D R A F T

FOR DISCUSSION ONLY

Collection and Use of Personally Identifiable Data Act

Uniform Law Commission

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March 4, 2021

Collection and Use of Personally Identifiable Data Act

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Option: Uniform Personal Information Privacy Act

Section 1. Title

This [act] may be cited as the Collection and Use of Personally Identifiable Data Act.

Section 2. Definitions

In this [act]:

(1) "Collecting controller" means a controller that initially collects personal data from a data subject.

(2) "Compatible data practice" means processing consistent with the ordinary expectations, based on the context of data collection, of data subjects or likely to substantially benefit data subjects.

(3) "Controller" means a person that, alone or with others, determines the purpose and means of processing.

(4) "Data subject" means an individual to whom personal data refers.

(5) "Deidentified data" means personal data that has been modified to remove a direct identifier and has undergone a deidentification process that reasonably ensures the data cannot be linked to a specific individual by a person that does not have personal knowledge of the circumstances in which the data was collected or special access to the data subject's private information.

(6) "Direct identifier" means commonly recognized information that identifies a data subject, including name, physical address, email address, recognizable photograph, telephone number, and Social Security number.

Do we want to include a concept of an "indirect identifier"?

(7) "Incompatible data practice" means a data processing practice that is not a compatible data practice or a prohibited data practice.

(8) "Person" means an individual, estate, business or nonprofit entity, or other legal entity. The term does not include a public corporation or government or governmental subdivision, agency, or instrumentality.

(9) "Personal data" means information that identifies or describes a particular individual by a direct identifier. The term does not include pseudonymized data or deidentified data.

(10) "Processing" means performing, or directing a data processor to perform, an operation on personal or pseudonymized data, including collection, trause, storage, disclosure, analysis, prediction, and modification of the data, whether or not by automated means. "Process" has a corresponding meaning.

(11) "Processor" means a person that receives from a controller authorized access to personal data or pseudonymous data and processes the data on behalf of the controller.

(12) "Prohibited data practice" means processing prohibited by section 9 of this [act].

(13) "Pseudonymized data" means information derived by a controller or data processor from personal data by removing a direct identifier so that the data can no longer be attributed to a specific data subject without the use of additional information. The term includes information containing an Internet protocol address, a persistent unique ID, or other data related to a particular device if a direct identifier is not included. The term does not include deidentified data.

(14) "Publicly available information" means information:

(A) available ~~to the general public~~ from a federal, state, or local government record;

(B) available to the general public in widely distributed media, including:

(i) a publicly accessible website;

(ii) a website or other forum with restricted access if the information is available to a broad audience;

(iii) a telephone book or online directory;

(iv) a television, Internet, or radio program; and

(v) news media;

(C) observable from a publicly accessible location; or

(D) that a person reasonably believes is lawfully made available to the general public, if:

(i) the information is of the type generally available to the public; and

(ii) the person has no reason to believe that a data subject with authority to remove the information from public availability has directed the information to be removed.

(15) "Record" means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

To Committee: Changes below suggested by Jim Halperen.

(16) "Sensitive data" means personal data that reveals:

(A) ~~racial or ethnic origin, religious belief, mental or physical health condition or diagnosis, gender,~~ sexual orientation, transgender status, ~~citizenship~~, or immigration status;

(B) credentials sufficien to remotely access an account; ~~a password or other authenticating information, including a biometric identifier used for authentication;~~

(C) an individual's credit card or debit card number, or financial account number;

(D) a social security number or other ~~a~~ tax-identification number, or an individual's drivers license number or military identification number;

(E) real-time-geolocation information;

(F) ~~financial information;~~

(G) ~~information related to a~~ diagnosis or treatment for a disease or health condition;

(H) genetic sequencing information; or

(I) information about a data subject known to the controller to have been collected from a child ~~be~~ under [13] years of age.

(17) "Sign" means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

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

(18) "Stakeholder" means a person who has a direct interest in the development of a voluntary consensus standard or a person that represents such persons.

(19) "State" means a state of the United States, the District of Columbia, Puerto

Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. [The term includes a federally recognized Indian tribe.]

(20) "Third-party controller" means a controller that receives from another controller authorized access to personal data or pseudonymous data and determines the purpose and means of additional processing.

Comment

The Act recognizes the distinction between data controllers and data processors. A controller is the person who determines the purpose and means of data processing. There are two types of controllers. A "collecting controller" is a person who directly collects data from a data subject and thus has a relationship with the data subject. A "third party controller" is a person who obtains personal data not directly from data subjects but from another controller, generally a collecting controller. As long as the person directs the purpose and means of a data processing the person is a data controller. A processor, on the other hand, processes personal data at the direction of a controller; a processor does not determine the purpose of processing of personal data. However, if a person with access to personal data engages in processing that is not at the direction and request of a controller, that person becomes a controller rather than a processor, and is therefore subject to the obligations and constraints of a controller.

The language in (3) that requires the controller to dictate both the "purpose and means" of processing is intended to include within the term "means" the selection of the processor to perform the processing.

The definition of a "direct identifier" is limited to information that on its own tends to identify and relate specifically to an individual. The definition provides an illustrative list of examples, but the list is non-exhaustive so that the definition is flexible enough to cover new forms of identification that emerge in the future.

A persistent unique code that is used to track or communicate with an individual without identifying them is not a direct identifier. If the unique identifier or other code allows the data to be converted back to personal data with the use of a decryption key, data that includes such a code would be pseudonymized data.

Personally identifiable data, pseudonymized data, and deidentified data are mutually exclusive categories. Information that includes IP addresses or persistent unique IDs such as those imbedded in cookies that can be used to communicate with an individual should be treated as pseudonymized rather than deidentified data. Data that does not include direct identifiers or IP addresses/cookie IDs may nevertheless be pseudonymized data (as opposed to deidentified data) if it presents a reasonable risk of reidentification.

The definition of "publicly available information" includes information accessible from a

public website as well as information that is available on a nonpublic portion of a website if that nonpublic portion is nevertheless available to a large, non-intimate group of individuals. For example, if an individual shares personal data about themselves in a social media post that is accessible to all connected friends, that information is publicly available and would not fall within the scope of this Act. However, personal data that is shared with a hand-selected subset of friends through a direct message or through a highly constrained post on social media would not be publicly available.

