



April 23, 2021

Harvey Perlman, Chairman
Collection and Use of Personally Identifiable Data Drafting Committee
Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, IL 60602

Dear Chairman Perlman:

The Main Street Privacy Coalition (MSPC)¹ and the NFIB Small Business Legal Center² submit these comments on the latest draft of the Uniform Personal Data Protection Act (UPDPA),³ circulated on April 22, 2021, by the Uniform Law Commission's (ULC) Collection and Use of Personally Identifiable Data Drafting Committee (Committee).

In particular, our organizations appreciate the changes that the Committee incorporated into the latest draft of UPDPA that would prevent the problem of vicarious liability that many Main Street businesses might have faced with previous draft versions. By ensuring that all of the businesses handling personal data have responsibility to act in accordance with the requirements of the UPDPA, whether those businesses are characterized as controllers or processors, this latest draft more effectively protects consumer rights, creates the right incentives for all businesses to comply with the legislation, and more fairly ensures liability falls on businesses that are actually at fault if there is noncompliance. For these reasons, we urge the Committee to keep these critical changes to UPDPA in place even if stakeholders representing processors argue that processors should not be held liable when they violate the requirements of UPDPA.

There is, however, one change in the latest draft that undercuts the positive changes made to cure the vicarious liability problem. With the edit to strike "or data processor" from Section 9(a) of UPDPA (p. 21, l. 1), this important section prohibiting certain data practices would no longer apply to processors of personal data. This edit would therefore permit processors to engage in a multitude of activities that cause consumers actual harm without accountability for that harm or triggering liability as a prohibited data practice. That is both dangerous for consumers and could reintroduce vicarious liability for controllers that was deftly eliminated in other parts of the draft.

¹ From retailers to Realtors®, hotels to home builders, grocery stores to restaurants, and gas stations to convenience stores, its member companies interact with consumers day in and day out. Collectively, the industries that MSPC trade groups represent directly employ nearly 34 million Americans and constitute over one-fifth of the U.S. economy by contributing \$4.5 trillion to the annual U.S. gross domestic product. *See* <https://mainstreetprivacy.com/about/> for a complete list of the members of the Main Street Privacy Coalition.

² The NFIB Small Business Legal Center is a public interest law firm representing the interests of millions of small businesses across the country in our nation's courts and providing them with helpful legal resources.

³ *See* National Conference of Commissioners on Uniform State Laws, Uniform Personal Data Protection Act (April 22, 2021)(hereinafter "UPDPA").

Some might argue that this change should not be a concern because controllers actually “control” what is done with personal data. In reality, however, that is often not the case—just as the Committee explained in its memorandum accompanying the latest edits to the UPDPA. Quite often, large processors determine what happens with data—even if the contractual terms they dictate suggest otherwise. It would be unfortunate if the Committee let processors engage in “prohibited” data practices without limitations because processors were removed from section 9(a). Our organizations strongly urge the Committee to return to the previous language of that subsection so that consumers are protected from prohibited data practices by all parties subject to the UPDPA.

We also appreciate the Committee’s clarification that “denying a good or service, charging a different rate, or providing a different level of quality” to data subjects would only raise problems if that is done “in retaliation” for exercising rights under UPDPA, as described in the accompanying explanatory note in the comments to the section. Our organizations still have concerns, however, that the explanatory note might not be sufficient to ensure the legislation is interpreted as the Committee intends in some states or, if enacted, by courts of law. With that in mind, we would suggest adding a sentence to the end of subsection 5(f) of UPDPA that reads:

“For purposes of this subsection, it is not an act of retaliation if the controller’s denial of a good or service, charge of a different rate, or provision of a different level of quality results from the data subject correcting information that makes the data subject ineligible to participate in a bona fide loyalty, rewards, premium features, discounts, or club card program where the program’s terms of service specify the eligibility requirements for all participants.”

This added language would ensure that a data subject’s correction of personal data that makes them ineligible for a loyalty program would not be considered a retaliatory act by the controller. Our organizations think this suggested addition is sufficiently narrow to protect consumer rights to correct personal data while ensuring that the UPDPA would not undercut the viability of loyalty programs which are very popular with consumers.

We appreciate your continued consideration of its views and your tireless work to craft model legislation that protects consumers and takes into account the complexities of the many different ways in which data are handled by all parties who would be subject to UPDPA.

Very truly yours,

Main Street Privacy Coalition
<https://mainstreetprivacy.com>

NFIB Small Business Legal Center
<https://www.nfib.com/foundations/legal-center/>