

DRAFT
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COLLECTION AND USE OF PERSONALLY IDENTIFIABLE DATA ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

SEPTEMBER 17, 2020 SESSION



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September 4, 2020

COLLECTION AND USE OF PERSONALLY IDENTIFIABLE DATA ACT

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1 **COLLECTION AND USE OF PERSONALLY IDENTIFIABLE DATA ACT**

2 **INTRODUCTION**

3 The Collection and Use of Personally Identifiable Data Act (CUPID) regulates
4 enterprises that collect and use personal data from their consumers. The increasing capacity of
5 information technology along with the growing sophistication of data analytics permits personal
6 data to be used for a wide variety of purposes. Most fundamentally, personal data is critical to
7 many business transactions. Financial transactions, for example, require the collection of
8 background credit information. Loyalty programs require the collection and retention of
9 purchasing histories. Online purchases of goods and services require personal data to
10 authenticate the purchaser and permit delivery. Social media outlets enable us to share our news
11 and photos with friends and associates. And, increasingly, the connection of devices to the
12 internet, from our cell phones and virtual assistants to our automobiles and kitchen appliances,
13 provides the opportunity for the collection of significant amounts of information about our
14 everyday activities.

15
16 Beyond the mere collection of our personal information, various data points can be
17 analyzed together using sophisticated algorithms to produce a profile of our activities and to
18 predict our preferences, our health, our attitudes and our lifestyles. For example, it is reported
19 that on-line sellers, using profile data, can set an individualized price for each buyer close to the
20 maximum they would pay for the product. The personal data collected for a particular
21 transaction, when accumulated from all transactions, becomes a valuable business asset that can
22 be sold for use for other purposes. Some business models provide goods or services for free or
23 for less cost by relying on the sale of personal data as a primary revenue stream.

24
25 The objective of the drafting committee is to produce a uniform act to regulate the
26 collection, retention, and use of personal data in order to recognize people’s interests in the
27 personal data collected and used by companies. In the European Union, the General Data
28 Protection Regulation came into effect in 2018 and provides significant rights for data subjects,
29 including the right to know what data about them was being collected and the purpose for the
30 collection, the right to approve or disapprove of the use of their data, the right to correct
31 inaccurate data, and the right to have the data deleted when no longer necessary for the purpose
32 for which it was originally provided. The GDPR sparked interest in such legislation in the
33 United States, both to benefit consumers and to establish more uniform global rules for handling
34 personal data. California has adopted a comprehensive regulatory regime known as the
35 California Consumer Privacy Act (CCPA) which came into effect in January 2020. An initiative
36 measure is on the California ballot in November that would expand the regulatory structure over
37 use of personal data. Other states have considered similar proposals. No comprehensive statute
38 has been adopted although some specific privacy related measures have been enacted. For
39 example, Illinois has a statute regulating biometric data and Vermont has a statute requiring
40 registration of data brokers. While several proposals have been introduced in Congress, it does
41 not appear that they will be adopted anytime soon.

42
43 There are several major sector specific federal data privacy regimes in place, including
44 the Graham-Leach-Bliley Act (financial data), HIPPA (medical data), the Fair Credit Reporting

1 Act, the Federal Family Educational Rights and Privacy Act (student data) and several others.
2 Similarly, in some states there are more limited privacy regimes applicable to specific industries
3 or activities.
4

5 **The Committee Process**

6

7 The project has attracted over 200 observers from a wide variety of technology and other
8 industries interested in data collection as well as from consumer groups. The Committee was
9 able to have one pre-COVID-19 in-person meeting in February which was attended by over 50
10 observers. Since then we have had several Zoom sessions with active observer participation.
11 We have received numerous thoughtful and detailed position papers from them.
12

13 An initial framework draft was refined based on the February discussion and was
14 considered at two meetings conducted remotely. On April 14th, the committee held a 90 minute
15 video meeting, with the primary goal of soliciting observer comments on the revised draft. A
16 day long video meeting was then scheduled for April 24th with the primary objective to obtain
17 committee adoption of a first reading draft for submission to the Conference. Between April 14th
18 and April 23rd we received numerous detailed comments, suggestions, and concerns from a
19 variety of stakeholders. Fortunately, most of these came as specific suggestions for revision of
20 the text of the Act but some urged us to reconsider our basic approach.
21

22 In April two members of the drafting committee and a small number of observers
23 presented an alternative draft to the Committee. This alternative draft departed in significant
24 ways from the committee draft. This draft was much less prescriptive, narrowed the scope of the
25 regulatory footprint both in terms of who was regulated and what data was protected, recognized
26 compliance with other similar privacy regimes as sufficient, and incorporated a voluntary
27 consensus process to develop other permissible compliance regimes. It presented a very
28 different framework and philosophy for addressing personal data privacy. **The alternative draft**
29 **is found on the ULC website under the “2020 August 6 Web Conference” tab.**
30

31 The Committee held two meetings in August 2020 to consider which of the competing
32 drafts it was willing to pursue. The first meeting was with observers. While some were attracted
33 to the alternative, others were opposed and preferred the committee draft. A second meeting,
34 with only the committee present, convened a week later. Most thought there were attractive
35 elements of both drafts and that some middle ground seemed appropriate. Obviously, we have
36 not had the opportunity to develop these thoughts.
37

38 The first reading draft was presented to Commissioners at an informal session on August
39 19, 2020, and we received helpful comments. Some style suggestions from that meeting are
40 incorporated in the current draft, but there was not time for the committee to consider substantive
41 suggestions. A note in the comment to each section herein preserves those suggestions for
42 further deliberation. Accordingly, the committee draft is what is before you for this first reading.
43

1 **The Current Draft**

2
3 The current “first reading” draft is still very much a work in progress. The Drafting
4 Committee has voted to submit this to the Conference for your comments, but no committee vote
5 has been taken to approve any section or the work as a whole. This draft, like most first reading
6 drafts, is designed to solicit comments from other Commissioners and, importantly, keep this
7 project on schedule for a final reading in the summer of 2021.
8