To the Committee: We need to resolve the scope issue. There is first, the issue of any due process requirements raised by Jim Bopp. There is second, the issue of how to set the threshold. I've taken a stab at limiting the activities to be counted.

Section 3. Scope [1]

(a) This [act] applies to the activities of a controller or data processor that conducts business in this state or produces products or provides services targeted to residents of this state and that satisfy one or more of the following conditions:

(1) during a calendar year ~~becomes~~ engages in activities as the controller or processor of personal data concerning more than [50,000] data subjects, wherever located;

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

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

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

(5) For purposes of this subsection, "activities" does not include activities related

[1] Substitute for Sec3 (a):
(a) This [act] applies to any person that:
(1) collects personal data from at least [#] data subjects annually from this state,
(2) receives from a controller personal data of at least [#] data subjects annually from this state,
(3) processes personal data of at least [#] data subjects annually from this state, or
(4) maintains personal date of at least [#] data subjects annually from this state.

solely to conducting a commercial transaction such as processing credit card information or maintaining customer information solely for the exclusive use of the controller in its business.

To Committee: We need to make the following decisions:

1. whether or not to retain the exemptions for federal regimes;

2. whether to apply our statute if an entity subject to a federal regimes does not comply with that federal regime.

(b) This [act] does not apply to personal data that is:

(1) publicly available information;

(2) subject to the Health Insurance Portability and Accountability Act, Pub. L. 104-191, if the controller is regulated by that act;

(3) processed in connection with an activity subject to the Fair Credit Reporting Act, 15 U.S.C. Section 1681 et seq.[, as amended], or otherwise used to generate a consumer report by a consumer reporting agency as defined in 15 U.S.C. Section 1681a(f)[, as amended], a furnisher of the information, or a person procuring or using a consumer report;

(4) processed by a financial institution that processes personal information if the information is subject to the Gramm-Leach-Bliley Act of 1999, 12 U.S.C. Section 24a, et. Seq [, as amended], or is treated in substantial compliance with that act's data privacy and security requirements;

(5) collected, used, processed, or disclosed by an entity other than a financial institution if the personal information is subject to the Gramm-Leach-Bliley Act;

(6) subject to the Drivers Privacy Protection Act of 1994, 18 U.S.C. Section 2721 et seq.[, as amended];

(7) subject to the Family Education Rights & Privacy Act of 1974, 20 U.S.C.

Section 1232[, as amended];

(8) subject to the Children's Online Privacy Protection Act of 1998, 15 U.S.C. Sections 6501 et seq.[, as amended];

(9) processed solely in the course of a reasonable effort to prevent, detect, investigate, report on, prosecute, or remediate fraud, unauthorized access, or a breach of data security;

(10) processed solely as part of human-subjects research conducted in compliance with legal requirements for the protection of human subjects;

(11) disclosed to a government unit if disclosure is required or permitted by a warrant, subpoena, order or rule of a court, or otherwise as specifically required by law; or

(12) subject to a public disclosure requirement under [cite to state public records act].

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal laws. In a state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law, the phrase "as amended" should be omitted. The phrase also should be omitted in a state in which, in the absence of a legislative declaration, future amendments are incorporated into state law.*

Comment

This section limits the scope of the Act by limiting the controllers and processors obligated to comply and by limiting the type of data subject to the Acts provisions. Personal data privacy legislation can impose significant compliance costs on controllers and processors and thus most proposals contain limits similar to those in subsections (1), (2), and (3) which limit their provisions to larger controllers or processors—ones who either process data on a significant number of data subjects or earn a significant amount of their revenue from processing personal data. The threshold numbers are in brackets and each State can determine the proper level of applicability. The primary compliance mechanisms imposed are the obligation to publish a privacy policy and to conduct a privacy assessment in order to make their data practices transparent. Similarly, these firms must respond to consumer access and correction rights. The result of this limitation, however, is to put personal data at risk when collected by smaller firms.

By moving away from data subject consent as the basis for data processing and recognizing that data collectors are entitled to process data for compatible uses, some significant compliance costs

are accordingly reduced, while placing limits on incompatible or unexpected uses of data.

The processing of publicly available information is excluded from the act. There are significant First Amendment implication for placing limits on the use of public information. "Publicly available information" is defined in Section 2 of this act.

The remaining exemptions relate to well-established federal or state data privacy regimes that if not exempted would require additional and potentially conflicting compliance efforts. Subsections 9-12 are likely to be considered compatible uses but nonetheless are expressly exempted by this section.

Section 4. Controller and Data Processor Responsibilities; General Provisions

(a) A controller shall:

(1) if a collecting controller, provide under Section 5 a copy of a data subject's personal data ;

(2) correct or amend a subject's personal data on the subject's request under Section 5;

(3) provide notice and transparency under Section 6 about its processing practices ;

(4) obtain consent for processing that, without consent, would be an incompatible data practice under Section 8;

(5) not process personal data using a prohibited data practice;

(6) conduct a data privacy and security assessment under Section 10; and

(7) provide redress for an incompatible data practice or prohibited data practice that the controller performs or is responsible for performing ~~occurs~~ in the course of processing a subject's personal data.

(b) A data processor shall:

(1) correct an inaccuracy in a data subject's personal data on request of a controller;

(2) abstain from processing personal data or pseudonymized data for a purpose other than one requested by the controller; ~~and~~

(3) conduct routine data privacy assessments in accordance with Section 10; and

(4) provide redress for an incompatible or prohibited data practice the processor knowingly performs in the course of processing a data subject's personal data at the direction of the controller.

Comment

This Part clarifies the different obligations that collecting controllers, third party controllers, and data processors owe to individuals. Third party controllers, including data brokers, are firms that decide how data is processed. They are under most of the same obligations as collecting controllers. However, they are not under the obligation to respond to access or correction requests. A right of access or correction imposed on third party controllers would increase privacy and security vulnerabilities because third party controllers are not able to verify the authenticity of the request as easily as collecting controllers. However, collecting controllers must transmit credible collection requests to downstream third party controllers and data processors who have access to the personal data requiring correction.

