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Mr. Harvey Perlman
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Dear Harvey:

Thank you for organizing the video conference on April 14th to review the modifications to the first draft the Drafting Committee reviewed in February. We are concerned that the revised draft still does not adequately address the comments and discussions at the February meeting. Some of these were re-raised on the April 14th video conference. We bring them again to your attention here:

- The first draft's top-down, "command-and-control" structure was not replaced in the second draft with the kind of risk-based, two tier structure Karl Llewellyn used with such great success in the Uniform Commercial Code (i.e., facilitating best practices by the majority of businesses who are ethical while also clarifying when businesses will be punished).[1] This bill treats businesses as if they could not be trusted to apply general principles of law, imposing on all businesses a detailed set of obligations enforced by command and control hierarchy, whose only tools are threats of punishment. Because

[1] "You all have a hangover from law school; you feel that the proper way to draw a statute is to mark it out as if it was written for dumbell judges whom you are trying to corral. Of course that isn't the way to write good law. The way to write good law is to indicate what you want to do, and you assume within reason that the persons the law deals with will try to be decent; then after that, you lay down the edges to take care of the dirty guys and try to hold them in, which means that every statute ought to have two essential bases, one to show where the law wants you to go, and one to show where we will put you if you don't." Karl Llewellyn, Why a Commercial Code, 22 Tenn. L. Rev. 779 (1953)(address delivered at the 1952 Convention of the Tennessee Bar Association)

the fair information practice principles reflect the mutual interests of individuals and businesses in the appropriate handling of personal data, an incentive already exists for businesses to apply them appropriately. And for the small number of "dirty guys" who abuse their discretion, general principles allow the courts the right legal framework to hold them accountable.

- The second draft did not replace the first draft's single overbroad definition of "personal data" with different definitions appropriately calibrated to protect against the risk of concrete, tangible harm to consumers arising from non-compliance with the law. In the first Drafting Committee Meeting, Commissioners and observers repeatedly highlighted the fact that applying a single overbroad definition of "personal data" is unworkable because it creates insurmountable compliance barriers for businesses and can in fact *increase* privacy risks for consumers. A simple solution is to replace the overworked definition of "personal data" with two different definitions, a narrow one for structured information systems in which individual rights would apply under the fair information practice principles (FIPPs), and a broader one for all information systems to manage privacy risks using information security standards and privacy impact assessments. An example of a legal framework that effectively combines both a risk and a rights-based approach is the federal privacy framework where the Privacy Act of 1974 implements a system of individual rights for structured systems using the narrow definition of a "record", and the E-Government Act and the Federal Information Management Acts of 2002 effectively protect information systems against privacy risks using the broad definition of "personally identifiable information."

- The second draft's scope has not been integrated into the established consumer protection framework developed over decades by the Federal Trade Commission (FTC) and state attorneys general under the FTC Act and state baby FTC Acts. The second draft merely adds the concept of "unfair and deceptive acts and practices" to the first draft's framework, almost as an afterthought. Instead, the statute should provide that failing to appropriately implement fair information practice principles will be deemed an "unfair and deceptive practice." Because complying with a pre-existing sectoral privacy law cannot be deemed to be "unfair and deceptive," the "principles" approach builds instead of conflicts with the sectoral privacy system.

- The second draft does not contain a safe harbor framework based on approval by the [attorney general] of "voluntary, consensus standards" developed by businesses. This approach has been used to good effect in privacy laws like COPPA and the "codes of conduct" in GDPR. The information security section of this bill mentions "best practices," but these are not the same thing as codes of conduct or voluntary consensus standards. This approach involves a hybrid public-private partnership that removes barriers to the adoption of privacy standards by ethical businesses that wish to keep the trust of their customers, while keeping their compliance costs affordable. This also

simplifies the work of enforcement authorities in holding unethical businesses accountable.

- The second draft still contains the failed opt in/opt out model for consent as the means of providing heightened protections for sensitive information and compounds the problem by limiting compatible uses to those expressly disclosed in a notice to consumers. This perpetuates the existing failed system of overbroad notices never read by consumers and renders meaningless the role express consent needs to play in a privacy statute. It should be replaced with a structure based on implied consent for compatible uses, combined with an unequivocal requirement for express consent for any incompatible unauthorized secondary uses. This model provides much better protections to consumers while lessening compliance costs and increasing flexibility, as shown by the model of the HIPAA and the Privacy Act.

Please do not hesitate to be in touch if you have questions about these points or desire additional reference or clarification. We hope that you and the Committee will consider incorporating these suggestions into the committee's draft to be submitted to the annual meeting. Thank you for your attention.

Sincerely,

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*Views expressed reflect the scholars; American Enterprise Institute takes not policy positions.