



August 12, 2020

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

**RE: Feedback of BSA | The Software Alliance  
On the Personal Data Protection and Information System Security Act  
("ULC Alternative Draft")**

Dear Chairman Perlman,

BSA | The Software Alliance appreciates the opportunity to provide the Uniform Law Commission ("ULC") with additional feedback as you consider the draft Personal Data Protection and Information System Security Act ("Alternative Draft").

BSA is the leading advocate for the global software industry before governments and in the international marketplace.<sup>1</sup> Our members are enterprise software companies that create the technology products and services that power other businesses. They offer tools including cloud storage services, customer relationship management software, human resources management programs, identity management services, and collaboration software. Our companies compete on privacy—and their business models do not depend on monetizing users' data. BSA members recognize that companies must earn consumers' trust and act responsibly with their data and have long called for a comprehensive national privacy law.

This letter follows up on feedback that BSA provided on the Alternative Draft during ULC's August 6, 2020, virtual meeting. In particular, we want to underscore two concerns with the Alternative Draft:

- ***Lack of Interoperability.*** The Alternative Draft is intended to take a fundamentally different approach to consumer privacy legislation than existing laws like the California Consumer Privacy Act ("CCPA") and the EU's General Data Protection Regulation ("GDPR"). This approach risks further fragmenting the landscape of privacy laws that provide consumers rights over their personal data and impose obligations on businesses that handle consumers' personal data. To be clear, we do not believe that states should copy-and-paste either the CCPA or GDPR into their state laws. But privacy laws established around the world need to be consistent

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<sup>1</sup> BSA's members include: Adobe, Atlassian, Autodesk, Bentley Systems, Box, Cadence, CNC/Mastercam, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens Industry Software Inc., Sitecore, Slack, Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

enough that they are interoperable—so that consumers understand how their rights change across jurisdictions and businesses can readily map new obligations imposed by a particular law against their existing obligations under other laws. The Alternative Draft risks creating a framework that diverges from existing commercial privacy laws and is not interoperable with those laws. That approach would not only sow confusion among consumers and the businesses that serve them, but is inconsistent with the ULC’s express goal of “promot[ing] the principle of uniformity” and bringing “clarity and stability to critical areas of state statutory law.”<sup>2</sup>

The Alternative Draft itself recognizes the importance of interoperability, but does not achieve it. Section 13 includes a provision intended to foster interoperability by deeming a company to comply with the measure if it notifies a state’s Attorney General that it complies with other laws, including the GDPR and CCPA. That approach creates a range of practical difficulties. At the outset, it is unclear that a state considering privacy legislation would adopt a provision of this kind. Even if it did, the state’s Attorney General could be required to interpret and apply those other laws in order to determine and verify if a company is actually in compliance with laws and regulations outside their jurisdiction. That would significantly burden state officials with interpreting a range of laws enacted not only by other states, but also by other countries, and expands the potential for conflicting interpretations of those laws. The Alternative Draft’s approach accordingly risks fragmenting state privacy laws, not unifying them.

- **Lack of Controller/Processor Distinction.** The Alternative Draft also fails to recognize a distinction that is critical to privacy laws worldwide, which differentiate between data processors and data controllers. That distinction is important from a privacy perspective, because it ensures a privacy law can adopt role-based responsibilities that improve privacy protection. For example, the GDPR applies to both “controllers” that determine the means and purposes for which consumers’ data is collected and “processors” that process data on behalf of a controller.<sup>3</sup> The CCPA contains a similar distinction, between “businesses” that determine the means and purposes of processing a consumer’s personal data and “service providers” that process that data on behalf of a business.<sup>4</sup> Laws and voluntary frameworks that promote data privacy and cross-border transfers worldwide also reflect the distinct roles that different types of companies have in handling consumers’ data.<sup>5</sup>

Failing to distinguish between data controllers and data processors can undermine consumer privacy, not strengthen it. For example, placing consumer-facing obligations, like obtaining consent or responding to consumer rights requests, on all businesses ignores the different roles that different businesses have in handling consumers’ data. Consumers often expect to interact with a business that provides

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<sup>2</sup> See Uniform Law Commission, Overview, About Us, <https://www.uniformlaws.org/aboutulc/overview> (explaining that the ULC commissioners “research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.”).

<sup>3</sup> GDPR, Art.4(7), (8).

<sup>4</sup> Cal. Civil Code 1798.140(c), (v).

<sup>5</sup> For example, privacy laws in Hong Kong, Malaysia, and Argentina distinguish between “data users” that control the collection or use of data and companies that only process data on behalf of others. In Mexico, the Philippines, and Switzerland, privacy laws adopt the “controller” and “processor” terminology. Likewise, the APEC Cross Border Privacy Rules, which the US Department of Commerce has strongly supported and promoted, apply only to controllers and are complemented by the APEC Privacy Recognition for Processors, which help companies that process data demonstrate adherence to privacy obligations, and help controllers identify qualified and accountable processors.

them a service—but do not expect to interact with the network of data processors that may store, analyze, and process data at the direction of that consumer-facing business. Indeed, in many cases a data processor will be contractually prohibited from accessing consumer data that it handles on behalf of a data controller, as a way to increase the privacy protections afforded to that data. If a privacy law required both the consumer-facing business and the data processors working for that business to obtain a consumer’s consent, it would not only inundate consumers with duplicative consent requests but could create greater security risks (by requiring consumers to grant or deny permissions to data processors they do not know) and privacy risks (by potentially requiring data processors to look at data they otherwise would not).<sup>6</sup>

BSA urges the Committee to consider these significant concerns in determining whether to proceed in considering the Alternative Draft.

At the same time, we recognize that the existing draft Collection and Use of Personally Identifiable Data Act contains a number of provisions that continue to raise concerns for BSA members. These include provisions addressing the appropriate obligations for data processors and data controllers, as well as the scope of the draft and the method for enforcing the rights and obligations it creates. BSA welcomes the opportunity to continue engaging with you on those important issues going forward. BSA members support strong privacy protections for consumers and we appreciate the opportunity to provide these comments.

Sincerely,

A handwritten signature in blue ink that reads "Kate Goodloe". The signature is written in a cursive, slightly slanted style.

Kate Goodloe  
Director, Policy  
BSA | The Software Alliance

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<sup>6</sup> For further explanation of the importance of distinguishing between controllers and processors, see BSA, *The Global Standard: Distinguishing Between Controllers and Processors in Privacy Legislation*, available at: <https://www.bsa.org/files/policy-filings/03032020controllerprocessor.pdf>.