This Act does not obligate controllers or processors to delete data at the request of the data subject. This is substantially different from the GDPR, the California Consumer Privacy Act, and several privacy bills recently introduced to state legislatures. There is a wide range of legitimate interests on the part of collectors that require data retention. It also appears difficult given how data is currently stored and processed to assure that any particular data subject's data is deleted. The restriction on processing for compatible uses or incompatible uses with consent should provide sufficient protection.

Section 5. Right to Copy and Correct Personal Data

(a) A collecting controller shall establish a reasonable procedure for a data subject to request a copy of currently maintained personal data relating to the subject or an amendment or correction of the subject's personal data. The procedure must include a method to authenticate the requesting data subject's identity to ensure the security of the data.

(b) Subject to subsection (c), on request of a data subject, a collecting controller shall:

(1) provide one copy of currently maintained personal data relating to the subject

free of charge once every 12 months;

(2) provide additional copies free of charge or on payment of a fee reasonably based on administrative costs;

(3) make a requested correction if:

(A) the controller does not have reason to believe the request for correction is fraudulent; and

(B) the correction is reasonably likely to affect a decision that will materially affect a legitimate interest of the data subject; and

(4) make a reasonable effort to ensure that a correction performed by the collecting controller also is performed on personal data held by any third-party controller or processor that directly or indirectly received personal data from the collecting controller.

(c) If a request by a data subject under subsection (a) is unreasonable or excessive, a collecting controller:

(1) may refuse to act on the request; and

(2) must notify the subject of the basis for a refusal.

(d) A collecting controller shall comply with a request under subsection (a) promptly. If the controller does not comply with the request [not later than 45 days] [within a reasonable time] after receiving it, the collecting controller shall provide the data subject who made the request an explanation of the action being taken to comply with the request.

(e) A third-party controller or processor receiving a request from a controller to correct personal data shall make the correction, or enable the controller to make the correction, if the controller or processor does not have reason to believe the request for correction is fraudulent. A third-party controller shall make a reasonable effort to ensure that such a correction also is

performed by any third-party controller or processor that directly or indirectly received personal data from it.

(f) A controller may not discriminate against a data subject for exercising a right under this section by denying a good or service, charging a different rate, or providing a different level of quality.

(g) Except as provided in subsection (c), an agreement that waives or limits a right or duty under this section is contrary to public policy and unenforceable.

Comment

The requirement to provide a copy of data or to initiate a data correction applies only to collecting controllers. These are the firms that already necessarily have a relationship with the data subject such that a secure authentication process would not unduly burden their business. A collecting controller must transmit any reasonable request for data correction to third party controllers and processors and make reasonable efforts to ensure that these third parties have actually made the requested change. Any third-party controller that receives a request for correction from a collecting controller must transmit the request to any processor or other third-party controller that it has engaged so that the entire chain of custody of personal data is corrected.

Subpart (f) ensures that a data subject who uses a right to access or correction is not penalized through diminished services or access for using their rights. This anti-discrimination provision is narrower than those appearing in statutes that also provide a right to deletion. A variety of firms follow a business model that provides their services for free or at a reduced rate in exchange for their customers providing personal data. This provision does not affect such a business model.

Section 6. Privacy Policy

(a) A controller shall adopt and comply with a reasonably accessible, clear, and meaningful privacy policy that discloses:

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

(2) categories of personal data the controller provides to a data processor or another person, and the purpose of providing the data;

(3) compatible data practices that will be applied routinely to the personal data by the controller or by an authorized processor;

(4) incompatible data practices that, with consent of the data subject, will be applied to the personal data by the controller or an authorized processor;

(5) the procedure by which a data subject may exercise a right under Section 5;

(6) federal, state, or international privacy laws or frameworks with which the controller complies; and

(7) the identity of a voluntary consensus standard the controller has adopted.

(b) The privacy policy under subsection (a) must be reasonably available to a data subject at the time personal data is collected about the subject.

(c) If a controller maintains a public website, the controller must publish the privacy policy on the website.

(d) At any time, the [Attorney General] may review the privacy policy of a controller.

Comment

The purpose of the required privacy policy is to provide data subjects with a transparent way to determine the scope of the data processing conducted by collecting controllers. While consent to compatible data practices is not required, the privacy policy does assure that data subjects can determine what those practices are for a particular controller and may exercise their right not to engage with that controller. Thus, this helps to promote an autonomy regime without requiring burdensome consent instruments. The privacy policy also permits consumer advocates, and the Attorney General, to monitor data practices and to take appropriate action.

Controllers and processors do not have to explicitly state compatible data practices that are not routinely used. For example, a controller may disclose personal data that provides evidence of criminal activity to a law enforcement agency without listing this practice in its privacy policy as long as this type of disclosure is unusual.

Subsection (b) requires the privacy policy to be reasonably available to the data subject at the time data is collected. This does not require providing a data subject with individual notice. Placement of the privacy policy on a public website or posting in a location that is accessible to data subjects is sufficient.

Section 7. Compatible Data Practice

(a) A controller or processor may engage in a compatible data practice without the data subject's consent. The following factors apply to determine whether processing of personal data constitutes a compatible data practice:

(1) the data subject's relationship with the controller;

(2) the type of transaction in which the data was collected;

(3) the type and nature of the data collected;

(4) the risk of a negative consequence on the data subject of the proposed use or disclosure of the data;

(5) the effectiveness of a safeguard against unauthorized use or disclosure of the data; and

(6) the benefit to the data subject of the proposed use or disclosure of the data.

(b) A compatible data practice includes processing that:

(1) initiates or effectuates a transaction with a data subject with the subject's knowledge or participation;

(2) is reasonably necessary to comply with a legal obligation or regulatory oversight of the controller;

(3) meets a particular and explainable managerial, personnel, administrative, or operational need of the controller;

(4) permits appropriate internal oversight of the controller or external oversight by a government unit or the controller's agent;

(5) is reasonably necessary to create pseudonymized or deidentified data;

(6) permits analysis for generalized research or research and development of a new

product or service; [There was discussion about AI here but not certain if anything is required.]

(7) is reasonably necessary to prevent, detect, investigate, report on, prosecute, or remediate an actual or potential:

(A) fraud;

(B) unauthorized transaction or claim;

(C) security incident;

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

(E) other legal liability of the controller;

(F) threat to national security.

