



February 27, 2023

Chair McHenry, Ranking Member Waters, and Members of the Committee on Financial Services:

The undersigned organizations write to you today to express opposition to H.R. 1165, The Data Privacy Act of 2023, scheduled for mark-up in Committee this Tuesday, February 28. While we are pleased to see that language in an earlier draft of this bill, which would have repealed Section 1033 of the Dodd-Frank Act (which gives consumers the right to access their own data from a financial service business concerning the product or service they receive from that business), has been removed, we continue to have significant concerns about this bill. Some of our organizations communicated about these concerns earlier this month in an earlier statement prepared for the February 8 Subcommittee hearing entitled “Revamping and Revitalizing Banking in the 21st Century.”¹

While claiming to strengthen the Gramm-Leach-Bliley Act (GLBA) and increase consumer protections, H.R. 1165 actually would result in fewer rights for consumers, because it would deprive them of important – and enforceable – rights under state law, including the laws in over half states that govern credit reporting and in some cases, other types of consumer

¹ Consumer Groups Statement of Opposition to Bill that Would Preempt Stronger State Privacy Law, Feb. 8, 2023, <https://www.nclc.org/resources/consumer-groups-statement-of-opposition-to-bill-that-would-preempt-stronger-state-privacy-law/>

reporting. The bill rewrites Section 507 of GLBA to preempt any state or municipal law or rule that regulates financial institutions with respect to “the collection or disclosure of personal information.” *The potential scope of this preemption is breathtaking.*

The Data Privacy Act of 2023 Preempts a Broad Array of Stronger State Laws.

At an initial glance, Section 507 of GLBA as amended by H.R. 1165 would nullify the application of state privacy laws to banks and credit unions. One example would be the California Financial Information Privacy Act,² which unlike GLBA requires **opt-in**, not opt-out, for sharing with nonaffiliated third parties. This California law should serve as a model for a real, meaningful change to GLBA’s weak opt-out regime. Instead, H.R. 1165 nullifies this better opt-in regime. The bill could also be interpreted to override state data breach notification laws, which all 50 states have adopted, with respect to financial institutions, because such laws would arguably pertain to the “disclosure” of personal information.

But the scope of preemption does not stop there, because the term “financial institutions” under GLBA covers more than just depository institutions. GLBA’s coverage extends to consumer reporting agencies (CRAs) and debt collection agencies,³ as well as auto dealers, travel agents, and many other businesses that are not banks or credit unions.⁴ Thus, H.R. 1165’s expanded scope of preemption would nullify any state privacy law governing these entities, *including state credit reporting laws, as well as laws governing the furnishing of certain information (e.g. medical debt) to CRAs.*

State credit reporting and medical debt laws could be wiped out by the Data Privacy Act of 2023

Over half of the states (27 plus Puerto Rico) have laws governing credit reports, and in some cases, other types of consumer reports.⁵ These laws may govern the Big Three credit bureaus (*i.e.* Equifax, Experian and TransUnion); other CRAs (e.g., tenant screening and background check companies); the creditors and debt collectors that furnish information to those entities (known as “furnishers”); and businesses that use credit reports and other consumer reports. Most of these state credit/consumer reporting laws allow the consumer to seek legal relief. *All of these state laws could potentially be wiped out by H.R. 1165.*

² Cal. Fin. Code §§ 4050 to 4060. The California Consumer Privacy Act also has data security provisions that are applicable to financial institutions and privately enforceable. Cal. Civ. Code § 1798.150

³ The Bank Holding Company Act regulation on which “financial institution” status is based refers specifically to both collection agency activities in (b)(2)(iv) and credit bureau services in (b)(2)(v). 12 C.F.R. § 225.28. See also *Trans Union, L.L.C. v. Fed. Trade Comm’n*, 295 F.3d 42, 48, 49 (D.C. Cir. 2002) (FTC permissibly determined that a CRA is a “financial institution” subject to the rulemaking authority of the FTC under the Act)). See generally, National Consumer Law Center, *Fair Credit Reporting* (10th ed. 2022) § 18.4.1.4, updated at www.nclc.org/library.

⁴ 12 C.F.R. § 1016.3(l)(3). See generally, National Consumer Law Center, *Fair Credit Reporting* (10th ed. 2022) § 18.4.1.4, updated at www.nclc.org/library.

⁵ These states include AZ, AR, CA, CO, CT, GA, KS, LA, ME, MD, MA, MI, MT, NE, NV, NH, NJ, NM, NY, OH, OK, PR, RI, SC, TX, UT, VT, WA. For citations and summaries, see Appendix H of National Consumer Law Center, *Fair Credit Reporting* (10th ed. 2022), updated at www.nclc.org/library.

State laws governing CRAs or furnishers could be preempted as laws governing "the collection or disclosure of personal information" under Section 507(a) as amended by H.R. 1165. These laws include California Civil Code 1785.25(a), a law that was specifically carved out from preemption⁶ by the Fair and Accurate Transactions Act of 2003 (FACTA). It is one of the few (if not the only) law that permits consumers to seek legal relief against a furnisher for submitting inaccurate information without first filing a dispute with a CRA. The carveout of California Civil Code § 1785.25(a) was a specific tradeoff made during the drafting of FACTA.

