

ULC CUPID

COMPARISON BETWEEN ALTERNATIVE DRAFT AND COMMITTEE DRAFT

August 4, 2020

By Commissioner James Bopp, Jr.

Introduction

Following the recommendation of a Study Committee that it base its proposed Act on the EU's General Data Protection Regulation ["GDPR"] and the California Consumer Privacy Act ["CCPA"], this Drafting Committee began its deliberations. As a result, the first draft of the proposed Act, the Collection and Use of Personally Identifiable Data Act ["Committee Draft"], was based on these laws and the Drafting Committee has continued to base its deliberations on this framework. The Drafting Committee never debated the underlying premises for the GDPR, the CCPA or the Committee Draft, or their suitability to accomplish the aims of the Drafting Committee.

However, as the Drafting Committee's deliberations continued, grave questions were raised with regard to some of the premises that underlie the Committee Draft based on cost, workability and enactability. At the Drafting Committee's meeting in February, Commissioner Larry Metz proposed an outline for an Alternative Draft, which, at my request, he reduced to writing. After sharing the Metz outline with several Commissioners and Official Observers, it was decided that a thought experiment should be initiated on whether an Alternative Draft, based on the Metz outline, could be developed, what it would look like, and whether it would be an improvement on the Committee Draft. Over the next few months, the interested parties developed an Alternative Draft. In April, that Alternate Draft was put aside to see if the work of the Drafting Committee could be successfully completed based on the Committee Draft.

It soon became clear, however, that the Drafting Committee's work was floundering because the Committee Draft contained some irreconcilable problems. As a result, the Alternative Draft was shared with Chairman Perlman and several other Commissioners and Official Observers. After their review and comment, substantial changes and improvements were made in the Alternative Draft, the Personal Data Protection and Information System Security Act, dated July 5, 2020, which was then submitted to Chairman Perlman for consideration by the Drafting Committee.

The following is a comparison of the Alternative Draft with Committee Draft, as I see it. This gives an overview and supplements the Alternative Draft's Prefatory Note and Comments.

Overview

Premise: The premise of the Alternative Draft is that there exists a mutually beneficial relationship between consumers, who provide personal data, and businesses, which receive the personal data, that should be fostered and protected, based on contract principles and on appropriate protection of personal privacy. Furthermore, consumers and the public at large often benefit from new and innovative uses of personal data. The Alternative Act protects this mutually beneficial relationship by imposing notice, consent and privacy protections on personal data provided to a business by the consumer. And it fosters innovation by permitting appropriate use of personal data, by preventing abuse, and by the flexible application of the privacy protection requirements to defined sectors and in specific contexts. The Alternative Draft does not seek to supplant existing privacy laws but supplements them where no current privacy protections exists.

The Committee Draft, however, seems to envision a world of predatory businesses, intent on misusing and abusing consumer's personal data, so they need to be highly regulated and closely monitored. The premise also seems to be that consumers own, i.e., have a property right in, their personal data, regardless of the source of that data, except if publically available. As a result, the Committee Draft imposes a vast array of burdensome and detailed consumer rights and business duties, applicable to anyone with consumer personal data regardless of source, implemented through an elaborate and intrusive system of administrative and bureaucratic requirements and procedures on businesses, and backed up by the threat of government and private enforcement.

Approach: The Alternative Draft's approach is reasonable and flexible. Customer notice and consent to the use of personal data is required, but it also includes implied consent for compatible uses. Businesses are required to comply with appropriate privacy protections, but may comply through a safe harbor of voluntary consensus standards, recognized by the Attorney General as complying with the Act, which tailors the Act's privacy protections and information system security requirements to defined sectors and in specific contexts. And businesses are deemed in compliance with the Act if they are in compliance with other privacy laws.

The Alternative Draft is based on the privacy protection principles of the Privacy Act of 1974 and the American Law Institute's Principles of Law, Data Protection, on the information security principles of the E-Government Act and the Federal Information Security Management Act, on the principles for voluntary consensus standards of the American National Standards Institute and the Office of Management and Budget Circular A-119, on the successful use of voluntary consensus standards to achieve compliance with the GDPR though Articles 40 and 41 in Great Britain and with the Consumer Products Safety Act, the Children's Online Privacy Protection Act, the Food, Drug, and Cosmetic Act, and on applicable constitutional

requirements.

The Committee Draft, however, imposes an elaborate one-size-fits-all regime of specific and detailed privacy rights and duties and a burdensome administrative and bureaucratic structure on all possessors of personal data.

The Committee Draft is based on the GDPR and CCPA, which have been extensively criticized for their costs of compliance, for enforcement and to innovation and competition, and for their overall ineffectiveness. *See, e.g., The 10 Problems of the GDPR*, Testimony of Roslyn Layton, American Enterprise Institute Visiting Scholar, Before the U.S. Senate Judiciary Committee, March 12, 2019, <https://www.judiciary.senate.gov/imo/media/doc/Layton%20Testimony1.pdf>.

Comparison of Key Features

(1) The Alternative Draft regulates businesses that collect personal data in connection with a relationship with a consumer, avoiding the pitfalls associated with attempting to regulate information directly, as the Committee Draft does.