(8) assists a person or government entity acting under paragraph (7);

(9) is reasonably necessary to comply with or defend a legal claim; or

(10) is consistent with the ordinary expectations of data subjects or is likely to substantially benefit data subjects.

(c) A controller may use personal data, or disclose pseudonymized data to a third-party controller, to deliver targeted content and advertising to an individual. The controller also may disclose pseudonymized data to a third-party controller for this purpose. This subsection applies only to targeted delivery of purely expressive content. Personal data or pseudonymized data may not be used for ~~targeted~~ individualized decisional treatment, including to set a price or another term in a transaction. The processing of personal data or pseudonymized data for ~~targeted~~ individualized decisional treatment is an incompatible data practice unless the processing is otherwise compatible under this section. This subsection does not prevent providing special considerations to members of loyalty or award programs.

(d) A controller may process personal data in accordance with the rules of a voluntary

consent standard under Sections 11 through 14 to which the controller has committed in its privacy policy unless a court has prohibited the processing or found it to be an incompatible data practice.

Comment

Compatible data practices are mutually exclusive from incompatible and prohibited data practices described in Sections 8 and 9. Although compatible practices do not require specific consent from each data subject, they nevertheless must be reflected in the publicly available privacy policy as required by Section 6.

Subsection (a) provides a list of factors that can help determine whether a practice is or is not compatible. Subsection (b) provides a list of nine specific practices that are per se compatible and do not require consent from the data subject followed by a tenth gap-filling category that covers any other processing that meets the more abstract definition of "compatible data practice." The factors listed in subsection (a) inform how the scope of "compatible data practice" should be interpreted. The catch-all provision in (b)(10) allows controllers and processors to create innovative data practices that are unanticipated and do not fall into the scope of one of the conventional compatible practices to proceed without consent as long as data subjects substantially benefit from the practice. In order to find that data subjects substantially benefit from the practice, a court should ask whether data subjects would be likely to prefer that the processing occur and would be likely to consent to the processing if it were not for the transaction costs inherent to consenting processes.

Practices that qualify as compatible under subsection (f) include detecting and reporting back to data subjects that they are at some sort of risk, e.g. of fraud, disease, or criminal victimization. Another example is processing that is used to recommend other purchases that are complements or even requirements for a product that the data subject has already placed in a virtual shopping cart. Both of these examples are now routine practices that consumers favor, but when they first emerged, they seemed creepy. Subsection (b)(10) is intentionally reserving space, free from regulatory burdens, for win-win practices of this sort to emerge. This allowance for beneficial repurposing of data makes CUPIDA different in substance from the GDPR, which restricts data repurposing unless __ and which gives data subjects a right to object to any processing outside certain limited "legitimate grounds" of the controller. (Articles 5(1)(b), 18, and 22 of the General Data Protection Regulation.)

Subsection (c) makes clear that the act will not require pop-up windows or other forms of consent before using data for tailored advertising. This leaves many common web practices in place, allowing websites and other content-producers to command higher prices from advertisers based on behavioral advertising rather than using the context of the website alone. This marks a substantial departure from the California Consumer Privacy Act and other privacy acts that have been introduced in state legislatures, including the Washington Privacy Act Sec. 103(5) and the proposed amendments to the Virginia Consumer Data Protection Act Sec. 59.1-573(5). All of these bills permit data subjects to opt out of the sale or disclosure of personal data for the purpose of targeted advertising.

Under subsection (c), websites and other controllers cannot use or share data even in pseudonymized form for tailored treatment unless tailoring treatment is compatible for an entirely different reason. For example, a firm that shares pseudonymized data with a third party controller for the purpose of creating "retention models" or "sucker lists" that will be used by the third party or by the firm itself to modify contract terms cannot rely on subsection (c), because the processing is used for targeted decisional treatment. The firm also cannot rely on subsection (b)(10) or any other provision of this section because the processing is unanticipated and does not substantially benefit the data subject. (*See* Maddy Varner & Aaron Sankin, *Sucker List: How Allstate's Secret Auto Insurance Algorithm Squeezes Big Spenders,* THE MARKUP (February 25, 2020) for an allegation that provides an example of this sort of processing.) By contrast, a firm that runs a wellness-related app and shares pseudonymized data with a third party controller for the purpose of researching public health generally or for assessing a health risk to the data subject specifically would be in a different posture. Like the "sucker list" example, this controller might not be able to rely on subsection (c) because the processing may be used to guide a public health intervention or to modify recommendations that the wellness app gives to the data subject. Nevertheless, the app producer could rely on subsection (b)(10) for processing that changes the function of the app itself because this processing, while potentially unanticipated, redounds to the benefit of the data subject without meaningfully increasing risk of harm. The app producer could rely on subsection (b)(6) for disclosure of pseudonymized data to produce generalized research (which then may be used for general public health interventions.)

Subsection (d) incorporates any data practice that has been recognized as compatible through a voluntary consent process as one of the per se compatible data practices, effectively adding these to the list contained in subsection (c).

Section 8. Incompatible Data Practice

(a) Processing is an incompatible data practice even if it otherwise is a compatible data practice if it:

(1) contradicts or is not disclosed in the privacy policy of the controller required by Section 6; or

(2) fails to provide reasonable data security measures, including appropriate administrative, technical, and physical safeguards to prevent unauthorized access.

~~(b) Data security measures that conform to best practices promulgated by a professional organization, government entity, or other specialized source presumptively are reasonable under subsection (a)(2) unless a court has found the measures to be unreasonable.~~

(c) If a third-party controller or a processor engages in an incompatible data practice, a collecting controller is deemed to have engaged in the same practice if the collecting controller knew or should have known that the personal data would be used for the practice and was in a position to prevent the practice.

(d) A controller may not engage in an incompatible data practice unless, at the time the personal data is collected about the data subject:

(1) the controller, or a previous controller that was a collecting controller, provided sufficient notice and information to the data subject that the subject's personal data may be processed for incompatible data practice; and

(2) the subject had a reasonable opportunity to withhold consent to the practice.

(e) A controller may not process a data subject's sensitive data for an incompatible data practice without obtaining the subject's express, voluntary, and signed consent in a record for each practice.

