasonably likely to be misused in a manner  
10 causing substantial harm or inconvenience to  
11 the consumers to whom the information relates.

12 (2) NEURAL NETWORKS AND INFORMATION SE-  
13 CURITY PROGRAMS.—In determining the likelihood  
14 of misuse of sensitive account information under  
15 paragraph (1)(C), a covered entity shall consider  
16 whether any neural network or security program has  
17 detected, or is likely to detect or prevent, fraudulent  
18 transactions resulting from the breach of security.

19 (c) NOTICE REQUIRED.—If a covered entity deter-  
20 mines under subsection (b)(1)(C) that sensitive account  
21 information or sensitive personal information involved in  
22 a breach of data security is reasonably likely to be misused  
23 in a manner causing substantial harm or inconvenience  
24 to the consumers to whom the information relates, such



1 covered entity, or a third party acting on behalf of such  
2 covered entity, shall—

3 (1) notify, in the following order—

4 (A) the appropriate agency or authority  
5 identified in section 5;

6 (B) an appropriate law enforcement agen-  
7 cy;

8 (C) any entity that owns, or is obligated  
9 on, a financial account to which the sensitive  
10 account information relates, if the breach in-  
11 volves a breach of sensitive account informa-  
12 tion;

13 (D) each consumer reporting agency that  
14 compiles and maintains files on consumers on a  
15 nationwide basis, if the breach involves sensitive  
16 personal information relating to 5,000 or more  
17 consumers; and

18 (E) all consumers to whom the sensitive  
19 account information or sensitive personal infor-  
20 mation relates; and

21 (2) take reasonable measures to restore the se-  
22 curity and confidentiality of the sensitive account in-  
23 formation or sensitive personal information involved  
24 in the breach.

25 (d) COMPLIANCE.—

1           (1) IN GENERAL.—A financial institution shall  
2       be deemed to be in compliance with—

3           (A) subsection (a), and any regulations  
4       prescribed under such subsection, if such insti-  
5       tution maintains policies and procedures to pro-  
6       tect the confidentiality and security of sensitive  
7       account information and sensitive personal in-  
8       formation that are consistent with the policies  
9       and procedures of such institution that are de-  
10      signed to comply with the requirements of sec-  
11      tion 501(b) of the Gramm-Leach-Bliley Act (15  
12      U.S.C. 6801(b)) and any regulations or guid-  
13      ance prescribed under that section that are ap-  
14      plicable to such institution; and

15          (B) subsections (b) and (c), and any regu-  
16      lations prescribed under such subsections, if  
17      such institution—

18           (i)(I) maintains policies and proce-  
19      dures to investigate and provide notice to  
20      consumers of breaches of data security  
21      that are consistent with the policies and  
22      procedures of such institution that are de-  
23      signed to comply with the investigation and  
24      notice requirements established by regula-  
25      tions or guidance under section 501(b) of

1 the Gramm-Leach-Bliley Act (15 U.S.C.  
2 6801(b)) that are applicable to such insti-  
3 tution; or

4 (II) is an affiliate of a bank holding  
5 company that maintains policies and proce-  
6 dures to investigate and provide notice to  
7 consumers of breaches of data security  
8 that are consistent with the policies and  
9 procedures of a bank that is an affiliate of  
10 such institution, and that bank's policies  
11 and procedures are designed to comply  
12 with the investigation and notice require-  
13 ments established by any regulations or  
14 guidance under section 501(b) of the  
15 Gramm-Leach-Bliley Act (15 U.S.C.  
16 6801(b)) that are applicable to that bank;  
17 and

18 (ii) provides for notice to the entities  
19 described under subparagraphs (B), (C),  
20 and (D) of subsection (c)(1), if notice is  
21 provided to consumers pursuant to the  
22 policies and procedures of such institution  
23 described in clause (i).

24 (2) DEFINITIONS.—For purposes of this sub-  
25 section, the terms “bank holding company” and

1 “bank” shall have the same meaning given such  
2 terms under section 2 of the Bank Holding Com-  
3 pany Act of 1956 (12 U.S.C. 1841).

4 **SEC. 4. IMPLEMENTING REGULATIONS.**

5 (a) IN GENERAL.—Notwithstanding any other provi-  
6 sion of law, and except as provided under section 6, the  
7 agencies and authorities identified in section 5, with re-  
8 spect to the covered entities that are subject to the respec-  
9 tive enforcement authority of such agencies and authori-  
10 ties, shall prescribe regulations to implement this Act.

11 (b) COORDINATION.—Each agency and authority re-  
12 quired to prescribe regulations under subsection (a) shall  
13 consult and coordinate with each other agency and author-  
14 ity identified in section 5 so that, to the extent possible,  
15 the regulations prescribed by each agency and authority  
16 are consistent and comparable.