9 During the coming year, the Committee will consider the alternative draft. It raises very
10 significant contrasts of framework and approach to personal data privacy. There is considerable
11 churn within the academic and external constituencies as to which approach is both efficient but
12 still effectively protects legitimate privacy interests. Most current U.S. privacy law presumes
13 that personal data may be freely collected and processed in the absence of any specific law
14 forbidding it, and most such laws are limited to particular narrow industries or types of
15 information (health, financial services, students, etc.). Commercial privacy generally has been
16 governed by a “notice and choice” model under which the further use of a consumer’s personal
17 data is often disclosed in terms of service or privacy policies which the consumer seldom reads.
18

19 Processing of data can include subsequent disclosures to or uses by third parties for
20 unrelated purposes. In theory, the consumer may “opt out” of these practices by choosing not to
21 use a product or service, thus exercising a weak form of consent when they use services that
22 collect data. This model has come under increasingly strong criticism for failing to offer
23 sufficient protection. European law, seen most recently in the GDPR, begins with the opposite
24 presumption, that individuals have inherent rights in their personal data, and it may be collected
25 and processed only when specifically allowed by law. One of those legally authorized methods
26 is obtaining “opt-in” affirmative consent from a consumer, but this is largely limited to uses
27 connected with the particular purposes for which the personal data was collected in the first
28 place. There have been criticisms of the European model for its inflexibility that does not
29 adequately reflect the realities of the marketplace. In some cases its terms, if applied in the
30 United States, may be inconsistent with the First Amendment. Recent proposals in state
31 legislatures and Congress have tried to chart a middle course between these extremes of
32 contractual consent or personal rights. The Committee will continue to deliberate about the
33 optimal balance.
34

35 Even though they begin with opposite presumptions, most existing models end up relying
36 heavily on a form of individual consent. That traditional reliance on consent, particularly but not
37 exclusively in the online world, generally provides little protection for data subjects and little
38 guidance for business enterprises in processing personal data. A third approach might be to
39 focus rather on general standards that should be met when data collectors utilize personal data.
40 Given the diversity of enterprises that collect and process personal data, a standards-based
41 approach might announce some floor of regulatory expectations but require particular industries
42 to adopt codes of conduct or voluntary consensus standards and then to hold them accountable
43 for compliance with those standards. These requirements would apply independently from
44 individual consumers’ consent.
45

1 The current committee draft moves toward less focus on notice and consent as the basis
2 for privacy protection. The alternative draft provides an even more dramatic departure,
3 emphasizing that uses of data consistent with the expectations of consumers when making the
4 disclosure are impliedly consensual without specific notice where as other, non-compatible uses,
5 must be fully disclosed.

6 It is likely that any act addressing these issues will blend these perspectives. The
7 committee welcomes your views on this fundamental question. It will be central to the
8 Committee’s deliberations in the year ahead.

9
10 Significant issues that remain for Committee consideration are noted in the comments to
11 the appropriate sections of the act. We welcome Commissioner comments on these or any other
12 elements.

13
14 One final note. In recent weeks we have had a transition in our Reporter. Bill
15 McGeveran provided significant guidance to the Committee during the first year but his
16 obligations as Associate Dean of the Minnesota Law School during the adjustment to the
17 pandemic made it impossible for him to continue. Jane Bambauer of the University of Arizona
18 Law School has agreed to join us as a Reporter and we look forward to having her talent and
19 expertise applied to this project.
20

1 **COLLECTION AND USE OF PERSONALLY IDENTIFIABLE DATA ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Collection and Use of
3 Personally Identifiable Data Act.

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Data controller” means a person that, alone or jointly with others, determines the
6 purpose and means of processing personal data.

7 (2) “Data processor” means a person that processes personal data for a data controller
8 under the controller’s direction.

9 (3) “Deidentified”, with respect to information, means lacking capacity to identify,
10 describe, or be associated with a particular individual, if the data processor or data controller
11 does not attempt to restore the capacity of the information to identify, describe, or be associated
12 with the individual and, to prevent others from doing so, implements the following:

13 (A) technical safeguards that reasonably prevent reidentification of the individual;

14 (B) a business process that specifically prohibits reidentification of the individual;

15 and

16 (C) a business process that reasonably prevents inadvertent release of the
17 information.

18 (4) “Device” means a physical object that connects to the Internet.

19 (5) “Electronic” means relating to technology having electrical, digital, magnetic,
20 wireless, optical, electromagnetic, or similar capabilities.

21 (6) “Person” means an individual, estate, business or nonprofit entity, or other legal
22 entity. The term does not include a public corporation, government or governmental subdivision,
23 agency, or instrumentality.

1 (7) “Personal data” means information that identifies or describes a particular individual
2 or can be associated with a particular individual with reasonable effort, whether or not the data
3 has been collected directly from the individual. The term includes a probabilistic inference about
4 the individual, including an inference derived from profiling or information that identifies a
5 household or device if it can be associated with a particular individual with reasonable effort.
6 The term includes a unique identification number, an Internet protocol address, and other data
7 related to a device if the data can be associated with a particular individual by using reasonable
8 effort. The term does not include deidentified data.

9 (8) “Processing” means performing an operation on personal data, whether or not by
10 automated means, including use, storage, disclosure, analysis, or modification. “Process” has a
11 corresponding meaning.

12 (9) “Profiling ” means processing to evaluate, analyze, or predict an individual’s
13 economic status, health, personal preferences, interests, character, reliability, behavior, social or
14 political views, physical location, movements or demographic characteristics, including race,
15 gender, and sexual orientation. The term includes making a probabilistic inference derived from
16 personal data. The term does not include evaluation, analysis, or prediction based solely on the
17 individual’s current activity, including search queries, if no personal data is retained for use after
18 completion of the processing.