(f) Unless processing is prohibited by state or federal law or constitutes a prohibited data practice, a controller may require a data subject to consent to an incompatible data practice as a condition for access to the controller's goods or services. The controller may offer a reward or discount in exchange for the data subject's consent to process the subject's personal data.

Comment

An incompatible data practice is an unanticipated use of data that is likely to cause neither substantial harm nor substantial benefit to the data subject. (The former would be a prohibited data practice and the latter would be a compatible one.) An example of an incompatible data practice is a firm that develops an app that sells user data to third party fintech firms for the purpose of creating novel credit scores or employability scores.

Subpart (d) assigns responsibility (and, potentially, liability) to controllers who negligently or knowingly provide personal data to others who engage in an incompatible data practice.

Statements in a privacy policy do not meet the standards of notice required in subpart (e).

Subpart (f) makes clear that a firm may condition services on consent to processing that would otherwise be incompatible. In other words, if the business model for a free game app is to sell data to third party fintech firms, the app developers will have to receive consent that meets the requirements of subpart (d). But the firm can also refuse service to a potential customer who does not consent. This is distinguishable from the California Privacy Rights Act's nondiscrimination provision, which permits variance in price or quality of service only if the difference is "reasonably related to the value provided to the business by the consumer's data." (California Privacy Rights Act Section 11.)

Section 9. Prohibited Data Practice

(a) A controller or data processor may not engage in a prohibited data practice. A prohibited data practice is processing personal data in a manner that reasonably and foreseeably would:

(1) inflict on a data subject specific and significant financial, physical, or reputational harm, undue embarrassment or ridicule, intimidation, or harassment;

(2) cause misappropriation of personal data to assume another's identity;

(3) cause physical or other intrusion on the solitude or seclusion of a data subject or a subject's private affairs or concerns, if the intrusion would be inappropriate and highly offensive to a reasonable person;

(4) constitute a clear violation of federal law or law of this state other than this [act];

(5) recklessly or knowingly fail to provide reasonable data security measures, including appropriate administrative, technical, and physical safeguards to prevent unauthorized access;

(6) process without consent under Section 8 personal data in a manner that the controller or processor knows is an incompatible data practice, or that a court or the Attorney General previously has determined to be an incompatible data practice;

(7) recklessly or knowingly cause an increased risk of subjecting a data subject to discrimination that would violate a federal or state law against discrimination; or

(8) cause undue risk of harm to a data subject or another that cannot be cured effectively by consent.

(b) It is a prohibited data practice to collect or create personal data by reidentifying or causing the reidentification of pseudonymized or deidentified data unless:

(1) the reidentification is performed by a controller or data processor that had previously deidentified or pseudonymized the data; or

(2) the purpose of the reidentification is to assess the privacy risk of deidentified data and the person does not use or disclose reidentified personal data except to demonstrate a privacy vulnerability to the controller or processor that created the deidentified data.

(c) If a third-party controller or data processor engages in a prohibited data practice, a controller is deemed to have engaged in the same practice if the controller knew or should have known that the personal data would be used for the practice.

Comment

Reidentification of previously deidentified data is a prohibited practice unless the reidentification fits one of the exceptions in subpart (b). Exception (b)(1) covers controllers or processors that are in the practice of pseudonymizing personal data for security reasons and then reidentify the data only when necessary. This exception covers controllers or processors who already have the right and privilege to process personal data. Exception (b)(2) exempts "white hat" researchers who perform reidentification attacks in order to stress-test the deidentification protocols. These researchers may disclose the details (without identities) of their demonstration attacks to the general public, and can also disclose the reidentifications (with identities) to the controller or processor.

Section 10. Data Privacy and Security Assessment

(a) A controller or data processor shall prepare in a record a data privacy and security risk assessment. The assessment shall evaluate the:

(1) privacy and security risks to the confidentiality and integrity of the personal data being processed, the likelihood of occurrence of such risks, and the impact tht such risk would

have on the privacy and security of the personal data.

(2) efforts taken to mitigate such risks, and

(3) extent to which its data practices comply with the provisions of this [act].

(b) The data privacy and security risk assessment shall be updated if there is a change in the risk environment or in a data practice that may materially affect the privacy or security of the personal data.

~~of its data practices. The assessment must evaluate material privacy and security risk associated with the controller's or data processor's data practices, the type of personal data processed, the means available and effort taken to mitigate the risk, how the data practices comply with this [act], and the likely tradeoff between remaining risks and the benefits of processing for individuals.~~

~~(b) A controller or data processor shall update the data privacy and security assessment if a change in data practice occurs that materially affects the risk or benefit of the practice or two years have passed since the last assessment.~~

(c) A data privacy and security assessment is confidential business information [and is not subject to a public records request or discovery in a civil action]. The fact that a controller or processor conducted an assessment, the facts underlying the assessment, and the date of the assessment are not confidential information.

Legislative Note: *The state should include appropriate language in subsection (c) exempting a data privacy assessment from an open records request and discovery in a civil case to the maximum extent possible under state law.*

Comment

The goal here is to ensure that all controllers and processors go through a reflective process of evaluation that is appropriate for their size and the intensity of data use. Other than being a record, the act does not require any particular format for the evaluation. There are many existing forms that companies can use to help them through a privacy impact assessment, and the

Attorney General may recommend or provide some of these on their website.

Section 11. Compliance with Other Data Protection Law

A controller or data processor complies with this [act] if it complies with a similar privacy protection law in another jurisdiction and the [Attorney General] determines the law in the other jurisdiction is as or more protective of data privacy than this [act].

Comment

Companies that collect or process personal data, particularly larger ones, have an interest in adopting a single set of data practices that satisfy the data privacy requirements of multiple jurisdictions. It is likely that such firms will adopt practices to meet the most demanding laws among the jurisdictions in which they do business. Compliance costs can be quite burdensome and detrimental to smaller firms that in the ordinary course of business must collect consumer data. The purpose of this section is to permit, in practice, firms to settle on a single set of practices relative to their particular data environment.

This section also greatly expands the potential enforcement resources for protecting consumer data privacy. Adoption of this act confers on the state attorney general, or other privacy data enforcement agency, authority not only to enforce the provisions of this act but also to enforce the provisions of any other privacy regime that a company asserts as a substitute for compliance with this act.