17 (c) METHOD OF PROVIDING NOTICE TO CON-  
18 SUMERS.—The regulations required under subsection (a)  
19 shall—

20 (1) prescribe the methods by which a covered  
21 entity shall notify a consumer of a breach of data se-  
22 curity under section 3; and

23 (2) allow a covered entity to provide such notice  
24 by—

1 (A) written, telephonic, or e-mail notifica-  
2 tion; or

3 (B) substitute notification, if providing  
4 written, telephonic, or e-mail notification is not  
5 feasible due to—

6 (i) lack of sufficient contact informa-  
7 tion for the consumers that must be noti-  
8 fied; or

9 (ii) excessive cost to the covered enti-  
10 ty.

11 (d) CONTENT OF CONSUMER NOTICE.—The regula-  
12 tions required under subsection (a) shall—

13 (1) prescribe the content that shall be included  
14 in a notice of a breach of data security that is re-  
15 quired to be provided to consumers under section 3;  
16 and

17 (2) require such notice to include—

18 (A) a description of the type of sensitive  
19 account information or sensitive personal infor-  
20 mation involved in the breach of data security;

21 (B) a general description of the actions  
22 taken by the covered entity to restore the secu-  
23 rity and confidentiality of the sensitive account  
24 information or sensitive personal information  
25 involved in the breach of data security; and

1           (C) the summary of rights of victims of  
2           identity theft prepared by the Commission  
3           under section 609(d) of the Fair Credit Report-  
4           ing Act (15 U.S.C. 1681g), if the breach of  
5           data security involves sensitive personal infor-  
6           mation.

7           (e) TIMING OF NOTICE.—The regulations required  
8           under subsection (a) shall establish standards for when  
9           a covered entity shall provide any notice required under  
10          section 3.

11          (f) LAW ENFORCEMENT DELAY.—The regulations  
12          required under subsection (a) shall allow a covered entity  
13          to delay providing notice of a breach of data security to  
14          consumers under section 3 if a law enforcement agency  
15          requests such a delay in writing.

16          (g) SERVICE PROVIDERS.—The regulations required  
17          under subsection (a) shall—

18               (1) require any party that maintains or commu-  
19               nicates sensitive account information or sensitive  
20               personal information on behalf of a covered entity to  
21               provide notice to that covered entity if such party  
22               determines that a breach of data security has, or  
23               may have, occurred with respect to such information;  
24               and

1           (2) ensure that there is only 1 notification re-  
2           sponsibility with respect to a breach of data security.

3           (h) **TIMING OF REGULATIONS.**—The regulations re-  
4           quired under subsection (a) shall—

5           (1) be issued in final form not later than 6  
6           months after the date of enactment of this Act; and

7           (2) take effect not later than 6 months after  
8           the date on which they are issued in final form.

9           **SEC. 5. ADMINISTRATIVE ENFORCEMENT.**

10          (a) **IN GENERAL.**—Notwithstanding any other provi-  
11          sion of law, section 3, and the regulations required under  
12          section 4, shall be enforced exclusively under—

13          (1) section 8 of the Federal Deposit Insurance  
14          Act (12 U.S.C. 1818), in the case of—

15                (A) a national bank, a Federal branch or  
16                Federal agency of a foreign bank, or any sub-  
17                sidiary thereof (other than a broker, dealer,  
18                person providing insurance, investment com-  
19                pany, or investment adviser), or a savings asso-  
20                ciation, the deposits of which are insured by the  
21                Federal Deposit Insurance Corporation, or any  
22                subsidiary thereof (other than a broker, dealer,  
23                person providing insurance, investment com-  
24                pany, or investment adviser), by the Office of  
25                the Comptroller of the Currency;

1 (B) a member bank of the Federal Reserve  
2 System (other than a national bank), a branch  
3 or agency of a foreign bank (other than a Fed-  
4 eral branch, Federal agency, or insured State  
5 branch of a foreign bank), a commercial lending  
6 company owned or controlled by a foreign bank,  
7 an organization operating under section 25 or  
8 25A of the Federal Reserve Act (12 U.S.C.  
9 601, 604), or a bank holding company and its  
10 nonbank subsidiary or affiliate (other than a  
11 broker, dealer, person providing insurance, in-  
12 vestment company, or investment adviser), by  
13 the Board of Governors of the Federal Reserve  
14 System; and

15 (C) a bank, the deposits of which are in-  
16 sured by the Federal Deposit Insurance Cor-  
17 poration (other than a member of the Federal  
18 Reserve System), an insured State branch of a  
19 foreign bank, or any subsidiary thereof (other  
20 than a broker, dealer, person providing insur-  
21 ance, investment company, or investment ad-  
22 viser), by the Board of Directors of the Federal  
23 Deposit Insurance Corporation;

24 (2) the Federal Credit Union Act (12 U.S.C.  
25 1751 et seq.), by the National Credit Union Admin-



1       istration Board with respect to any federally insured  
2       credit union;

3               (3) the Securities Exchange Act of 1934 (15  
4       U.S.C. 78a et seq.), by the Securities and Exchange  
5       Commission with respect to any broker or dealer;

6               (4) the Investment Company Act of 1940 (15  
7       U.S.C. 80a–1 et seq.), by the Securities and Ex-  
8       change Commission with respect to any investment  
9       company;

