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Submitted via electronic mail to: regulations@coppa.ca.gov

August 20, 2024

California Privacy Protection Agency
Attn: Elizabeth Allen
2101 Arena Blvd
Sacramento, CA 95834

Re: NAI Comments on Proposed Data Broker Registration Regulations

To the California Privacy Protection Agency:

On behalf of the Network Advertising Initiative (the “NAI”), thank you for the opportunity to provide comments in response to the notice of proposed rulemaking on data broker registration (the “NPRM”)¹ issued by the California Privacy Protection Agency (the “Agency”) under SB 362 (the “Delete Act”).²

Founded in 2000, the NAI is the leading non-profit, self-regulatory association for advertising-technology companies. For over 20 years, the NAI has promoted strong consumer privacy protections, a free and open internet, and a robust digital advertising industry by maintaining the highest industry standards for the responsible collection and use of consumer data for advertising. Our member companies range from large multinational corporations to smaller startups and represent a significant portion of the digital advertising technology ecosystem, all committed to strong self-regulation and enhancing consumer trust.

Our comments below are organized into two sections.

¹ 27-Z Cal. Regulatory Notice Reg. 844 (July 5, 2024), https://coppa.ca.gov/regulations/pdf/data_broker_reg_nopa.pdf.

² See CAL. CIV. CODE §§ 1798.99.80 *et seq.*

In Section I, we focus on the Agency’s proposed definition of reproductive health care data (“RHCD”) and recommend that the Agency specify that RHCD is sensitive personal information under the California Consumer Privacy Act (“CCPA”).³ Doing so will promote clarity and consistency both for consumers seeking to exercise their CCPA rights with businesses that collect RHCD as shown on California’s data broker registry page (the “Registry”),⁴ and for businesses seeking to provide the information required by the Delete Act.

In Section II we address the fact that in some cases businesses process RHCD and/or precise geolocation solely for short-term, transient uses such as de-identifying, aggregating, deleting, or rendering it non-sensitive. Based on this fact, we recommend that the Agency distinguish this type of data minimization from other types of processing undertaken for commercial purposes and use the distinction to clarify which businesses must report that they collect RHCD and/or precise geolocation. Doing so will help consumers identify which businesses on the Registry use these categories of information for commercial purposes and facilitate their exercise of CCPA rights; and will incentivize businesses to minimize their processing of those categories of data.

I. Comments regarding the proposed definition of reproductive health care data

- A. *The Agency should update the proposed definition of “reproductive health care data” to better align with the CCPA by specifying that it is “sensitive personal information” under the CCPA.*

As discussed in more detail below, the definition of RHCD proposed by the Agency does not specify that RHCD is “sensitive personal information” under the CCPA.⁵ The Agency should amend the proposed definition of RHCD to make this specification because doing so will promote clarity and consistency both for consumers seeking to exercise their CCPA rights with businesses shown to collect RHCD on the Registry, and for businesses seeking to report the information required by the Delete Act.

The Delete Act uses the term RHCD to specify a type of data businesses must report when registering with the Agency, but does not define the term.⁶ One of the goals set by the Agency in the Initial Statement of Reasons (ISOR) accompanying the NPRM is to define certain terms

³ CAL. CIV. CODE §§ 1798.100 *et seq.*

⁴ See *Data Broker Registry*, CAL. PRIV. PROT. AGENCY, https://cppa.ca.gov/data_broker_registry/ (last visited Aug. 15, 2024).

⁵ See CAL. CIV. CODE § 1798.140(ae) (defining sensitive personal information).

⁶ See *id.* § 1798.99.82(b)(2)(E).

used in the Delete Act that are not otherwise defined by the CCPA, including RHCD.⁷ To meet that goal, the Agency proposed the following definition for RHCD:⁸

“Reproductive health care data” means any of the following:

(1) Information about a consumer searching for, accessing, procuring, using, or otherwise interacting with goods or services associated with the human reproductive system, which includes goods such as contraception (e.g., condoms, birth-control pills), pre-natal and fertility vitamins and supplements, menstrual-tracking apps, and hormone-replacement therapy. It also includes, but is not limited to, services such as sperm- and egg-freezing, In Vitro Fertilization, abortion care, vasectomies, sexual health counseling; treatment or counseling for sexually transmitted infections, erectile dysfunction, and reproductive tract infections; and precise geolocation information about such treatments.

(2) Information about the consumer’s sexual history and family planning, which includes information a consumer inputs into a dating app about their history of sexually transmitted infections or desire to have children is considered sexual history and family planning information.

(3) Inferences about the consumer with respect to (1) or (2).