Section 12. Compliance with Voluntary Consensus Standard

If the [Attorney General] recognizes a voluntary consensus standard under Section 15, a controller or data processor complies with this [act] if it adopts and complies with the standard.

Comment

Developing detailed common rules for data practices applicable to a wide variety of industries is particularly challenging. Data practices differ significantly from industry to industry. This is reflected in a number of specific federal enactments governing particular types of data (HIPPA for health information) or particular industries (Graham-Leach-Bliley for financial institutions). The Act imposes fundamental obligations on controllers and data processors to protect the privacy of data subjects. These include the obligations to allow data subjects to access and copy their data, to correct inaccurate data, to be informed of the nature and use of their data, to expect their data will only be used as indicated when it is collected, and to be assured there are certain data practices that are prohibited altogether. No voluntary consensus standard may undermine these fundamental obligations.

On the other hand, how these obligations are implemented may depend on the particular business sector. Developing processes for access, copying, and correction of personal data can be a complex undertaking for large controllers. And consumers have vastly different expectations about the use of their personal information depending on the underlying transaction for which their data is sought. Signing up for a loyalty program is far different than taking out a mortgage. Providing an opportunity for industry sectors, in collaboration with stakeholders including data subjects, to agree on methods of implementing privacy obligations provides the flexibility any privacy legislation will require. There is some experience,

primarily at the federal level, of permitting industries to engage in a process to develop voluntary consensus standards that can be compliant with universal regulation and yet tailored to the particular industry.

Voluntary consensus standards are NOT to be confused with industry codes or other forms of self-regulation. Rather these standards must be written through a private process that assures that all stakeholders participate in the development of the standards. That process is set out in the following sections. Any concerns regarding self-regulation are also addressed in this act by requiring the Attorney General to formally recognize standards as being in substantial compliance with this Act. Thus there must be assurance that any voluntary consensus standard fully implements the fundamental privacy protections adopted by the act.

The act creates a safe harbor for covered entities that comply with voluntary consensus standards, recognized by the state Attorney General, that implements the Act's personal data privacy protections and information system security requirements for defined sectors and in specific contexts. These voluntary consensus standards are to be developed in partnership with consumers, businesses, and other stakeholders by organizations such as the American National Standards Institute, and by using a consensus process that is transparent, accountable and inclusive and that complies with due process. This safe harbor for voluntary consensus standards is modeled on Articles 40 and 41 of the GDPR, which provides for recognition of industry "codes of conduct," the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2056, *et seq.*, which uses voluntary consensus standards to keep consumer products safe, and the Children's Online Privacy Protection Act ("COPPA"), 15 U.S.C. § § 6501-6506, which uses such standards to protect children's privacy online. This provision of the Act is in conformity with the Office of Management and Budget (OMB) Circular A-119, which establishes policies on federal use and development of voluntary consensus standards. Thus there is not only precedent for the adoption of voluntary consensus standards but actual experience in doing so.

By recognizing voluntary consensus standards, the Act provides a mechanism to tailor the Act's requirements for defined sectors and in specific contexts, enhancing the effectiveness of the Act's privacy protections and information system security requirements, reducing the costs of compliance for those sectors and in those contexts, and, by requiring that the voluntary consensus standard be developed through the consensus process of a voluntary consensus standards body, the concerns and interests of all interested stakeholders are considered and reconciled, thus ensuring broad-based acceptance of the resulting standard. Finally, by recognition of voluntary consensus standards by the Attorney General, the Act ensures that the voluntary consensus standard substantially complies with the Act.

Voluntary consensus standards also provides a mechanism to provide interoperability between the act and other existing data privacy regimes. The Act encourages that such standards work to reasonably reconcile any requirements among competing legislation, either general privacy laws or specific industry regulations. For example, it would provide an opportunity for firms that process both financial, health, and other data to attempt to create a common set of practices that reconcile HIPPA and GLB regulations with that applicable under this act for other personal data.

Section 13. Content of Voluntary Consensus Standard

A stakeholder may initiate a process to develop a voluntary consensus standard for compliance with a requirement of this [act]. A voluntary consensus standard may address any data practice, including:

(1) identification of compatible data practices for an industry;

(2) the process and method for securing consent of a data subject for an incompatible data practice;

(3) a common method for responding to a request by a data subject for access to or correction of personal data, including a mechanism for authenticating the subject;

(4) a format for a data privacy policy that will provide consistent and fair communication of the policy to data subjects;

(5) a set of practices that provides reasonable security to personal data ~~held~~ maintained by a controller or data processor; and

(6) any other policy or practice that ~~protects the privacy rights of data subjects~~relates to compliance ~~consistent~~ with this [act].

Comment

This section clarifies the policies and practices that seem most appropriate for voluntary consensus standards and most likely to differ among industry sectors. The list of policies and practices is not intended to be exclusive. The section, however, does make clear that any such standards must remain consistent with the act's privacy protection obligations on controllers and processors.

Section 14. Process for Development of Voluntary Consensus Standard

The [Attorney General] may recognize a voluntary consensus standard only if the standard is developed by a voluntary-consensus-standards body through a process that:

(1) achieves general agreement, but not necessarily unanimity, through a consensus process that:

(A) includes stakeholders representing a diverse range of industry, consumer, and public interests;

(B) gives fair consideration to each comment by a stakeholder;

(C) responds to each good-faith objection by a stakeholder;

(D) attempts to resolve each good-faith objection by a stakeholder;

(E) provides each stakeholder an opportunity to change the stakeholder's vote after reviewing comments received; and

(F) informs each stakeholder of the disposition of each objection and the reason for the disposition;

(2) provides stakeholders a reasonable opportunity to contribute their knowledge, talents, and efforts to the development of the standard;

(3) is responsive to the concerns of all stakeholders;

(4) consistently complies with documented and publicly available policies and procedures that provide adequate notice of meetings and standards development; and

(5) includes a right for a stakeholder to file a statement of dissent.

Comment

This section outlines the process required for the adoption of voluntary consensus standards in order to allow them to be considered a safe harbor under this act. The process is consistent with OMB A-119 and has been utilized by industries and accepted by federal regulatory agencies. The development and operation of the process required by this section is the responsibility of the voluntary consensus organization that facilitates development of the standards. The role of the Attorney General would be only to assure that the resulting standards were developed by such a process.