10              (5) the Investment Advisers Act of 1940 (15  
11       U.S.C. 80b–1 et seq.), by the Securities and Ex-  
12       change Commission with respect to any investment  
13       adviser registered with the Securities and Exchange  
14       Commission under that Act;

15              (6) the Commodity Exchange Act (7 U.S.C. 1  
16       et seq.), by the Commodity Futures Trading Com-  
17       mission with respect to any futures commission mer-  
18       chant, commodity trading advisor, commodity pool  
19       operator, or introducing broker;

20              (7) the provisions of title XIII of the Housing  
21       and Community Development Act of 1992 (12  
22       U.S.C. 4501 et seq.), by the Director of Federal  
23       Housing Enterprise Oversight (and any successor to  
24       such functional regulatory agency) with respect to  
25       the Federal National Mortgage Association, the Fed-

1       eral Home Loan Mortgage Corporation, and any  
2       other entity or enterprise (as defined in that title)  
3       subject to the jurisdiction of such functional regu-  
4       latory agency under that title, including any affiliate  
5       of any such enterprise;

6               (8) State insurance law, in the case of any per-  
7       son engaged in providing insurance, by the applica-  
8       ble State insurance authority of the State in which  
9       the person is domiciled; and

10              (9) the Federal Trade Commission Act (15  
11       U.S.C. 41 et seq.), by the Commission for any other  
12       covered entity that is not subject to the jurisdiction  
13       of any agency or authority described under para-  
14       graphs (1) through (8).

15       (b) EXTENSION OF FEDERAL TRADE COMMISSION  
16       ENFORCEMENT AUTHORITY.—The authority of the Com-  
17       mission to enforce compliance with section 3, and the reg-  
18       ulations required under section 4, under subsection (a)(8)  
19       shall—

20              (1) notwithstanding the Federal Aviation Act of  
21       1958 (49 U.S.C. App. 1301 et seq.), include the au-  
22       thority to enforce compliance by air carriers and for-  
23       eign air carriers; and

24              (2) notwithstanding the Packers and Stock-  
25       yards Act (7 U.S.C. 181 et seq.), include the author-

1       ity to enforce compliance by persons, partnerships,  
2       and corporations subject to the provisions of that  
3       Act.

4       (c) NO PRIVATE RIGHT OF ACTION.—

5             (1) IN GENERAL.—This Act, and the regula-  
6       tions prescribed under this Act, may not be con-  
7       strued to provide a private right of action, including  
8       a class action with respect to any act or practice  
9       regulated under this Act.

10            (2) CIVIL AND CRIMINAL ACTIONS.—No civil or  
11       criminal action relating to any act or practice gov-  
12       erned under this Act, or the regulations prescribed  
13       under this Act, shall be commenced or maintained in  
14       any State court or under State law, including a  
15       pendent State claim to an action under Federal law.

16       **SEC. 6. PROTECTION OF INFORMATION AT FEDERAL AGEN-**  
17       **CIES.**

18       (a) DATA SECURITY STANDARDS.—Each agency  
19       shall implement appropriate standards relating to admin-  
20       istrative, technical, and physical safeguards—

21             (1) to insure the security and confidentiality of  
22       the sensitive account information and sensitive per-  
23       sonal information that is maintained or is being  
24       communicated by, or on behalf of, that agency;

1           (2) to protect against any anticipated threats or  
2 hazards to the security of such information; and

3           (3) to protect against misuse of such informa-  
4 tion, which could result in substantial harm or in-  
5 convenience to a consumer.

6           (b) SECURITY BREACH NOTIFICATION STAND-  
7 ARDS.—Each agency shall implement appropriate stand-  
8 ards providing for notification of consumers when such  
9 agency determines that sensitive account information or  
10 sensitive personal information that is maintained or is  
11 being communicated by, or on behalf of, such agency—

12           (1) has been acquired without authorization;  
13 and

14           (2) is reasonably likely to be misused in a man-  
15 ner causing substantial harm or inconvenience to the  
16 consumers to whom the information relates.

17 **SEC. 7. RELATION TO STATE LAW.**

18           No requirement or prohibition may be imposed under  
19 the laws of any State with respect to the responsibilities  
20 of any person to—

21           (1) protect the security of information relating  
22 to consumers that is maintained or communicated  
23 by, or on behalf of, such person;

24           (2) safeguard information relating to consumers  
25 from potential misuse;

1           (3) investigate or provide notice of the unau-  
2           thorized access to information relating to consumers,  
3           or the potential misuse of such information for  
4           fraudulent, illegal, or other purposes; or

5           (4) mitigate any loss or harm resulting from  
6           the unauthorized access or misuse of information re-  
7           lating to consumers.

8   **SEC. 8. DELAYED EFFECTIVE DATE FOR CERTAIN PROVI-**  
9   **SIONS.**

10          (a) COVERED ENTITIES.—Sections 3 and 7 shall take  
11          effect on the later of—

12                 (1) 1 year after the date of enactment of this  
13          Act; or

14                 (2) the effective date of the final regulations re-  
15          quired under section 4.

16          (b) AGENCIES.—Section 6 shall take effect 1 year  
17          after the date of enactment of this Act.

○