19 (10) “Publicly available information” means information that is (A) lawfully made
20 available to the general public from federal, state, or local government records; (B) available in
21 widely distributed media; or (C) any such information that a person has a reasonable basis to
22 believe is lawfully made available to the general public. For purposes of this definition:

1 (A) a person has a reasonable basis to belief that information is lawfully made
2 available to the general public if the person has taken steps to determine that the information is
3 of the type that is available to the general public and that the data subject who can direct that the
4 information not be made available to the general public has not done so., and

5 (B) “Widely distributed media” means information that is available to the general
6 public, including information from a telephone book or online directory; a television, Internet, or
7 radio program; the news media; or a Web site that is available to the general public on an
8 unrestricted basis. A Web site is not restricted merely because an internet service provider or a
9 site operator requires a fee or password, so long as either the Web site makes the information
10 available to the general public or the consumer provides access to the information to the general
11 public. .

12 (11) “Record” means information that is inscribed on a tangible medium or that is stored
13 in an electronic or other medium and is retrievable in perceivable form.

14 (12) “Sensitive data” means:

15 (A) personal data revealing racial or ethnic origin, religious belief, mental or
16 physical health condition or diagnosis, an activity or preference related to gender sexual
17 orientation, citizenship, or immigration status;

18 (B) biometric or genetic information; or

19 (C) personal data about an individual known to be under [13] years of age.

20 (13) “Sign” means, with present intent to authenticate or adopt a record:

21 (A) to execute or adopt a tangible symbol; or

22 (B) to attach to or logically associate with the record an electronic symbol, sound,
23 or process.

1 (14) “State” means a state of the United States, the District of Columbia, Puerto Rico, the
2 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
3 the United States. [The term includes a federally recognized Indian tribe.]

4 (15) “Targeted advertising” means advertising displayed to an individual on the basis of
5 profiling.

6 (16) “Transfer” means convey to the possession or control of another person.

7 *Need legislative note for paragraphs 12(C) and 14.*

8 **Comment**

9 The reach of a data privacy act is driven by the definition of “personal data”. This term
10 can be as narrow as information that specifically identifies an individual or as broad as any piece
11 of information without identifying characteristics but when combined with other such
12 information identifies a specific individual. There is also data that starts out identifying an
13 individual but through technological means has been de-identified. This latter category does not
14 identify a person but can generally be re-identified.

15
16 The definition of “personal data” in this section includes any information that
17 incorporates specific personal identifiers, including name; a unique identification number such as
18 a social security number; an individual number for financial or similar accounts; payment card
19 information; a postal address; a telephone number; or an email address. The definition is not
20 limited to such directly identifying information, however. A profile about a unique individual
21 may be personal data even if it lacks any of these traditional identifiers. When information can
22 be used to make an association with an individual through one or more intervening inferences
23 using a reasonable amount of effort, that information qualifies as personal data. Similarly,
24 information associated with a device or a household is personal data if it can be associated with a
25 particular individual, even if the name of that individual is not known to the relevant data
26 controller or processor.

27
28 The alternate draft is limited to data that clearly identifies an individual for privacy
29 purposes but broadens the definition when there is an obligation to keep such data secure. The
30 committee has been encouraged to consider a tiered approach with some data having more
31 protection than others.

32
33 The current draft has a category of “sensitive data” which is personal data that has a clear
34 and important link to personal privacy. And it includes data about children. *Informal meeting*
35 *comment:* It was suggested the Committee think about whether addresses should be included as
36 “sensitive” data for persons subjected to domestic abuse or federal judges.

1 A broad definition of personal data also must account for data that may be ambiguous as
2 to the individual it identifies. An IP address on a home computer identifies a household but not
3 necessarily the user of the computer at any point in time. The GPS in an automobile or a
4 personal assistant on a cell phone may not identify the driver or user. These issues remain before
5 the committee.

6
7 **SECTION 3. SCOPE.**

8 (a) This [act] applies to the commercial activities of a data controller or data processor
9 that conducts business in this state or produces products or provides services targeted to this state
10 if the person:

11 (1) is the controller or processor of personal data concerning more than [50,000]
12 individuals in any one calendar year;

13 (2) earns more than [50] percent of its gross annual revenue directly from
14 activities as a data controller or data processor; or

15 (3) is a data processor acting on behalf of a controller whose activities the
16 processor knows or has reason to know satisfy paragraph (1) or (2).

17 (b) Subject to subsection (c), this [act] does not apply to:

18 (1) personal health information as defined in the Health Insurance Portability and
19 Accountability Act, Pub. L. 104-191 if the custodian of the information is regulated by that act;

20 (2) activity involving personal information governed by the Fair Credit Reporting
21 Act, 15 U.S.C. Section 1681 et seq. [,as amended], or otherwise used to generate a consumer
22 report, by a consumer reporting agency, as defined in 15 U.S.C. Section 1681a(f) [,as amended],
23 by a furnisher of the information or a person procuring or using a consumer report;

24 (3) publicly available information;

25 (4) Personal information collected, used, processed or disclosed by a financial
26 institution that processes information to the extent such personal information is subject to the

1 Gramm-Leach-Bliley Act of 1999, or is treated in substantial compliance with that Act’s data
2 privacy and security requirements. This exemption also applies to personal information
3 collected, used, processed, or disclosed by other entities to the extent such personal information
4 is subject to the Gramm-Leach-Bliley Act.

5 (5) personal information regulated by the Federal Family Educational Rights and
6 Privacy Act, 20 U.S.C. Section 1232 [, as amended];

7 (6) a state or local government; or

8 (7) personal data on employees collected or retained by an employer if the data is
9 directly related to the employment relationship.

10 (c) The [Attorney General] by rule may exempt information or activity from all or a part
11 of this [act] if the collection, processing, transfer, or retention of the information or the activity is
12 regulated by law directed at consumer privacy or data security other than this [act].

