Harvey S. Perlman

March 4, 2021

To: Commissioners and Observers

From: Harvey Perlman, Chair

Re: Next meeting of CUPID Drafting Committee

We are scheduled to meet from 10:00 a.m. until 4:30 p.m. (CST) on Friday and Saturday, March 12 and 13, to consider the draft of the Uniform Collection and Use of Personally Identifiable Data Act. We will break for 30 minutes each day around 12:30 p.m.

We are progressing toward a final product to present to the annual meeting of the Uniform Law Commission sometime this summer. Although time would permit another drafting committee meeting before this summer, the March meetings are the last we have scheduled. I would like to treat the March meetings as our "final" meeting with the hope that we can agree on a final product. We can, of course, schedule a subsequent meeting if necessary. I plan to conduct the March meetings as follows:

Friday, March 12. We will review the entire Act and will welcome observer comments. It would be most helpful if observers with concerns could present alternatives (either language or concept) in order to position the drafting committee to make decisions. The only thing I am confident about is that we will not achieve 100% consensus on all matters. Jane has had an unexpected family matter arise which will require her to miss the early part of Friday's meeting.

Saturday, March 13. I hope to limit discussion largely to members of the drafting committee. Where there is disagreement, I intend to take votes of the committee to permit us to move forward (or backwards depending on the vote)! Observers are welcome to observe on Saturday and should be available for comment at the request of a drafting committee member.

The Current Draft

The current draft largely reflects the discussion at our last meeting. Since then, Jane and I have met with a few observers with specialized concerns and have incorporated their

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thoughts when we thought it appropriate. There may remain some issues on which we still disagree with their positions. There is also considerable recent legislative activity in the States, and, in a few instances, we have borrowed language from these proposals. This draft has also benefited from a detailed style review by Steve Willborn and other members of the Style Committee.

A Substantial New Issue

We have made one substantial change in this draft that requires explanation and your consideration. It involves Section 3 and the scope of our act. You will note that Section 3 (a)(4) applies our act to:

> (4) any other controller or processor unless they process personal data solely using compatible data practices.

The consequence of this provision is that a controller or processor who does not meet the thresholds for being a "big" controller or processor will still be subject to our act if they use other than compatible data practices.

To understand this provision, it is important to remember the following salient features of our act. First, it is designed to significantly reduce the compliance costs required by more elaborate proposals, such as the California legislation and the Washington proposal. We have recognized that some uses of collected data are to be expected (compatible uses), and do not need to rely on consent and the steps necessary to secure consent. Second, our act expressly provides that firms complying with other data privacy regimes are regarded as in compliance with our act. And, third, it permits particular industries to adopt voluntary consensus standards that once approved are recognized to be in compliance with our act.

There is currently considerable legislative activity on data privacy among the States and in Congress. All of the proposals we have reviewed are modeled after California or Washington approaches. Virginia recently adopted such a proposal. All of these proposals apply only to firms that meet a threshold of a large number of data subjects or a large percentage of their income being derived from data processing. We continue those thresholds in Section 3.

So what is the state of personal data privacy in these regimes? From the controller or processor perspective, in order to comply with a variety of state laws, it is likely they will peg their compliance to the most onerous regime or the largest market-place. It is then likely that a de facto national standard of protective activities in practice will be adopted. It seems unlikely that they will limit their privacy procedures to citizens of the state in which the legislation was adopted. The privacy of personal data collected by smaller controllers or processors however will remain untouched.

The question then arises as to what role the Uniform Law Commission might have in adopting a privacy regime like the one we propose. If our act is adopted in any state with similarly high thresholds for applicability, large controllers and processors will continue to direct their compliance to the broadest requirements in the largest markets. Certainly our act would assure the provisions were applicable to citizens of adopting states and it would provide enforcement powers to the state Attorney General. Personal data will remain unprotected from uses by firms that do not meet the thresholds.

At this point our act can be seen as additive if it provides some level of consumer protection from data use by smaller firms. Yet, such firms will resist, for good reasons, the high compliance costs associated with responding to consumer requests for access and correction, developing and publishing privacy policies, and conducting privacy assessments, particularly when they do not really do more than collect credit card data which is processed by credit card processors or maintain a customer list.

The scope proposal in the current draft provides a middle ground. Firms who do not meet the collection or processing thresholds would still be subject to the provisions of our act *unless* they limit their data practices to those that are "compatible". Arguably consumer autonomy is protected because they would expect their data to be used for compatible practices as we define them. On the other hand, the Act would impose additional burdens if the smaller firm decided to engage in incompatible practices. In this way, consumer protection is expanded beyond that provided under the other models, while smaller firms can avoid any compliance costs unless they decide to adopt incompatible data practices. If they do, it seems fair to require them to comply with the act.

We recognize that some small firms may argue they will face uncertainty as to whether a particular practice is a compatible data practice. Section 7 lists a number of practices that provide considerable certainty. If particular industries have unique issues, the opportunity to develop a voluntary consensus standard defining compatible practices is provided.

We look forward to discussion on whether this expansion of the scope of the act makes sense.

Other Issues

Without attempting to limit discussion, the following issues are highlighted for your review:

1. We have acknowledged that there are really two types of controllers, those who collect information directly from data subjects and those who collect information from other controllers. We have also tried to be clear as to the obligations of collecting controllers, third-party controllers, and processors—aligning those obligations with the realistic opportunity their position in the data chain provides to fulfill them.

2. We met with representatives of the Attorneys General to resolve any concerns they have with the draft. I believe it is fair to say that they remain uneasy regarding at least two major issues: whether the state AG offices have the resources to fulfill the enforcement and regulatory responsibilities we impose and whether compliance with a voluntary consensus standard should be an absolute safe harbor or should only be a persuasive factor in determining a violation. We feel strongly it has to be a safe harbor in order to provide incentives for industries to engage in the process.

3. We have provided three alternatives for a private right of action. There are three paths for the drafting committee: to pick one, to propose all three in brackets for individual state choice, or to remain silent on the issue.

We look forward to the discussion next week.

Sincerely,

Harvey S. Perlman