

Comments of Consumer Reports
In Response to the
California Privacy Protection Agency's
Invitation for Comments On
Proposed Data Broker Regulations

By

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August 20, 2024



Consumer Reports¹ appreciates the opportunity to provide feedback on the California Privacy Protection Agency's (CPPA) Invitation for Comments on Proposed Data Broker Regulations. We thank the CPPA for initiating this proceeding and for its other initiatives to protect consumer privacy. We are supportive of the Agency's efforts to provide additional clarity for consumers and businesses about the scope of data brokers' registration responsibilities under the Delete Act.

We provide responses to several of the Agency's proposed regulations below.

I. Section 7601 (Definitions)

“Direct Relationship”

“Data broker” currently means a business that knowingly collects and sells to third parties the personal information of a consumer with whom the business does not have a direct relationship.² The Agency proposes defining the term “direct relationship” to provide additional clarity.

This is a critical definition, as the existing framework has led to substantial ambiguity surrounding which data brokers are included in the scope of the law. This, along with the long list of other possible exemptions data brokers can claim and the lack of substantial enforcement to-date, has led to a perceived under-count of registered data brokers compared with the full universe of data brokers doing business in the state.³ On top of that, data brokers employ notoriously complex and opaque data aggregation tactics, amassing data from hundreds or even thousands of different sources, which can make the determination of a “direct relationship” genuinely difficult to assess without further guidance. Ultimately, the Delete Act sought to provide consumers an easier way to manage their right to delete relative to businesses that collect and sell their personal information without their knowledge or consent — an intent that should be mirrored in the regulations.

We are therefore largely supportive of this proposed definition, which states that if a consumer intentionally interacts with a business to obtain information about or accesses, purchases, uses, or requests products or services within the preceding three years, a direct relationship exists. Providing a timeframe is helpful, as the term “direct relationship” implies an ongoing dialogue between consumer and business; businesses should not be considered as having direct

¹ Consumer Reports is an independent, nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For over 80 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers' interests, including their interest in securing effective privacy protections. Unconstrained by advertising, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

² Civil Code Section 1798.99.80 (c)

³ Suzzane Smalley, Delete-your-data laws have a perennial problem: Data brokers who fail to register, The Record, (October 17, 2023), <https://therecord.media/state-data-broker-registries-california-vermont>

relationships with consumers indefinitely just because they may have interacted at one time. Three years without interaction between consumer and business is reasonable to establish that the consumer no longer desires to continue the relationship with the business and that any consent to collect or share personal data should be considered lapsed. This understanding has precedent in other areas of the law. For example, California generally considers financial assets “abandoned” if there has been no activity on the account or contact with the owner for three years.⁴

The Rules would also clarify that a business is “still a data broker if it has a direct relationship with a consumer but also sells personal information about the consumer that the business did not collect directly from the consumer.”⁵ Whether a company is acting as a data broker or engaging in the practice of data brokerage depends on the context. A company like Facebook is not generally known as a data broker, but they act as one when they sell access to consumer information that did not derive from a direct interaction with the consumer (for example, for personal data collected through the Facebook pixel embedded on third-party websites).

However, applying universal deletion requests to all personal information collected by entities that have hybrid direct-indirect relationships with consumers may carry unintended consequences that could negatively impact consumers. The Agency should consider clarifying the Rules to state that universal deletion requests should only apply to the personal information that was indirectly collected from consumers and not all of the personal information held by that entity. While a consumer’s universal deletion request should certainly apply to information that was surreptitiously collected and subsequently sold (e.g. data from third-party cookies, pixels, or other online tracking technologies), it shouldn’t also apply to information they have shared directly with the business and might reasonably want to exercise more granular control over (e.g. photos uploaded to Facebook) and for which existing CCPA rights would suffice.

