SIIA Accelerating Innovation in Technology, Data & Media

1090 Vermont Ave NW Sixth Floor
Washington DC 20005-4905
www.siia.net

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Harvey Perlman, Chair
William McGeveran, Reporter
Collection and Use of Personally Identifiable Data Committee
Via Email

Dear Chair Perlman and Professor McGeveran:

On behalf of the Software & Information Industry Association (SIIA),[1] we thank you for the Committee's thoughtful work to develop the Collection and Use of Personally Identifiable Data Act and for welcoming our participation as an observer. We submit these initial comments to identify several concerns we have with the current draft of the proposed bill.

At the outset, we believe it is critical that any Uniform Law Commission project not attempt to interfere with existing well-established principles of sectoral privacy law. Some of these principles are federal in nature, and a conflict between them and any proposed uniform law would only result in confusion, undercutting the purpose of such a statute in the first instance. We share many of the concerns raised by CDIA and others about the draft, and additional suggestions from us are forthcoming—like many groups, COVID-19 has disrupted our normal processes.

With that said, these initial comments are based on our preliminary review of the proposed bill and focuses on one issue critical to our members: the importance of the contemplated exclusion for publicly available information. We anticipate offering further comments and suggested revisions as this process continues.

I. Publicly Available Information

Our members create and provide a variety of publications and services incorporating publicly available information, ranging from educational products, scientific, technical and medical publishing, business-to-business publications (such as professional directories and merger and acquisition news), and research tools (such as Westlaw and Lexis that are well-known to the Committee). The value of these tools depends on their completeness and accuracy, and consists in large part of information that is publicly available from both government and non-governmental sources. It is critical that privacy regulation excludes "publicly available

[1] SIIA is the principal trade association for the software and digital content industries. We have over 800 members spread across eight specialized divisions. SIIA members include software publishers, financial trading and investment services, specialized and B2B publishers, and educational technology service providers. For more on SIIA, please visit our website at www.siia.net.

information" from its scope to ensure that these socially valuable and necessary uses are not impeded. We note that the definitions mention "publicly available data" and that section 3 excludes "publicly available information." We assume that this is a drafting error, and that the intent is that they be the same thing.

The earlier version of the draft bill contemplated an exclusion for publicly available information in Section 3(b)(3). Based on the teleconference on April 14, we had understood that there was a drafting error due to conflicting definitions for "publicly available information" in Sections 2(12) and 3(b)(3), and that the intended path forward was to adopt the definition set forth in Section 3(b)(3).

The April 21 version, which inadequately treats publicly available information, is a significant step backwards and leaves the draft vulnerable to a First Amendment challenge. In general, we agreed with the prior version wherein the Section 3(b)(3) definition and exclusion appropriately excluded public records and widely distributed media.

For reasons made clear in a memorandum that SIIA submitted to the California legislature,[2] the California Consumer Privacy Act's failure to exclude information in which no legitimate expectation of privacy exists runs afoul of the First Amendment, and puts the validity of that statute in doubt.

By removing the concept of widely distributed media from the draft, the Committee has repeated California's mistake. The draft now has created individual "privacy rights" such as opt-out, deletion and correction in data (1) voluntarily released by the government and (2) that the citizenry circulates in broader public and commercial discourse. As written, the draft covers professional contact details, credential and licensing details, biographical data, and other information drawn from registries, directories, websites, and news and social media channels. As written, therefore, the draft is both vague and overbroad. Moreover, as the problem is definitional, it would be extremely difficult for many courts to sever the offending provision from the rest of the statute. The defect, therefore, is fatal.

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[2] *See* SIIA Memorandum, available at http://www.siia.net/Portals/0/pdf/Policy/Data%20Driven%20Innovation/Memo%20re%20CCPA.pdf?ver=2019-01-25-163504-003; See also *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) ("the creation and dissemination of information are speech within the meaning of the First Amendment"), citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[i]f the acts of disclosing and publishing information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of express conduct.")

SIIA believes that a privacy law must exclude information in the public domain in order to pass constitutional muster. We would propose that the definition of publicly available data incorporate the definition of "widely distributed media", which has its origins in Gramm-Leach-Bliley's Regulation P. We offer the following language for your consideration:

- "Publicly available information" means information that is (1) lawfully made available to the general public from federal, state, or local government records; (2) available in widely distributed media; or (3) any such information that a person has a reasonable basis to believe is lawfully made available to the general public. For purposes of this section, a person has a reasonable basis to belief that information is lawfully made available to the general public if the person has taken steps to determine that the information is of the type that is available to the general public and that the data subject who can direct that the information not be made available to the general public has not done so.

- "Widely distributed media" means information that is available to the general public, including information from a telephone book or online directory; a television, Internet, or radio program; the news media; or a Web site that is available to the general public on an unrestricted basis. A Web site is not restricted merely because an internet service provider or a site operator requires a fee or password, so long as either the Web site makes the information available to the general public or the consumer provides access to the information to the general public.

This proposed language is intended to cover information that the government requires to be made available without request and that which is made available from public records, as well as that which might be made available to the public from behind a newspaper paywall. At the same time, limited distributions of information (such as within a small, closed discussion group on social media) could not be used, as in such circumstances the consumer would have an expectation of privacy as applied to those not included in such a discussion.

II. Conclusion

We thank you again for this opportunity to provide you with our preliminary comments, and for considering our concerns. If you have questions or concerns, please contact us at your convenience. We also plan to participate in the next meeting.

Respectfully submitted

Christopher A. Mohr
VP, Intellectual Property and General Counsel

Sara C. DePaul
Senior Director, Technology Policy