Although the proposed definition does state that RHCD is information “about” a consumer, it does not explicitly state that such information is sensitive personal information under the CCPA. In evaluating the NAI’s recommendation for updating the proposed definition to state this explicitly, the Agency should consider both (1) the role of the defined term RHCD within the Delete Act; as well as (2) the overall purpose of the proposed regulations and how the defined term RHCD works to serve that purpose.

Regarding the first point, the role of the defined term RHCD in the proposed regulations is to clarify when a business must indicate that it “collects consumers’ reproductive health care data” when completing its annual registration as a data broker with the Agency.⁹ After a business provides this information to the Agency, the Agency publishes it on the Registry and enables the public to view the list of businesses on the Registry based on whether those

⁷ See CAL. PRIV. PROT. AGENCY, Initial Statement of Reasons at 1-2 (July 5, 2024), https://cppa.ca.gov/regulations/pdf/data_broker_reg_isor.pdf (hereinafter “ISOR”); CAL. CIV. CODE § 1798.99.80(a) (stating that CCPA definitions apply to the Delete Act unless otherwise specified).

⁸ CAL. CODE REGS. tit. 11, § 7601 (proposed), https://cppa.ca.gov/regulations/pdf/data_broker_reg_prop_text.pdf.

⁹ See CAL. CIV. CODE § 1798.99.82(b)(2)(E); ISOR at 8.

businesses collect reproductive health care data.¹⁰ The way the Agency presents this information on the Registry suggests that the Agency views the Delete Act’s reporting requirement as working primarily in service of transparency for consumers, because the incorporation of the reported information on the Registry allows consumers to more easily identify which businesses may collect RHCD about them.

As to the second point, the Agency has indicated that the overall objectives of the proposed rulemaking – which should cover its definition of RHCD – include:¹¹

“ensur[ing] that data brokers provide accurate and adequate information to support the statute’s goals of consumer protection through transparency and informed decision-making when exercising the California Consumer Privacy Act (CCPA) privacy rights.”

Reading these two points together, the NAI understands the main purpose of defining RHCD in the proposed regulations to be clarifying when a business must report to the Agency that it collects RHCD, which in turn empowers the Agency to give consumers transparency into which businesses on the Registry collect RHCD. But this transparency is not an end in itself – the added transparency should also support “informed decision-making”¹² for consumers when exercising their CCPA privacy rights. In other words, transparency into the collection of RHCD should enable consumers to more easily exercise their CCPA rights with businesses who collect it.

To help achieve this purpose, the NAI recommends that the Agency harmonize the proposed definition of RHCD with the CCPA by specifying that RHCD is “sensitive personal information.”¹³ Doing so will clarify for both consumers and businesses that RHCD is subject to the consumer rights and business responsibilities set forth in the CCPA, including the rights to delete, to opt out of sales and sharing, as well as the right to limit the use of sensitive personal information.¹⁴

¹⁰ See *Data Broker Registry*, CAL. PRIV. PROT. AGENCY, https://coppa.ca.gov/data_broker_registry/ (last visited Aug. 15, 2024).

¹¹ ISOR at 1.

¹² *Id.*

¹³ See CAL. CIV. CODE § 1798.140(ae). As a practical matter, specifying that RHCD is sensitive personal information also guarantees that it will be treated as “personal information,” because sensitive personal information is a subset of personal information under the CCPA; see *id.* § 1798.140(v)(1)(L) (specifying that personal information includes sensitive personal information); *id.* § 1798.140(ae) (including the term personal information in every enumerated type of sensitive personal information).

¹⁴ See *id.* § 1798.105 (establishing the consumers’ right to delete); *id.* § 1798.120 (establishing the consumers’ right to opt out of the sale or sharing of personal information); *id.* § 1798.121 (establishing the consumers’ right to limit use and disclosure of sensitive personal information).

If the Agency does not make this clarification, businesses will be in the position of determining on an individual basis whether data they collect that does *not* meet the CCPA definition of personal information (*i.e.*, data that is publicly available, is lawfully made available to the general public, or is deidentified or aggregated)¹⁵ may nevertheless be RHCD under the Delete Act, which could lead to inconsistencies and additional compliance burdens. Further, without this clarification, consumers may be misled into believing that a business is collecting personal information about them that relates to their reproductive health care even if that business only processes, *e.g.*, de-identified or aggregate data relating to reproductive health care. The result could be that consumers seeking to exercise their CCPA rights after learning which businesses collect RHCD through the Registry would not have their expectations met – because under the current proposed definition, it would be possible that no CCPA rights relate to certain RHCD.