13 (d) This [act] does not apply to the collection, authentication, maintenance, retention,
14 disclosure, sale, processing, communication, or use of personal information necessary to:

15 (1) initiate or complete a transaction in goods or services which an individual
16 requested;

17 (2) prevent, detect, investigate, report on, prosecute, or remediate an actual or
18 potential:

19 (A) fraud;

20 (B) unauthorized transaction or claim;

21 (C) security incident;

22 (D) malicious, deceptive, or illegal activity; or

23 (E) other legal liability of the controller;

1 (3) assist a person or government agency acting under paragraph (2); or

2 (4) comply with or defend a legal claim:

3 (A) setting a requirement, standard, or expectation to limit or prevent
4 corruption, money laundering, or violation of export controls; or

5 (B) related to an action under paragraph (2).

6 *Need a legislative note for brackets in (a)(1) and (a)(2) and for “as amended.”*

7 **Comment**

8 The scope section is one of the more contentious provisions of the Act. The section has
9 three functions. It first limits the applicability of the Act to larger enterprises or at least
10 enterprises that do significant data collection and processing. Second, it specifically exempts
11 certain industries or data processes where privacy concerns have already been addressed by
12 statute. And, third, it exempts general uses of data collected from individuals where the use or
13 processing and retention of data should reasonably be expected by individuals when they submit
14 data to others or is necessary to protect the interests of the data collector or processor from legal
15 liability.

16
17 The issue of personal data privacy associated with a public health emergency like the
18 current pandemic has not been addressed by the committee in this draft.

19
20 Subsection (a): Limited to larger entities. Limiting the requirements of the act to larger
21 entities is a feature of the GDPR and CCPA enactments. Both acts are highly prescriptive in
22 their requirements and compliance is costly. The committee has deferred direct consideration of
23 whether such an exemption will be necessary until it finalizes the regulatory obligations imposed
24 by the act.

25
26 *Informal meeting comments:* It was observed that this section refers to “commercial
27 activities” whereas the definition of “person” includes non-profits. The committee will need to
28 determine whether non-profits should be included within the scope of this act. It was also
29 observed that controllers may transition over the course of time between below to above the
30 thresholds so that some transition period would be appropriate to permit compliance. Any
31 threshold related to “data subjects” would need to determine if it applies only to subjects within
32 the state.

33
34 Subsection (b): Relationship with existing privacy regimes. One of the significant
35 challenges is how to blend the act’s requirements with existing privacy regimes. This remains an
36 issue before the Committee. For example, one issue involves the federal Graham-Leach-Bliley
37 Act which regulates financial data collected by financial and other institutions. The current draft
38 exempts personal data already regulated by GLB or any other data activity if the financial

1 institution voluntarily complies with GLB. The alternative draft would have a broadly worded
2 exemption for covered entities that comply with not inconsistent regulatory regimes.

3 Employment data. The current draft exempts data collected by an employer about an
4 employee in the context of the employment relationship. It has been argued this is too narrow
5 and should extend to other forms of agency relationships. The alternative draft would apply only
6 to transactions between consumers and the consumer-facing entities and would thus not apply to
7 data derived from non-consumer transactions.

8 *Business-to-business data.* It has been urged upon us to exempt all business-to business
9 data from the act. The question is whether a broad exemption may incorporate transactions that
10 contain personal data. We will consider whether a narrower exemption makes sense in this
11 setting. The alternative draft would incorporate this exemption.

12 *Publicly available data.* The current draft exempts publicly available data which is
13 broadly defined. It is argued that not to do so would raise serious First Amendment objections.
14 However, data algorithms can take widely diverse and sometimes non- personally identifiable
15 public data to profile an individual on matters that otherwise would be private.

16 Note: The alternative draft incorporates the concept of “compatible use” which
17 essentially the processing and use of personal data if the use or processing is necessary or
18 expected in order to initiate or complete the transaction out of which the data was voluntarily
19 collected. This concept, if adopted by the committee, may reduce the need for specific
20 exemptions.

21
22 **SECTION 4. INDIVIDUAL RIGHTS OF INDIVIDUALS GENERALLY.** With

23 respect to an individual’s personal data, an individual may require a data controller to:

- 24 (1) confirm whether the controller has retained or is processing the data;
25 (2) provide a copy of the data in accordance with Section 5;
26 (3) correct an inaccuracy in the data retained or processed by the controller; or
27 (4) subject to Section 3(d), delete the data.

28 **Comment**

29 This section states the primary rights of individuals in their personal data. These are
30 rights common to most data privacy statutes and permit the data subject to some control over
31 their personal data as long as that control does not interfere with the data collectors legal
32 obligations or the purposes for which the data was collected. This section must be read in light
33 of section 11 which requires the data controller to minimize the amount of data collected in
34 relation to the purpose for which it is collected, section 12 which requires that when data is
35 collected, the data subject is informed of the purpose for which the data is to be used, and section
36 13 which limits the use of data to the purpose disclosed.

1 services, housing, insurance, education enrollment, an employment opportunity, health care
2 services, or access to basic necessities.

3 (b) A data controller may not process or transfer sensitive data for a purpose under
4 subsection (a) unless the controller receives prior affirmative consent from the individual.

5 **Comment**

6 This section is based on several other proposals that distinguish between general personal
7 data and that which is particularly sensitive. The individual has the right to “opt out” if their
8 general personal data is being used for targeted advertising or profiling that may impact
9 important decisions made about them. The individual must “opt in” to the use of their sensitive
10 personal data for purposes of targeted advertising or profiling. Thus for example an individual
11 may have to take affirmative action to prevent the use of their name, address, or buying habits
12 from being used to direct advertising in their direction. However, an individual would have to
13 give prior permission for the use of their genetic composition or health records.

