



April 23, 2020

Uniform Law Commission
111 N. Wabash Avenue, Suite 1010
Chicago, Illinois 60602

RE: Collection and Use of Personally Identifiable Data Act

Dear Executive Committee of the Uniform Law Commission:

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies across the country, from small businesses to household brands, advertising agencies, and technology providers. Our combined membership includes more than 2,500 companies, is responsible for more than 85 percent of U.S. advertising spend, and drives more than 80 percent of our nation's digital advertising spend. We and the companies we represent strongly believe consumers deserve meaningful privacy protections supported by reasonable government policies.

We appreciate the Uniform Law Commission's ("ULC" or "Commission") goal to "promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practical."¹ We agree that harmonizing data privacy laws is important for enabling consistent and strong protections for all Americans. Individuals should have the same privacy protections under law no matter where they live. For this reason, we are key supporters of Privacy for America, a framework for a national data privacy standard that would clearly define prohibited practices that make personal data vulnerable to breach or misuse, while preserving the benefits that come from responsible use of data.²

We provide the following comments, including our key concerns with the draft Collection and Use of Personally Identifiable Data Act ("CUPIDA"). We submit these recommendations in the interest of harmonizing state data privacy laws and furthering legislative provisions that offer robust protections to consumers, while also preserving the significant benefits data offers to society and the economy.

I. The Data-Driven and Ad-Supported Online Ecosystem Benefits Individuals and Supports Essential Operations

Today, a broad array of rich content is available on the Internet, including information and news content, video and music streaming services, and interactive software services such as email and social networks. These have all experienced robust growth over the last decade, providing a wide array of transformative benefits to consumers for free, or for little cost, supported by digital advertising. Digital advertising, particularly data-driven advertising, has been fundamental to the success of the Internet and the digital economy, providing significant benefits to consumers by connecting them with products and services that are more relevant to their interests, and providing opportunities for American businesses large and small to connect with consumers. Effective consumer privacy legislation must preserve these core benefits while enhancing privacy protections.

¹ Uniform Law Commission, *Constitution, Bylaws, and Rules of Procedure*, § 1.2, located at <https://www.uniformlaws.org/aboutulc/constitution>.

² Privacy for America, *Principles for Privacy Legislation* (Dec. 2019), located at <https://www.privacyforamerica.com/overview/principles-for-privacy-legislation-dec-2019/>.

II. CUPIDA's Private Right of Action Will Engender Frivolous Litigation Without Providing Commensurate Consumer Benefit

The proposed draft would provide a private right of action to injured individuals for certain violations of the CUPIDA.³ Enforcement should instead be vested with state Attorneys General. Private rights of action serve as a windfall to the plaintiff's bar without providing any real relief for consumers. They stifle innovation by threatening entities with staggering and potentially insurmountable legal costs. Private rights of action fail to provide robust protections for individuals, drain judicial resources, and penalize businesses for mere technical violations of the law. As a result, including such an enforcement mechanism in CUPIDA would make states adopting its terms unfriendly to consumers and businesses alike.

Private rights of action can cause significant financial strain for businesses even when they do not violate the law. Low pleading standards allow cases to proceed with minimal showings of consumer injury, leading to excessive costs for entities to defend lawsuits when claims may be highly questionable or even unsupportable. Private litigant enforcement actions can drive companies to settle cases with plaintiffs despite meritorious arguments they may have to support their defense. Small, startup, and mid-size firms are particularly vulnerable to the threat of litigation. Quick settlements favor the plaintiff's bar, provide little benefit to consumers, and do not support development of consistent, enforceable standards.

Neither of the two states that already passed comprehensive privacy legislation included a private right of action as broad as the provision proposed by the ULC. Moreover, disagreement over whether a private right of action should be included in the enforcement scheme twice caused Washington state to fail in its attempts to enact privacy legislation.⁴ As such, including a private right of action in proposed uniform legislation is not reflective of a consensus approach that would be practical across the states. Rather, it would likely create a significant hurdle for legislators in their attempts to pass meaningful and reasonable privacy protections for the citizens of their states, as disagreement over such a provision threatens to stall or thwart their efforts.