Section 15. Recognition of Voluntary Consensus Standard

(a) The [Attorney General] may recognize a voluntary consensus standard only if the [Attorney General] finds that the standard:

(1) protects the rights of data subjects under Sections 5 through 9; and

(2) is developed by a voluntary consensus standards body through a process that substantially complies with Section 14 of this [Act]; and

(3) reasonably reconciles the requirements of this [act] with the requirements of other federal and state law.

(b) The [Attorney General] shall adopt rules under [cite to state administrative procedure act] that establish a procedure for filing a request under this [act] to recognize a voluntary consensus standard. The rules may:

(1) require the request to be in a record demonstrating that the standard and process through which it was adopted comply with this [act];

(2) require the applicant to indicate whether the standard has been recognized as appropriate elsewhere and, if so, identify the authority that recognized it; and

(3) set a fee to be charged to the applicant, which must reflect the cost reasonably expected to be incurred by the [Attorney General] in acting on a request.

(c) The [Attorney General] shall determine whether to grant or deny the request and provide the reason for a denial. In making the determination, the [Attorney General] shall consider the need to promote predictability and uniformity among the states and give appropriate deference to a voluntary consensus standard developed consistent with this [act] and recognized by a privacy-enforcement agency in another state.

(d) ~~A final decision by the [Attorney General] may be appealed under~~The Attorney General may withdraw recognition of a voluntary consensus standard if the Attorney General finds that its provisions or its interpretation is not consistent with this [act]. ~~[cite to state administrative procedure act].~~

(e) A voluntary consensus standard recognized by the Attorney General shall be available to the public.

Comment

This section makes clear that the basic privacy interests of consumers will be protected throughout any voluntary consensus standards process. Each state Attorney General or other data privacy enforcement agency must assure that the rights accorded to consumers under this Act with respect to their personal data are preserved. To be recognized as compliant with this act, the Attorney General must determine that the standards were adopted through a process outlined in Section [ ], which will assure that all stakeholders including representatives of data subjects are involved. The Attorney General must also confirm that the standards are consistent with the act's imposed obligations on controllers and processors. And the Attorney General must find the standards reasonably reconcile other competing data privacy regimes.

Any industry or firm seeking to establish a set of voluntary consensus standards would have the burden of convincing the Attorney General that the standards comply with this section. It is recognized that this standard setting process can be expensive and thus the incentive for particular industries to participate will be determined in part by their expectation that standards will be treated consistently from state to state. Thus, the act contains provisions that encourage the Attorney General of each state in which this act is adopted to collaborate with Attorneys General from other states.

The Attorney General is encouraged to work with other states to achieve some uniformity of application and acceptance of these standards. While the act recognizes the State's inherent right to determine the level of data privacy protection it does encourage the Attorney General to take the actions of other states into account.

Currently the National Association of Attorneys General has created a forum through which various state Attorney Generals offices share policies and enforcement actions related to consumer protection including specifically data privacy. This activity suggests it is realistic to believe that consistency across states can be achieved.

The section also authorizes the Attorney General to charge a fee commensurate with the expense of reviewing requests for recognition of voluntary consensus standards. Such a fee is appropriate to assure adequate resources for this process and as a cost of seeking a safe harbor from otherwise applicable legislation.

Section 16. Enforcement by [Attorney General]

(a) A violation of this [act] is a violation of [cite to state consumer protection act]. All remedies, penalties, and authority granted to the [Attorney General] by [cite to state consumer protection act] are available for enforcement of this [act].

(b) The [Attorney General] may adopt rules to implement this [act] under [cite to state administrative procedure act].

(c) In adopting rules under this section, the [Attorney General] shall consider the need to promote predictability for data subjects, regulated entities and uniformity among the states consistent with this [act] and is encouraged to:

(1) consult, if deemed appropriate, with Attorneys General or other personal data privacy enforcement agencies in other jurisdictions that enact an act substantially similar to this [act];

(2) consider any suggested or model rules or enforcement guidelines promulgated by the National Association of Attorneys General or any successor organization; ~~and~~

(3) consider the rules and practices of Attorneys General or other personal data privacy enforcement agencies in other jurisdictions; and ~~.~~

(4) consider any voluntary consensus standards developed consistent with the requirements of this [act], particularly if such standards have been recognized and accepted by other Attorneys General or other personal data privacy enforcement agencies.

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

Legislative Note: *In subsection (a), the state should cite to the state's consumer protection law.*

Legislative Note: *In subsection (b) the state should cite to the state's administrative procedure act or other act regulating the adoption of rules and regulations.*

Comment

The challenge in uniform state legislation when agencies are given the power to adopt implementing rules and regulations is to continue to assure a reasonable degree of uniform application and enforcement of the substantive provisions. This is not a unique problem here where the state Attorney General or any other personal data privacy enforcement agency will be required to implement and enforce standards that are, by their nature, flexible so they may be implemented by diverse industries. Nor is this a problem limited to data privacy protection.

Every state has adopted a general consumer protection law that governs transactions of interstate businesses within the state. The enforcement provision here is modeled after these "little FTC acts" and merely provides detail and specificity related to data privacy.

What remains uniform by adopting this act is the acknowledgement of the rights of consumers to obtain access to data held about them, to correct inaccurate data, and to be informed of the uses to which their data may be put. The distinction in this act between compatible, incompatible, and prohibited uses of personal data would create a uniform approach to the use of personal data although the very concept of "compatible" use is dependent on the nature of the underlying transaction from which the data is collected.

In order to encourage as much uniformity as possible, the state Attorney General is encouraged by subsection (c) to attempt to harmonize rules ~~and enforcement policies~~ with those in other states that have adopted this act. The Attorney General may also consider voluntary consensus standards that have been approved in other states, but, of course, there is no requirement that he accept them unless they have been previously approved in this state. These provisions are derived from section 9-526 of the Uniform Commercial Code which has been successful in harmonizing the filing rules and technologies for security interests by state filing offices. While there is not a direct analogy between privacy enforcement and filing rules, the potential, it demonstrates that legislation can successfully encourage state officials to cooperate as a substitute for federal dictates.

The section applies to general policies and not to the decision to bring a particular enforcement action. The latter decision is one for prosecutorial discretion.