14
15 **SECTION 7. EXERCISING RIGHTS OF INDIVIDUALS.**

16 (a) An individual may exercise a right under section 4 of this [act] by notifying the data
17 controller by any reasonable means of the individual’s intent to exercise the right. A parent or
18 legal guardian of a child under age [18] may exercise a right on behalf of the child.

19 (b) A data controller shall comply with a request under this section without undue delay.
20 If the controller does not comply with the request [not later than 45 days] [within a reasonable
21 time] after receiving it, the controller shall provide the individual who made the request an
22 explanation of the action being taken to comply with the request.

23 (c) A data controller shall make a reasonable effort to ensure that its response to a request
24 by an individual to exercise a right under this [act] includes personal data in the possession or
25 control of a data processor acting on the controller’s behalf. The controller shall make a
26 reasonable effort to notify the processor when an individual exercises the right and instruct the
27 processor to adjust the individual’s personal data to be consistent with the controller’s response
28 to the request.

1 *Need a legislative note for subsections (a)(age) and (b)(alternative language).*

2 **SECTION 8. DATA PRIVACY COMMITMENT.**

3 (a) A data controller that collects, uses, processes, or retains personal data of an
4 individual shall adopt a data privacy commitment and file it with the [Attorney General]. The
5 commitment must be approved by the data privacy officer designated by the controller under
6 Section 15, be in clear language reasonably accessible to an individual, and contain:

7 (1) the precise procedure by which an individual may notify the controller of the
8 individuals exercise or a right under Section 4;

9 (2) the manner and extent to which the controller intends to use or transfer to
10 others the personal data of an individual, the purpose of the use or transfer, and a simple method
11 by which an individual can withdraw consent for the use or transfer;

12 (3) the manner in which the controller intends to respond to an individual's
13 request for correction of personal data, including a policy to authenticate the request and to
14 notify a data processor to make the correction;

15 (4) the manner in which the controller intends to respond to an individual's
16 request to delete personal data;

17 (5) the procedure for appealing an initial determination by the controller,
18 including supervision of the appeal by the officer;

19 (6) the procedure for [filing a complaint] with the [Attorney General]; and

20 (7) any condition on the exercise of a right under Section 4 which:

21 (A) is necessary by the nature of the controller's business or industry; and

22 (B) does not adversely affect the substance of the right.

23 (b) A data controller that adopts a data privacy commitment under subsection (a) shall

1 publish the commitment on its website and other places where it will be reasonably accessible to
2 an individual.

3 (c) The [Attorney General] at any time may review the privacy commitment of a data
4 controller and may institute an action under Section 19 to determine whether the commitment
5 complies with this [act].

6 *Legislative notes on [filing a complaint] and [Attorney General] (although the latter may have*
7 *been done earlier and doesn't need to be repeated.*

8
9

Comment

10 The privacy commitment required by this section is envisioned as permitting the
11 incorporation and use of voluntary consensus standards or best practices in compliance with this
12 Act. Statutory provisions directing the means of compliance with the Act are difficult to apply to
13 the variety of different industries and purposes for which data is collected and used. Thus this
14 section requires a data controller to publish how they intend to comply with the Act. The terms
15 of the commitment remain subject to regulatory enforcement by the state Attorney General if it
16 fails to meet the substantive standards of privacy protection provided in this Act.

17

18 A significant issue in this and following sections is whether the regulatory provisions
19 should apply to just data controllers or also to data processors and to what extent. The current
20 act limits these obligations to data controllers but requires that these obligations be passed on to
21 data processors by an agreement and enforced by data controllers. (Section 14). Data processors
22 argue that the controllers are the consumer-facing entity and that data processors have no
23 relationship with the data subjects. On the other hand, small retailers who collect data may have
24 little leverage over large data processors to enforce contractual provisions. The issue will be
25 further considered by the Committee.

26

SECTION 9. DUTY OF LOYALTY OF DATA CONTROLLER AND DATA

PROCESSOR.

29 (a) A data controller or data processor may not engage in processing practices that violate
30 this act or otherwise exposes an individual to an unreasonable and material risk of harm.

31 (b) The [Attorney General] may adopt rules that identify a processing practice as unfair,
32 deceptive, or abusive.

1 **Comment**

2 *Informal meeting comments:* It was suggested that use of the term “duty of loyalty” may
3 inadvertently raise a host of fiduciary obligations not intended for this circumstance.

4
5 There was also a more general comment that phrasing these requirements in terms of
6 “duty” seemed inappropriate.

7
8 **SECTION 10. DUTY OF DATA SECURITY OF DATA CONTROLLER AND**

9 **DATA PROCESSOR.** A data controller or data processor shall adopt, implement, and maintain
10 reasonable data security measures to protect the confidentiality and integrity of personal data in
11 the possession or control of the controller or processor. Reasonable data security measures
12 include appropriate administrative, technical, and physical safeguards. Data security measures
13 must be evaluated as part of the data privacy assessment under Section 16. Evaluation of the
14 reasonableness of data security measures must take into consideration the magnitude and
15 likelihood of security risks and potential resulting harm, the resources available to the controller
16 or processor, and industry practices among other similarly situated controllers or processors.
17 Reasonable security practices may be derived from best practices promulgated by a professional
18 organization, government entity, or other specialized source.

19 **Comment**

20 *Informal meeting comments:* It was suggested we should be clear about whether using
21 “best practices” is a safe harbor from enforcement actions.

22
23 **SECTION 11. DUTY OF DATA MINIMIZATION OF DATA CONTROLLER**

24 **AND DATA PROCESSOR.** A data controller or data processor may not collect, process, or
25 retain more personal data than necessary to permit processing. A controller that transfers
26 personal data to a processor may transfer only as much personal data as necessary to complete
27 the processor’s processing. At the end of the provision of services or as otherwise specified by
28 agreement, the processor shall delete, deidentify, or return personal data to the relevant

1 controller.