As an alternative and more reasonable approach, we ask the Commission to take steps to ensure consumer data privacy enforcement responsibilities are placed within the purview of state Attorneys General offices only. This enforcement framework would lead to stronger and more consistent outcomes for consumers while better enabling businesses to allocate funds to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements.

III. CUPIDA's Regulatory Directive Would Obstruct a Uniform Approach

Despite the goal of the ULC, and particularly this Committee, to establish a uniform standard with respect to state privacy laws, the bill would provide state Attorneys General with broad regulatory authority to "adopt rules and regulations to implement the provisions of [the] Act."⁵ Providing a regulatory directive in this fashion would not support the development of a uniform approach to data privacy laws, but rather runs contrary to that goal. Under the current draft of the bill, each state adopting the ULC's approach would give its Attorney General the ability to promulgate rules interpreting the law. As such, states adopting the ULC's draft bill would likely diverge quite dramatically in their regulatory approaches to data privacy, which would not further the Commission's goal of harmonizing state laws. This would deprive consumers the consistency sought by this Committee, and it would deny companies

³ CUPIDA at § 20.

⁴ Senate Democrats, *Carlyle issues statement on Washington Privacy Act*, (Mar. 12, 2020), located at <http://sdc.wastateleg.org/carlyle/2020/03/12/carlyle-issues-statement-on-washington-privacy-act/>.

⁵ CUPIDA at § 19(c).

the regulatory consistency to enable effective compliance across the country. We therefore encourage the ULC to remove the bill’s broad regulatory authority to better ensure consistency among state standards for data privacy.

IV. CUPIDA’s Duty of Loyalty is Unclear and Impractical

The bill places new business duties on controllers and processors that represent novel and unprecedented approaches to privacy law. For instance, the bill imposes a “duty of loyalty” on processors and controllers forbidding them to “engage in processing practices that are unfair, deceptive, or abusive.”⁶ The bill gives the state Attorneys General the authority to “adopt regulations declaring particular processing activities to be unfair, deceptive, or abusive,” and it notes that “[a]n unfair practice shall include processing or use of data that exposes the data subject to an unreasonable material risk of harm.”⁷ CUPIDA’s duty of loyalty is substantially vague and proposes no clear guidance by which controllers or processors may discern which activities may violate the law. It therefore serves as an impractical and indeterminable obligation for businesses. The bill’s duty of loyalty provision is also an approach that has not been adopted by any other state that has enacted privacy legislation. Instead of creating amorphous duty standards, the proposed legislation should clearly define obligations imposed on businesses that mitigate risks to consumers, while preserving the benefits to individuals and our economy that result from the responsible use of data.

V. CUPIDA’s Broad Definitions and Consumer Rights Could Impede Essential Advertising Functions

The bill would define “personal data” broadly as “information that can be associated with a particular data subject by using a reasonable amount of effort.”⁸ This definition provides little clarity regarding what may constitute a “reasonable amount of effort,” thereby obscuring what is personal data under the legislation. We urge the Commission to provide a clearer definition for “personal data.”

Additionally, the bill’s opt out right and its approach to data transfers could impede functions that are essential to digital advertising. While the opt out right appears to apply to “targeted advertising” and “profiling”, the bill also states that data controllers must file a data privacy commitment with the state Attorney General noting “a simplified method by which the data subject can withdraw consent” for uses or transfers of personal data.⁹ This provision could be interpreted to expand the opt out right beyond targeted advertising and profiling, which could impact certain operations that are essential to digital commerce such as ad reporting and delivery. The bill also prevents data processors from transferring *any* personal data to other processors or to any other person without permission from the controller.¹⁰ This prohibition could detrimentally impact commonplace digital advertising delivery platforms and processes like real-time bidding, which rely on the transfer of pseudonymous identifiers, such as an IP address or an advertising ID, for the purposes of advertising. The lack of a clear approach to data transfers and the opt out right in CUPIDA could degrade consumers’ online experiences by inhibiting transfers of data they expect.

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⁶ *Id.* at § 9(a).

⁷ *Id.* at §§ 9(a), (b).

⁸ *Id.* at § 2(9).

⁹ *Id.* at §§ 6, 8(a)(2).

¹⁰ *Id.* at § 14(4).

We urge the ULC to consider the issues we pose in this letter and thank the Commission for working constructively with stakeholders in the effort to draft uniform privacy legislation.

Sincerely,

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