It goes without saying that the committee needs to pick a path on a private right of action. In thinking about how to structure our discussion, some choices seem independent and some seem relative. Unless the committee believes a different order I would propose we make the choice in the following order:

1. Should the committee propose all three alternatives to the States and let them decide?

2. If the committee votes "no" on proposition 1, then I propose the following votes to see if we can find a position.

a. As between A and B, which would you favor.
b. As between B and C, which would you favor.
c. As between A and C, which would you favor
d. Hopefully we will see that one alternative has little support and we can vote on the top two.

[To the drafting committee: The question of whether the act should accommodate a private cause of action on behalf of injured parties has proven controversial, not only among the committee and its observers but also in legislatures that have considered privacy legislation. Accordingly, three options for a private cause of action are included below. It is contemplated

that the drafting committee will ultimately decide which alternative to include. Another option, of course, is to provide all three alternatives to the states.]

Alternative A

Section 17. Private Cause of Action

(a) An individual has a cause of action for an injunction or other equitable relief against a controller or data processor that processes the individual's personal data:

(1) in violation of this [act]; and

(2) in a manner reasonably likely to cause measurable harm.

(b) An individual has a cause of action for actual damages against a person that knowingly engages in a prohibited data practice in a manner likely to cause and that causes:

(1) financial, physical, or reputational injury to the individual;

(2) physical or other intrusion on the solitude or seclusion of the individual or the individual's private affairs or concerns, if the intrusion would be highly offensive to a reasonable person;

(3) increased risk of subjecting the individual to discrimination in violation of any federal or state law against discrimination; or

(4) other substantial injury to the individual.

(c) At least [30] days before filing an action under subsection (b), a claimant must, in a record, make a demand for relief from a controller or data processor, identify the claimant, and describe the violation of this [act] relied on and the injury suffered. If not later than [30] days after delivery of the demand, the controller or data processor receiving the demand may tender a settlement in a record. If the tender is rejected by the claimant and the claimant brings an action under this section against the controller or processor, the controller or processor may file the tender and an affidavit concerning its rejection in the action.

(d) Except as provided in subsection (e), if a claimant brings an action under this section and the court finds for the claimant, the court shall award the claimant the amount of the claimant's actual damages.

(e) If the court in an action under this section finds for the claimant and finds that the tender under subsection (c) was reasonable in relation to the injury claimed by the claimant, the court shall limit the claimant's relief to the amount tendered.

(f) If the court finds a violation of this [act] was willful and with knowledge or reason to know that the same practice had previously been determined to violate this [act], the court may award the claimant up to three times the claimant's actual damages.

Comment

This section provides a limited private cause of action to persons injured by violations of the Act that can be shown to have caused measurable harm. Whether or not to authorize a private cause of action for violations of data privacy legislation has been a matter of considerable controversy. The substantive provisions of any data privacy act must be broad in order to encompass the wide variety of data uses and industries to which it applies. Such provisions make it difficult for controller or processors to assure in advance that they have met all technical requirements. This uncertainty provides plaintiffs and their lawyers considerable leverage to force large settlements. Many proposals enhance this leverage by providing statutory damages in lieu of proven damages because of the difficulty of monetizing privacy violations. This in turn encourages class actions which again imposes considerable settlement leverage. On the other hand, leaving enforcement solely to a public agency, particularly a State Attorney General's office, is subject to the resource allocation and priorities of each office. And, where an actor violates a victim's data privacy expectations and causes serious harm, it is more than appropriate to provide the victim relief.

Alternative 1 to section 17 attempts to respond to both concerns. First subsection (a) authorizes an injured victim to seek injunctive relief. While it is recognized as unlikely that a data subject will in most instances have an incentive to expend resources to obtain an injunction, this section would be useful to consumer advocacy organizations in policing egregious behavior.

Subsection (b) requires the plaintiff not only to prove a violation that constitutes a "prohibited practice" under section [ ] of the Act but also that the defendant acted knowingly in the face of the likelihood the violation would cause harm. The plaintiff is limited to recovery of those actual damages the plaintiff can prove. Moreover, the plaintiff must thirty days prior to filing an action make a demand of settlement on the defendant. The defendant has an opportunity to make a reasonable response which may include correction of the violation or a

monetary settlement or both. If in the subsequent action a court finds the settlement offer reasonable, the plaintiff's relief is limited to that relief.

Subsection (e) provides a private cause of action for triple damages but only where the plaintiff can show the actor acted willfully to commit a data practice that had previously been determined to violate the act.

Alternative B

Section 17. Private Cause of Action Prohibited

The [Attorney General] has exclusive jurisdiction to enforce this [act]. This [act] does not provide a claim for damages or injunctive relief by a person.

Comment

This alternative expressly prohibits any private cause of action for a specific violation of this act. This would apply notwithstanding that the general consumer protection law of the particular jurisdiction authorizes private causes of action for other violations.

Alternative C

Section 17. Enforcement Action

The enforcement and remedial provisions of [cite to state consumer protection act] apply to a violation of this [act].

Comment

This alternative defers to the decision each state has made regarding enforcement of its general consumer protection law, usually referred to as the "little FTC Act" which prohibits unfair and deceptive practices. Every state has adopted some form of private remedy. In some states private causes of action are authorized only for violations of established rules rather than the general prohibition against unfair or deceptive acts. Others may impose procedural requirements such as requiring plaintiffs to engage with the Attorney General before bringing a suit. See, National Consumer Law Center, Unfair and Deceptive Acts and Practices (9th ed. 2016).

End of Alternatives

Section 18. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of

uniformity of the law among jurisdictions that enact it.

Section 19. Electronic Records and Signatures in Global and National Commerce Act

This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[as amended][, as in effect on [the effective date of this [act]], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. In a state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law, the phrase "as amended" should be omitted. The phrase also should be omitted in a state in which, in the absence of a legislative declaration, future amendments are incorporated into state law.*

[Section 20. Severability

If any provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

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

Section 21. Effective Date

This [act] takes effect [180 days after the date of enactment].

Legislative Note: *The legislative drafter may wish to include a delayed effective date of at least 60 days to allow time to all applicable agencies and industry members to prepare for implementation and compliance.*