



October 16, 2020

Professor Harvey Perlman
Chair, ULC Collection and Use of Personally Identifiable Data Committee
McCollum Hall 263
Lincoln NE 68583-0902

Re: Collection and Use of Personally Identifiable Data Act, October 12, 2020 Draft

Dear Professor Perlman,

Consumer Reports¹ appreciates the work of the Uniform Law Commission in developing this latest draft of the Collection and Use of Personally Identifiable Data Act (CUPIDA), and the opportunity to offer comments.² We have been closely involved in recent state efforts to implement privacy legislation, such as in California and Washington State, and recognize the challenges in devising legislation that adequately protects consumers without creating unworkable requirements on industry. However, the key goal of this legislation should be to rein in abusive practices that undermine consumer privacy, and unfortunately, this proposal misses the mark. As currently drafted, this ambiguous proposal would do little to protect privacy and reform companies' data collection and sharing behaviors. We generally agree with the points made in the analysis submitted by Common Sense Media, Consumer Federation of America, Electronic Frontier Foundation, and Privacy Rights Clearinghouse, and recommend several changes to the CUPIDA draft in order to align in with consumers' fundamental right to privacy:

¹ Consumer Reports is an independent, nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For over 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests. Unconstrained by advertising, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to advancing privacy protections, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

² National Conference of Commissioners on Uniform State Laws, Collection and Use of Personally Identifiable Data Act (Oct. 12, 2020) [hereinafter CUPIDA].

- Clearly prohibit secondary data processing, including cross-context targeted advertising; and
- Prohibit disparate treatment for individuals exercising their privacy rights.

Now more than ever, consumers need effective privacy protections. Consumers are constantly tracked: online, through apps, and in the physical world. Without protections over the sharing of data, our personal information can be sold without our permission or awareness, or otherwise disseminated in ways that could mean getting charged more for insurance, or even facing job discrimination.³ This information is often widely traded as a matter of course. As just one example, a recent study found that 10 apps, including dating and period-tracking apps, together sent sensitive personal information on consumers (such as location data) to at least 135 companies involved in advertising and behavioral profiling.⁴ Additionally, in light of the COVID-19 crisis, consumers are increasingly relying on their internet service providers, Google platforms, and teleconferencing services, and should not have to sacrifice their right to privacy in order to work and learn from home.

However, as drafted, this proposal would put companies in control of deciding whether or not consumers' information will be shared with third parties — rendering it meaningless as privacy legislation. By providing protections only over “incompatible data practices,” which are vaguely defined as practices that are not consistent with typical expectations and not likely to benefit consumers,⁵ companies are given broad leeway to decide whether or not to extend privacy rights to consumers, even though companies may have a very different interpretation of what is expected or beneficial than ordinary consumers.

Because the proliferation of data is, to the consumer, unpredictable and hard to control, the law's protections should apply *per se* protections for privacy intrusions. Potential harms to the consumer may not be obvious when the data is first collected because data collected in the past could be used in new and unexpected ways. In addition, the notion of compatible or incompatible practices introduces unnecessary uncertainty into the law, both for companies and consumers. In practice these decisions will be made (often opaquely) by companies with incentives to allow data processing and disregard consumer interests.

Companies have proven that they cannot be trusted to regulate themselves with respect to privacy. The online advertising industry has already reneged on commitments to honor Do Not Track signals and have implemented self-regulation practices that have failed to limit the

³ Donna Rosato, *What Your Period Tracker App Knows About You*, CONSUMER REPORTS (Jan. 28, 2020), <https://www.consumerreports.org/health-privacy/what-your-period-tracker-app-knows-about-you/>.

⁴ *Out of Control: How Consumers Are Exploited by the Online Advertising Industry*, NORWEGIAN CONSUMERS COUNCIL at 5-6 (Jan. 14, 2020), <https://fil.forbrukerradet.no/wp-content/uploads/2020/01/2020-01-14-out-of-control-final-version.pdf>.

⁵ CUPIDA, *supra* note 2, Section 8(a).

collection and sale of consumer data in any meaningful way.⁶ And many of the biggest companies, such as Facebook, have managed to avoid meaningful regulation by declaring their data sharing practices, including for cross-context targeted advertising, outside of the opt-out provision of the CCPA,⁷ even though reining in the abuses of cross-context targeted advertising was one of the motivating factors for the legislation.⁸ The language in this draft, if it moves forward, could do real harm by enshrining existing weak, voluntary controls.