Another example of a law that could be preempted is a Maine law restricting reporting of medical debts for the first 180 days, Me. Rev. Stat. Ann. tit. 10, § 1310-H(4). It was recently upheld in *CDIA v Frey*, 26 F.4th 1 (1st Cir. 2022), cert. denied, 2023 WL 2123760 (U.S. Feb. 21, 2023), as not preempted by the Fair Credit Reporting Act (FCRA). With H.R. 1165, that law might instead be preempted by GLBA. Texas has a similar law, Tex. Bus. & Comm. Code § 20.05(a)(5), and a number of states have pending bills to restrict the furnishing of medical debt information (e.g. North Carolina [HB 1039](#) - Medical Debt De-Weaponization Act; Colorado [HB 23-1126](#)) - all of these if passed could be preempted by H.R. 1165.

The Consumer Financial Protection Bureau (CFPB) took great pains to limit the scope of FCRA preemption in an Interpretive Rule issued July 2022,⁷ in part so that states could regulate the reporting of medical debts, which have proved to be a tremendous burden in terms of negative credit reporting on consumers. H.R. 1165 could potentially undo all of that, and even worse, eliminate every single state credit reporting law.

Note that GLBA specifically has a carveout for the Fair Credit Reporting Act at 15 U.S.C. § 6806. But the carveout does not extend to state credit reporting laws, which implies that they would be impacted by GLBA preemption.

Data Breach Notification Laws

A number of states have data breach notification laws that are stronger than GLBA and could be preempted with respect to financial institutions as laws that govern the "disclosure" of personal information. For example, the breach notification provisions issued under GLBA by the banking regulators do not require depository institutions to send a notification if they determine that misuse of the information is not "reasonably possible."⁸ Several states do not have this exception in their breach notification laws.⁹ More critically, the Federal Trade Commission's

⁶ 15 U.S.C. § 1681t(b)(1)(F)(ii).

⁷ CFPB, *The Fair Credit Reporting Act's Limited Preemption of State Laws*, 87 Fed. Reg. 41,042 (July 11, 2022).

⁸ See Supplement A to 12 C.F.R. Appendix B to Part 30—Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice (OCC version). There are parallel cites to the same Interagency Guidelines for the other banking regulators.

⁹ See, e.g., Cal. Civ. Code § 1798.82; Ga. Code Ann. § 10-1-912; 815 Ill. Comp. Stat. § 530/20, Mass. Gen. Laws ch. 93H, §3A.

Safeguards Rule issued under GLBA does not even require the non-depository institutions under its coverage to send breach notifications to consumers at all.¹⁰

Other stronger provisions of state laws include:

- California's law has specific formatting and informational requirements.¹¹
- Most importantly, many of these state laws allow consumers to seek redress in court if a business does not comply with the law's requirements.¹² While some of these laws provide that compliance with GLBA by a financial institution is sufficient for compliance with the state law, these state laws still do allow a consumer a private right of action if the financial institution fails to comply with both GLBA and the state law.

This last right is especially important because GLBA lacks a private remedy for consumers to enforce the Act when their rights are violated. Thus, for states with private remedies, this bill could strip consumers of their right to seek legal redress.

The Data Privacy Act of 2023 is effectively silent on and fails to address the need for more rights to private action or remedy for consumers.

GLBA's lack of a private remedy is one of the fundamental deficiencies of the Act. H.R. 1165 fails to improve the situation, and instead preempts private remedies in over 20 state credit reporting laws. It is silent on the need for such protections in federal law, which are desperately needed.

A previous draft contained modest new liability provisions, but these were limited in scope and added very little to the protections that consumers already have under the Electronic Funds Transfer Act (EFTA) and the Truth in Lending Act/Fair Credit Billing Act (TILA/FCBA). This failure is not only a missed opportunity, but when combined with the overly broad preemption of state laws, is effectively a step backward that would strip consumers of their existing rights to seek legal redress under these state laws.

Thank you for your consideration. If you have any questions about this statement, please contact Chi Chi Wu at cwu@nclc.org or 617-542-8010.

¹⁰ FTC Safeguards Rule, 16 C.F.R. part 314. The FTC has recently proposed adding a requirement for the institutions under its jurisdiction to provide a notification to the Commission itself, but not to consumers. 86 Fed. Reg. 70062 (Dec. 9, 2021).

¹¹ Cal. Civ. Code § 1798.82.

¹² See, e.g., Alaska Stat. § 45.48.080; Cal. Civ. Code § 1798.82; Haw. Rev. Stat. § 487N-3; 815 Ill. Comp. Stat. § 530/20; La. Stat. Ann. § 51:3075; Md. Code Ann., Com. Law § 14-3508; Mass. Gen. Laws ch. 93H, §3A; N.H. Rev. Stat. Ann. § 359-C:21; N.C. Gen. Stat. § 75-65; Or. Rev. Stat. § 646A.604; S.C. Code Ann. § 39-1-90; Tenn. Code Ann. § 47-18-2107; Wash. Rev. Code § 19.255.040. Cf. Va. Code Ann. § 18.2-186.6.