2 **SECTION 12. DUTY OF TRANSPARENCY OF DATA CONTROLLER.**

3 (a) A data controller shall provide an individual with a reasonably accessible, clear, and
4 meaningful privacy notice that discloses:

5 (1) categories of personal data collected or processed by or on behalf of the
6 controller;

7 (2) the purpose for processing personal data by the controller or on the
8 controller's behalf;

9 (3) categories of personal data the controller provides to a data processor or
10 another person;

11 (4) categories of data processors or other persons that receive personal data from
12 the controller;

13 (5) the nature and purpose of profiling an individual using personal data; and

14 (6) procedures by which an individual may exercise a right under Section 4

15 (b) A notice under this section must clearly and conspicuously designate at least two
16 methods for an individual to contact the data controller to exercise a right under this [act]. One
17 method must be a toll-free telephone number. If the controller maintains an Internet website, one
18 method must be through the website.

19 (c) If a data controller processes personal data for targeted advertising or provides
20 personal data to a data processor or other person to process for targeted advertising, the notice
21 under this section must clearly and conspicuously disclose the processing and provide an
22 automated Internet-based mechanism for the individual to exercise the right to opt out of targeted
23 advertising.

1 (d) A notice under this section must be reasonably available at the time personal data is
2 collected from an individual.

3 **SECTION 13. DUTY OF PURPOSE LIMITATION OF DATA CONTROLLER.**

4 A data controller may not process personal data or permit a data processor or other person to
5 process personal data for a purpose that is not disclosed in a notice to an individual under Section
6 12.

7 **SECTION 14. DATA PROCESSING BY AGREEMENT.**

8 (a) Processing of personal data by a data processor that is not the data controller must be
9 governed by an agreement in a record between the processor and controller which sets out the
10 nature and purpose of the processing, the type of personal data subject to processing, including
11 identification of any sensitive data, the duration of the processing, and the rights and duties of
12 both parties. The agreement must include the following terms:

13 (1) The processor shall follow the instructions of the controller regarding the
14 processing of the data and adopt appropriate technological or organizational measures to perform
15 its duties under this [act].

16 (2) The processor may not process personal data for a purpose other than the
17 purpose of the processing provided in a notice under Section 12 to an individual and for purposes
18 stated in the agreement.

19 (3) The controller has a reasonable right to audit the conduct of the processor and
20 the processor shall make available to the controller all information necessary to demonstrate the
21 processor's compliance with this [act] and the agreement.

22 (4) The processor may not transfer the personal data to another data processor or
23 other person without the permission of the controller. A transfer to another processor must be

1 governed by an agreement in a record that imposes the same duties on the recipient of the
2 personal data that are imposed on the processor in the agreement between the controller and the
3 processor, even if the recipient is not subject to this [act].

4 (b) A data controller may indemnify a data processor for liability of the processor under
5 this [act].

6 (c) Processing personal data without an agreement that substantially complies with this
7 section is subject to enforcement under Section 19. A data controller that authorizes the
8 processing of information by another without an agreement reasonably consistent with this
9 section is subject to a private cause of action under Section 20.

10 *Need a legislative note for [unfair act and practice] in (c).*

11 **Comment**

12 The entity that collects data (data controller) is often different from the entity that
13 processes that data (data processor). It is the data controller who normally has the direct
14 relationship with the individual and makes commitments to the individual regarding the future
15 use and processing the data. The concern remains however whether data processors will comply
16 with the commitments made by the data controller. Similarly an individual is most likely to
17 assert their rights of access, correction, or deletion against the controller and in most instances
18 will not know the identity of any data processor using the data.

19
20 The primary mechanism for enforcement of individual’s rights must accordingly be
21 focused on the data controller. However, in order to insure processor compliance, this section
22 requires that all processing be accomplished pursuant to a written agreement that binds the
23 processor to the obligations and commitments of the controller and requires the processor
24 cooperate with the controller in satisfying legitimate consumer requests.

25
26 It has been argued by some in the industry that this simple view may be unworkable
27 given the current methods and mechanisms of data use and processing. It may be difficult for
28 processors to “find” a particular individual’s data given the technological way data is stored.
29 The committee will need to explore this issue further.

30 31 **SECTION 15. DATA PRIVACY OFFICER.**

32 (a) A data controller and data processor shall designate an individual employee or
33 contractor to serve as data privacy officer.

1 (b) A data privacy officer must have qualifications appropriate for supervision of the
2 duties under this [act] of data controllers and data processors. Appropriate qualifications depend
3 on the scale, complexity, and risk of the processing of the controller or processor.

4 (c) A data privacy officer is responsible for the data privacy assessment under Section 16
5 and shall sign the assessment personally.

6 (d) If a data privacy officer designated under subsection (a) spends a reasonable amount
7 of time fulfilling the responsibilities under this [act] of data controllers and data processors, the
8 officer may perform other duties for the controller, processor, or other persons. If the officer is
9 not an employee of the controller or processor, the controller or processor and the officer shall
10 execute an agreement in a record which specifies the officer's duties. An individual may serve as
11 an officer for more than one controller or processor.

12 (e) A data privacy officer may assign or delegate other persons to complete tasks under
13 the officer's supervision, but the officer shall retain authority over completion of the tasks.

14 **Comment**

15 This section requires the designation of someone in entities that collect and use data to
16 designate an individual as the data privacy officer. The function of the officer is to conduct the
17 data privacy assessment required by section 16. The section is drafted to assure that for many
18 entities this may be an assignment added to the responsibilities of another official or it may be a
19 function that can be contracted out to a firm who specializes in privacy assessment.

20 21 **SECTION 16. DATA PRIVACY ASSESSMENT.**

22 (a) A data controller or data processor shall prepare in a record a data privacy assessment
23 of each processing undertaken by the controller or processor

24 (b) A data controller or data processor shall complete a data privacy assessment about
25 each processing not less than every two years. The controller or processor shall update the
26 assessment when a change in processing may materially affect the risks, harms, or benefits of

1 processing.