Further, the draft explicitly blesses cross-context targeted advertising as a compatible data practice over which consumers have no control.⁹ For many consumers, behavioral advertising is a serious abuse of their personal privacy. Not only does the widespread collection of data involved in this tracking leave consumers vulnerable to security breaches and inadvertent disclosure of damaging information, but it also reveals more about consumers than they might want to share with others: their sexual preferences, health issues, and political activities. It can also perpetuate historic inequalities by facilitating differential pricing¹⁰ and allowing companies to target job or housing offers to members of specific groups.¹¹ Finally, most people just don't want their personal information sold to countless strangers without their knowledge,¹² and at the very least companies should be required to honor consumers' efforts to opt out of the ad tech ecosystem.

To help address these issues, we offer the following recommendations:

- **Clearly prohibit secondary data processing, including for cross-context targeted advertising.** Instead of using vague concepts such as “incompatible data practices,” the draft should clearly lay out that only processing that is necessary to provide the service should be permitted, with narrowly-crafted carveouts for operational purposes such as

⁶ Statement of Justin Brookman, *Before the House Subcommittee on Digital Commerce and Consumer Protection*, Understanding the Digital Advertising Ecosystem at 10 (June 14, 2018),

<https://docs.house.gov/meetings/IF/IF17/20180614/108413/HHRG-115-IF17-Wstate-BrookmanJ-20180614.pdf>.

⁷ Patience Haggin, *Facebook Won't Change Web Tracking in Response to California Privacy Law*, WALL ST. J. (Dec. 12, 2019), <https://www.wsj.com/articles/facebook-wont-change-web-tracking-in-response-to-california-privacy-law-11576175345>.

⁸ Nicholas Confessore, *The Unlikely Activists Who Took On Silicon Valley — and Won*, N.Y. TIMES (Aug. 14, 2018),

<https://www.nytimes.com/2018/08/14/magazine/facebook-google-privacy-data.html>.

⁹ CUPIDA, *supra* note 2, Section 7(d).

¹⁰ BIG DATA AND DIFFERENTIAL PRICING (Feb. 2015),

https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs/Big_Data_Report_Nonembargo_v2.pdf.

¹¹ Noam Scheiber and Mike Isaac, *Facebook Halts Ad Targeting Cited in Bias Complaints*, N.Y. TIMES (Mar. 19, 2019), <https://www.nytimes.com/2019/03/19/technology/facebook-discrimination-ads.html>.

¹² Mary Madden and Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CTR. (May 20, 2015), <https://www.pewresearch.org/internet/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/>; Joseph Turow et al., *The Tradeoff Fallacy: How Marketers are Misrepresenting American Consumers and Opening Them Up to Exploitation*, Annenberg School for Communication, University of Pennsylvania (Jun. 2015), https://www.asc.upenn.edu/sites/default/files/TradeoffFallacy_1.pdf.

first-party analytics. Data processing for secondary purposes should be prohibited, including for cross-context targeted ads.

- **Prohibit disparate treatment for individuals who exercise privacy rights.** This draft includes language that would allow companies to charge consumers for exercising their rights under the law.¹³ Such language could render privacy rights attainable only to those who can afford it, and was one of the primary reasons why Consumer Reports could not support the CCPA.¹⁴ Privacy is a right, and should be available to everyone. The language instead should clarify that companies may not treat consumers differently for not agreeing to share data for a separate unrelated product. Consumer Reports would be happy to provide language clarifying that bona fide loyalty programs, that reward consumers for repeated patronage but do not disclose data to third parties pursuant to those programs, are permitted. Additionally, the 2020 Washington Privacy Act does a good job of addressing this important issue.¹⁵

We thank you again for your work on this draft, and are happy to provide language for your consideration. We look forward to working with you to help ensure that consumers have the strongest possible legal protections to safeguard their personal data.

Sincerely,

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¹³ CUPIDA, *supra* note 2, Section 8(g).

¹⁴ Consumer Reports, Letter to California Legislature Re: AB 375 (Jun. 28, 2018), <https://advocacy.consumerreports.org/wp-content/uploads/2018/06/CU-Letter-AB-375-final-1.pdf>.

¹⁵ Washington Privacy Act, SB 6281 (2019-20), <https://app.leg.wa.gov/billsummary?BillNumber=6281&Initiative=false&Year=2019>.