At the same time, entities more widely considered to be data brokers may collect data, in some instances, directly from consumers and should not be let off the hook. For instance, until recently, major location data broker X-Mode collected some personal data directly from consumers through its Walk Against Humanity and Drunk Mode apps.⁶ Yet X-Mode predominantly collected data from other sources, including SDKs embedded in hundreds of third-party apps⁷ and purchases of location data from other data brokers and aggregators, which led it to become the “2nd largest US location data company.”⁸ The proposed approach would ensure that data brokers like X-Mode would not receive a total carveout just because they

⁴ California State Controller’s Office, About Unclaimed Property, https://www.sco.ca.gov/upd_about_unclaimed_property.html

⁵ Proposed Section 7601(a)

⁶ X-Mode Social, Inc., Complaint, In the Matter of X-Mode Social, Inc., FTC File No. 202-3038 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/X-Mode-Complaint.pdf

⁷ Express VPN, Investigation Xoth: Smartphone location tracking, <https://www.expressvpn.com/digital-security-lab/investigation-xoth>

⁸ X-Mode Social, Inc., Complaint, In the Matter of X-Mode Social, Inc., FTC File No. 202-3038 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/X-Mode-Complaint.pdf

collect a small fraction of consumer data from first-party apps. Going forward, this should help avoid creating perverse incentives for data brokers to create superficial “direct relationships” with consumers through mechanisms like a viral quiz app in order to avoid being classified as a data broker.

“Minor”

The Agency proposes defining the term “minor” as persons under 16 years of age and establishing when a business is considered to have knowledge of a person’s age. We support the inclusion of this definition, as data brokers may have adopted a narrower reading of the term “minor” without further clarification. The chosen definition is consistent with the CCPA, which already implicitly creates a category for minors (including different protections for those individuals aged 0-12 and 13-15, respectively) and provides them with enhanced protections compared to those aged 16 and up.⁹

“Reproductive Health Care Data”

The Agency proposes defining the term “reproductive health care data” to include “information about a consumer searching for, accessing, procuring, using, or otherwise interacting with goods or services associated with the human reproductive system”,¹⁰ certain types of health services and treatments, and information about consumers’ sexual history and family planning. We support the proposed definition, which will provide consumers insight into whether data brokers collect any information about these especially sensitive categories of information.

Importantly, the definition also includes inferences about consumers’ reproductive health care data. This is critical, as one of the main business lines for many data brokers is to aggregate information from a variety of sources to create marketing segments that make inferences about consumers (e.g. “expectant mothers”)¹¹ that are then shared or sold to other third parties. With the vast data stores held by data brokers, it’s possible that these inferences could be generated even without collection of any other reproductive health care data. Incorrect inferences about consumers can have damaging effects, including negative economic impacts¹² or directly endangering individuals’ safety.¹³ But even when inferences are correct, given the sensitivity of the assumptions in question and lack of control consumers otherwise have over data brokers,

⁹ CCPA Section 1798.120(c), https://cppa.ca.gov/regulations/pdf/cppa_act.pdf

¹⁰ Proposed Section 7601(e)

¹¹ Jon Keegan and Joel Eastwood, From “Heavy Purchasers” of Pregnancy Tests to the Depression-Prone: We Found 650,000 Ways Advertisers Label You, The Markup, (June 8, 2023), <https://themarkup.org/privacy/2023/06/08/from-heavy-purchasers-of-pregnancy-tests-to-the-depression-prone-we-found-650000-ways-advertisers-label-you>

¹² See, e.g., Kashmir Hill, Automakers Are Sharing Consumers’ Driving Behavior With Insurance Companies, the New York Times, (March 13, 2024), <https://www.nytimes.com/2024/03/11/technology/carmakers-driver-tracking-insurance.html>

¹³ Suzanne Bernstein, The Role of Digital Privacy in Ensuring Access to Abortion and Reproductive Health Care in Post-Dobbs America, American Bar Association, (June 3, 2024), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/technology-and-the-law/the-role-of-digital-privacy-in-ensuring-access-to-reproductive-health-care/

these inferences are inherently harmful. And even worse, data brokers have a poor track record of sharing reproductive health information with politically motivated actors that can put people in mortal danger.¹⁴ It is very likely that data brokers' ability to collect or make inferences about any aspect relating to consumers' reproductive health will be material to their decision to exercise their rights under the Delete Act.