2 (c) A data privacy assessment must evaluate the:

3 (1) type of personal data being processed;

4 (2) presence of sensitive data among the personal data being processed;

5 (3) scale of the processing activity;

6 (4) context in which personal data is collected and processed;

7 (5) seriousness of privacy risks and likelihood harm to individuals as a result of
8 the processing;

9 (6) direct or indirect benefits from the processing;

10 (7) resources reasonably available to the controller or processor to address privacy
11 risks, taking into account revenue generated by the processing; and

12 (8) measures the controller or processor has undertaken to mitigate any privacy
13 risks.

14 (c) Privacy risks evaluated in a data privacy assessment must encompass risks of all
15 potential harms to an individual, including:

16 (1) accidental disclosure or theft of personal data or other breach of security;

17 (2) identity theft;

18 (3) harassment;

19 (4) unwanted profiling;

20 (5) stigmatization or reputational harm;

21 (6) emotional harm, including anxiety, embarrassment, fear, and other
22 demonstrable mental harm; and

23 (7) other foreseeable outcomes that would be highly offensive to a reasonable

1 person.

2 (d) A data processor may fulfill its duties under this section by adopting a data privacy
3 assessment completed by a data controller concerning the same personal data.

4 (e) A data controller and data processor shall retain a record of a data privacy assessment
5 for 10 years after completion. On request of the [Attorney General] in connection with [an
6 investigation], the controller or processor shall provide a record of each current and former data
7 privacy assessment.

8 (f) Whether or not a data controller or data processor provides a data privacy assessment
9 to the [Attorney General], an assessment is confidential business information [and is not subject
10 to a public records request or compulsory civil discovery in a court].

11 **Legislative Note:** *The state should include appropriate language in subsection (f) exempting*
12 *data privacy assessments from open records requests and compulsory civil discovery requests to*
13 *the maximum extent possible under state law.*

14
15 *Also need a legislative note for [an investigation] in subsection (e).*

16
17

Comment

18 The primary obligation to consider and protect personal data is placed on the data
19 controller who is the entity that collects the data and directs the processing. The controller is
20 also normally the entity that deals directly with the individual. This section requires the data
21 controller to assess the privacy risks associated with each effort to process personal data. To
22 encourage an open assessment of the benefits and risks, the assessment should be protected from
23 disclosure. Otherwise the assessment will be done in a way to protect against the potential for
24 legal liability.

25

26 While the section appears to impose the obligation of assessment on both data controllers
27 and data processors, subsection (d) allows the processor to satisfy its obligation by obtaining the
28 assessment of the controller. This would encourage processors to assure that their clients comply
29 with this section and provide the processor the controller's assessment and means of mitigation
30 of risks.

31

SECTION 17. NONDISCRIMINATION.

32

33 (a) Subject to subsection (b), a data controller may require as a condition for access to its

1 goods or services that an individual permit processing of the consumer’s personal data.

2 (b) A data controller may not discriminate against an individual for exercising a right
3 under Section 4 to access and copy the individual’s personal data or correct an inaccuracy in
4 personal data by denying a good or service, charging a different rate, or providing a different
5 level of quality.

6 **Comment**

7 Nondiscrimination provisions have been subject to considerable concern. To the extent
8 an individual’s interest in privacy is considered a “right”, it would follow that the exercise of that
9 right should not result in discrimination. However, there are businesses whose business plan is
10 built on providing goods and services in exchange for access to personal data. As long as this is
11 made clear to individuals, they should not be entitled to the goods or services without being
12 willing to make the exchange. However, this should not implicate their right to access the data
13 held about them or to correct inaccurate data. The section acknowledges here that the right to
14 delete or withhold data cannot be subject to the nondiscrimination mandate.

15
16 **SECTION 18. WAIVER PROHIBITED.**

17 (a) Except as otherwise provided in subsection (b), an agreement that waives or limits a
18 right or duty under this [act] is contrary to public policy and is unenforceable,

19 (b) Subsection (a) does not apply to a provision under Section 14(b).

20 **SECTION 19. ENFORCEMENT BY [ATTORNEY GENERAL].**

21 (a) An [act or practice] by a person to which this [act] applies is a violation of the [cite to
22 the state’s consumer protection law] if the act or practice:

23 (1) substantially fails to comply with this [act]; or

24 (2) deprives an individual of a right under this [act].

25 (b) The authority of the [Attorney General] to bring an action to enforce [cite to the
26 state’s consumer protection law] includes enforcement of this [act].

27 (c) The [Attorney General] may adopt rules to implement this [act] under [cite to the
28 state’s administrative procedure act].

1 (d) In adopting rules and in bringing an enforcement action under this section the
2 [Attorney General] shall consider the need to promote uniformity within an industry and among
3 the states by:

4 (1) examining and, when appropriate, adopting rules consistent with rules adopted
5 in other states; and

6 (2) giving deference to any voluntary consensus standards adopted by an industry
7 under a process that is fair, open, allows balanced participation by interested parties, including
8 representatives of individuals, and provides an independent appeal procedure.

9 **Legislative Note:** *In subsection (a), the state should cite to the state's consumer protection law*
10 *and should use the term for unfair practice that is used in that law.*

11
12 *Need another legislative note about the state's administrative procedure act.*

13 14 **Comment**

15 The states vary in the powers and authority granted to the Attorney General, although
16 most states authorize the Attorney General to enforce their Consumer Protection Act. Under the
17 Consumer Protection Act, the Attorney General can often bring a civil action to enforce the act
18 and can seek civil penalties and injunctive relief. Such authority should be extended to enforce
19 the provisions of this Act.

20
21 States also vary on the extent to which the Attorney General adopts rules and regulations
22 to interpret and enforce statutory provisions. Unless prohibited by other law, the Attorney
23 General should be specifically directed to adopt rules and regulations pursuant to this act and in
24 accordance with the state Administrative Procedure Act.