The Committee Draft regulates all personal data, Committee Draft sec. 2(d), except publicly available information, Committee Draft sec. 2(12), and attempts to impose privacy protections, as well as information system security, on all personal information.

The Alternative Draft imposes privacy protection requirements, Alternative Draft sec. 4, only on personal data, Alternative Draft sec. 2(12), a much narrower definition than the Committee Draft's, which is collected from a consumer in connection with a relationship with the consumer. Alternative Draft sec. 2(3). This avoids the intractable problems associated with trying to impose notice and consent requirements on all personal data, including information not provided by the consumer, as the Committee Draft does.

(2) The Alternative Draft distinguishes between (a) personal data collected from consumers used for individualized decision-making, to which privacy protection requirements apply, and (b) personally identifiable information in information systems, to which security risk management practices are required, while the Committee Draft imposes privacy protection requirements on all personal data, broadly defined, anywhere.

The Committee Draft has one term, “personal data,” Committee Draft sec. 2(9), a broad definition, to which all privacy rights and duties, Committee Draft secs. 4, 5, 6, 7, 11, information system security requirements, Committee Draft secs. 10, 16, and administrative and bureaucratic requirements apply. Committee Draft secs. 8, 9, 14, 15, 17, 18.

The Alternative Draft has two terms: “personal data,” Alternative Draft sec. 2(12), a term much narrower than the Committee Draft’s, to which privacy protections apply, Alternative Draft sec. 4, and “personally identifiable information,” Alternative Draft sec. 2(13), a term as broad as the Committee Draft’s “personal data,” to which information system security requirements apply. Alternative Draft sec. 8. This avoids the intractable problems associated with imposing notice and consent requirements on the use of personal information generally.

(3) The Alternative Draft requires notice and consumer consent to use of personal data and implies consent for compatible uses, while the Committee Draft requires notice of and consent to every use.

The Committee Draft limits use of personal data, broadly defined, to only the original transaction the consumer requested, Committee Draft sec. 3(d), and the purposes for the processing of the personal data specified in the required notice which must be available when the personal data is collected from the consumer. Committee Draft sec. 12(d). Thus, consent is re-required for any new and unforeseen non-noticed use. Committee Draft secs. 12(a)(2), 13. The consumer can also opt-out of targeted advertising. Committee Draft sec. 12(c).

The Alternative Draft requires notice of any known use, Alternative Draft secs. 4(b)(4)(E), (F), and the consumer’s consent to the use, Alternative Draft sec. 4(a), but any compatible use is included within the consumer’s consent. Alternative Draft secs. 4(a), 5. This provides the flexibility of a reasonably implied consent to new and unforeseen, but appropriate and compatible, uses.

Furthermore, the Alternative Draft requires notice of and an opportunity to opt-out of any non-compatible use, Alternative Draft sec. 6, requires consent for every use of sensitive data, Alternative Draft sec. 6(b), and prohibits some uses all together. Alternative Draft sec. 7.

(4) The Alternative Draft is reasonable, flexible and adaptable, while the Committee Draft is specific, rigid, burdensome and exclusive.

The Alternative Draft imposes privacy requirements on the use of personal data based on reasonableness, *see, e.g.*, Alternative Draft sec. 4(b)(1) (“reasonable procedure”), on adaptability to defined sectors and in specific contexts through recognition of voluntary consensus standards, Alternative Draft secs. 9-13, and on compliance with other federal and state privacy laws. Alternative Draft secs. 3(b), 12(b), 13(g).

The Committee Draft has rigid, specific and detailed rights and duties, Committee Draft secs. 4, 5, 6, 7, 10, 11, imposes a burdensome administrative and bureaucratic structure on all businesses, Committee Draft secs. 8, 9, 14, 15, 16, 17, 18, and is exclusive, unless exempted. Committee Draft sec. 3(b). The Committee Draft currently exempts only 4 of the more than 600 known federal and state privacy laws, creating a potential conflict with each one of them.

(5) The enforcement of the Alternative Draft is through consumer protection laws, which integrates the Act into an already existing and familiar legal, bureaucratic and enforcement regime with little conflict with existing privacy laws, while the Committee Draft creates new privacy requirements through a new administrative and bureaucratic structure imposed on businesses and enforced directly which conflict with existing privacy laws.

The Committee Draft provides for enforcement by the Attorney General for any violation of the provisions of the Act. Committee Draft sec. 19. The direct enforcement of the provisions of the Act compounds the problems associated with the specific, rigid, exclusive and burdensome nature of the requirements of the Committee Draft and maximizes conflict with existing federal and state privacy laws. The Committee Draft provides for a limited private cause of action. Committee Draft sec. 20.

The Alternative Draft is enforced through the existing structure of state consumer protection laws, Alternative Draft sec. 14, and provides for a limited private cause of action only if provided for in the state’s consumer protection law. Alternative Draft secs. 14(c), (d), (e). Since enforcement of state consumer protection laws is already integrated with existing laws, it avoids these conflicts.