II. Section 7602 (Registration Submission Requirements)

Registration Transparency

The Agency proposes clarifying that each data broker business, regardless of its status as a subsidiary or parent company to another business, is required to uniquely register so long as it "independently meets the definition of 'data broker.'"¹⁵ We support this proposal, as it will prevent businesses from potentially evading disclosure of registration details that could be material to a consumer's decision to delete data held by a particular data broker. For instance, one can envisage a data broker with multiple subsidiaries independently operating as data brokers, each of which collect different types of consumer data. Each of those subsidiaries should be required to provide information required by Section 1798.99.82(b)(2), including whether they collect minors' data or reproductive health data, since these categories of personal data are uniquely sensitive and may be material to consumers' decision to exercise their rights under the Delete Act. While we don't believe that businesses should be required to register each separate legal entity in its corporate structure (e.g. Acme Data Broker Holding Company, Acme Data Broker Incorporated) since this could unnecessarily complicate the registry, businesses should be required to register subsidiaries that do business under unique business names that do not share common branding with the parent organization or that consumers would not reasonably associate with each other.

Penalty of Perjury

The agency seeks to establish a rule requiring an employee or agent for the data broker to register on behalf of the data broker and to have sufficient knowledge of their practices to provide accurate information under penalty of perjury. This proposal will provide extra assurance that data broker registration information will be accurate and useful for consumers and that individuals will be held personally liable when they supply information to the Agency. As the Agency points out in the Initial Statement of Reasons, adding a penalty of perjury "provides the Agency with the option of seeking sanctions and referring the matter to law enforcement in the event that such information is not true, complete, or accurate."¹⁶ The Delete Act currently only contemplates an administrative fine of two hundred dollars when data brokers fail to meet registration requirements.¹⁷ Without the prospect of personal liability, some data brokers may

¹⁴ Joseph Cox, Data Broker Is Selling Location Data of People Who Visit Abortion Clinics, Vice, (May 3, 2022), <https://www.vice.com/en/article/location-data-abortion-clinics-safegraph-planned-parenthood/>

¹⁵ Proposed Section 7602(a)

¹⁶ Initial Statement of Reasons, Proposed Section 7602(b), https://cppa.ca.gov/regulations/pdf/data_broker_reg_isor.pdf

¹⁷ Delete Act, Section 1798.99.82(c)(1), <https://legiscan.com/CA/text/SB362/2023>

decide that the benefits of providing inaccurate information outweigh the punishment of any potential fines, drastically reducing the efficacy of the registry.

Section 7603 (Registration Information Requirements)

The agency seeks to establish a rule requiring disclosure of the types of personal information, products and services, and the proportion of data collected and sold that are subject to other laws that qualify data brokers to claim an exemption.¹⁸

The Delete Act states that data brokers do not include entities “to the extent” that they are covered by the federal Fair Credit Reporting Act, Gramm-Leach-Bliley Act, Insurance Information and Privacy Protection Act, or Confidentiality of Medical Information Act,¹⁹ which introduces ambiguity regarding when data brokers must register with the Agency and what information they must provide. Many data brokers offer various business lines, products, and services, some of which may involve exempted information and some that may not. Consumers should be aware of the extent to which their deletion request will reach certain types of personal information held by the data broker and when the broker can rely on an exemption. Historically, it has been difficult for consumers, researchers, and advocates to understand who is required to comply with CCPA due to the complex interplay between exemptions and a relative lack of required disclosures when businesses are relying on an exemption.²⁰ By requiring data brokers to describe “the approximate proportion of data collected and sold that is subject to the enumerated laws in comparison with their total annual data collection and sales” consumers will be able to better anticipate the effect that their deletion request will have and plan accordingly.

We thank the California Privacy Protection Agency for its consideration of these points, and for its work to secure strong privacy protections for consumers. We are happy to answer any questions you may have, and to discuss these issues in more detail. Please contact Matt Schwartz (matt.schwartz@consumer.org) or Justin Brookman (justin.brookman@consumer.org) for more information.

¹⁸ Proposed Section 7603(d)

¹⁹ Delete Act, Section 1798.99.80(c)(1-4), <https://legiscan.com/CA/text/SB362/2023>

²⁰ See, e.g., Consumer Reports, Companies Continue to Share Health Data Despite New Laws, (January 16, 2024),

<https://advocacy.consumerreports.org/wp-content/uploads/2024/01/Companies-Continue-to-Share-Health-Data-1-16-2024-Consumer-Reports.pdf>