25
26 Subsection (d) attempts to encourage uniformity among the states by requiring the
27 Attorney General to consider actions in other states. Adoption of this Act with this provision
28 would lead naturally to the development, by state attorney general's or other groups of a set of
29 model rules and regulations for implementing the Act.

30
31 The act also seeks to encourage the adoption and implementation of voluntary consensus
32 standards by industries as long as they are adopted in an open, fair, and balanced process. The
33 criteria are modeled on the Office of Management and Budget Circular a-119 which governs
34 federal administrative agencies. This section represents a tentative move in the direction of
35 voluntary consensus standards. The alternative draft has a more elaborate implementation of
36 such a process which will be considered by the Committee. The focus must be to assure that
37 consumer representatives have a strong voice in development of standards and to protect against

1 the standard setting process being used to unfairly advantage some firms and disadvantage
2 others.

3
4 **SECTION 20. PRIVATE CAUSE OF ACTION.**

5 (a) A person may bring a private action for damages against a controller or processor that
6 processes the person’s data in violation of this [act] and in a manner that would reasonably
7 foreseeably cause, or is likely to cause, any of the following:

8 (1) financial, physical, or reputational injury to a person;

9 (2) physical or other intrusions upon the solitude or seclusion of a person or a person’s
10 private affairs or concerns, where such intrusion would be highly offensive to a reasonable person;

11 (3) increased risk of subjecting a person to discrimination in violation of any state or
12 federal anti-discrimination law applicable to the covered entity; or

13 (4) other substantial injury to a person.

14 (b) At least thirty days prior to the filing an action under this section, a written demand
15 for relief, identifying the claimant and reasonably describing the violation of the act relied upon
16 and the injury suffered, shall be mailed or delivered to the covered entity. Any covered entity
17 receiving such a demand for relief that, within thirty days of the mailing or delivery of the
18 demand for relief, makes a written tender of settlement which is rejected by the claimant may, in
19 any subsequent action, file the written tender and an affidavit concerning its rejection.

20 (c) If the court in any subsequent action finds for the claimant and also finds that the
21 relief tendered by the covered entity was reasonable in relation to the injury claimed by the
22 claimant, the claimant’s relief shall be limited to the amount tendered. In all other cases, if the
23 court finds for the claimant, recovery shall be in the amount of actual damages.

24 (d) If the court finds the violation of this [act] was a willful or knowing violation or that
25 the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know

1 that the act or practice complained of violated this [act], the court may award up to three times
2 the actual damages.

3 (e) In addition, the court shall award such other equitable relief, including an injunction,
4 as it deems to be necessary and proper.

5 **Comment**

6 This section provides a limited private cause of action to persons injured by violations of
7 the Act that can be shown to have caused identifiable harm. Whether or not to authorize a
8 private cause of action for violations of data privacy legislation has been a matter of considerable
9 controversy. The substantive provisions of any data privacy act must be broad in order to
10 encompass the wide variety of data uses and industries to which it applies. Such provisions
11 make it difficult for data controller or processors to assure in advance that they have met all
12 technical requirements and provides plaintiffs and their lawyers considerable leverage to force
13 large settlements. Many proposals enhance this leverage by providing statutory damages in lieu
14 of proven damages because of the difficulty of monetizing privacy violations. On the other
15 hand, leaving enforcement solely to a public agency, particularly a State Attorney General's
16 office, is subject to the resource allocation and priorities of each office.

17
18 Sections 20 and 21 attempt to respond to both concerns. Section 20 requires the plaintiff
19 not only prove a violation of the Act but also that the defendant acted negligently in the face of
20 the likelihood the violation would cause harm. The plaintiff is limited to recovery of those actual
21 damages the plaintiff can prove. Moreover, the plaintiff must thirty days prior to filing an action
22 make a demand of settlement on the defendant. The defendant has an opportunity to make a
23 reasonable response which may include correction of the violation or a monetary settlement or
24 both. If in the subsequent action a court finds the settlement offer reasonable, the plaintiff's
25 relief is limited to that relief.

26
27 It is only upon proof in addition that the violation was willful or knowing violation or the
28 settlement offer was made in bad faith that the plaintiff may recover three times the damage
29 award. Even here, the plaintiff's award is tied to actual damages.

30
31 The alternative draft provides an even more narrow authorization for private relief and
32 more elaborate pre-trial procedures to permit firms to correct violations.

33
34 *Informal meeting comments:* Suggestions were offered during the informal meeting
35 which will be considered by the Committee as it continues to deliberate. These suggestions
36 include: (a) consider authorizing a private action on behalf of competitors of the offending firm,
37 (b) authorize interim relief that might end the controversy, including cease and desist orders
38 related to the violation, and (c) consider attorneys fees and costs and how they might be
39 appropriately allocated.

40
41

1 but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
2 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
3 U.S.C. Section 7003(b).

4 **[SECTION 24. SEVERABILITY.** If any provision of this [act] or its application to
5 any person or circumstance is held invalid, the invalidity does not affect other provisions or
6 applications of this [act] which can be given effect without the invalid provision or application,
7 and to this end the provisions of this [act] are severable.]

8 *Legislative Note: Include this section only if this state lacks a general severability statute or a*
9 *decision by the highest court of this state stating a general rule of severability.*

10
11 **SECTION 25. EFFECTIVE DATE.** This [act] takes effect [180 days after the date of
12 enactment].

13 *Legislative Note: The effective date depends on the time entities would need to bring themselves*
14 *into compliance with the Act. To the extent the act requires adjustments in technology and*
15 *publications, a later effective date is appropriate.*

16
17

Comment

18 Entities in California after enactment of the CCPA had almost two years to achieve
19 compliance before the Act became effective. It may also be true that some sections of the Act
20 might lend themselves to earlier effectiveness. The committee thus is reserving proposing an
21 effective date or dates until it decides on the substantive provisions.