Similar issues could arise when considering whether RHCD is not only personal information, but also *sensitive* personal information. The definition of RHCD should not require businesses to determine individually whether personal information they process that is *not* classified as sensitive personal information under the CCPA may nevertheless be RHCD under the Delete Act. Instead, the Agency should define RHCD as a type of sensitive personal information, because RHCD should always be a subset of personal information that is “collected and analyzed concerning a consumer’s health” and/or their “sex life.”¹⁶ Defining RHCD as a type of sensitive personal information will also assist consumers in exercising their privacy rights when they visit the Registry and learn that a business collects RHCD. For example, a consumer may identify that a business on the Registry collects RHCD and seek to exercise their right to limit the use of sensitive personal information with that business under the CCPA.¹⁷ The consumer is sure to have their expectation met (*i.e.*, that the use of RHCD relating to them will be limited) if the Agency specifies by definition that RHCD is sensitive personal information.

The NAI appreciates the care demonstrated by the Agency in seeking to align the definition of RHCD with other aspects of California law that address information related to reproductive health care;¹⁸ but the proposed definition should also address the more fundamental issue of RHCD’s status as sensitive personal information under the CCPA. As discussed above, this will promote clarity and consistency both for consumers who are seeking to exercise their CCPA

¹⁵ See *id.* § 1798.140(v)(2)-(3).

¹⁶ See *id.* § 1798.140(ae)(2) (including personal information collected and analyzed relating to a consumer’s health and relating to a consumer’s sex life as types of sensitive personal information).

¹⁷ See *id.* § 1798.121(a).

¹⁸ See ISOR at 9 (explaining the proposed definition of RHCD is consistent with the definitions of similar terms in other areas of California law); see also CAL. HEALTH & SAFETY CODE § 128560(b) (defining “reproductive health”); CAL. CIV. CODE § 1798.300(e) (defining “reproductive health care services”); CAL. CIV. CODE § 56.05(q) (defining “reproductive or sexual health application information”).

rights based on the additional transparency into the collection of RHCD provided through the Registry as well as for businesses seeking to report the information required by the Delete Act.

B. Recommended amendments to the proposed definition of RHCD

The NAI recommends that the Agency amend its proposed definition of RHCD as set forth below to state explicitly that RCHD is sensitive personal information:

“Reproductive health care data” means [sensitive personal information \(as defined by Cal. Civ. Code § 1798.140\(ae\)\) collected and analyzed concerning](#) any of the following:

(1) ~~Information about~~ a consumer searching for, accessing, procuring, using, or otherwise interacting with goods or services associated with the human reproductive system, which includes goods such as contraception (e.g., condoms, birth-control pills), pre-natal and fertility vitamins and supplements, menstrual-tracking apps, and hormone-replacement therapy. It also includes, but is not limited to, services such as sperm- and egg-freezing, In Vitro Fertilization, abortion care, vasectomies, sexual health counseling; treatment or counseling for sexually transmitted infections, erectile dysfunction, and reproductive tract infections; and precise geolocation information about such treatments.

(2) ~~Information about~~ the consumer’s sexual history and family planning, which includes information a consumer inputs into a dating app about their history of sexually transmitted infections or desire to have children is considered sexual history and family planning information.

(3) Inferences about the consumer with respect to (1) or (2).

Adopting these changes to the proposed definition of RHCD would align the additional transparency the Delete Act provides into the processing of RHCD with the CCPA’s definition of sensitive personal information, which furthers consumers’ ability to exercise their privacy rights with businesses based on what they learn from the Registry. Further, it would promote consistency and administrability for businesses complying with both the CCPA and the Delete Act.

II. Comments regarding the scope of the reporting requirements for precise geolocation and reproductive health care data.

- A. *The Agency should not require business to report that they collect RHCD or precise geolocation if they process those types of information solely for the purpose of deleting, de-identifying, aggregating, or rendering them non-sensitive.*

Businesses collect information about consumers from a variety of sources that may include both sensitive and non-sensitive information. Some businesses incorporate more sensitive types of data directly into their commercial data products while taking the steps necessary to process those data types in a way that respects consumer privacy and complies with the law. Other businesses do not directly commercialize those types of data and instead take steps to avoid or minimize their processing of them by processing them only for purposes of deleting, de-identifying, aggregating, or rendering them non-sensitive (collectively, by “Minimizing” their processing of these data types).

For example, while some companies collect precise geolocation and incorporate precise geolocation directly into their data products, other businesses immediately “uplevel” precise geolocation information they collect by truncating latitude/longitude coordinates in a way that renders that information non-precise (*i.e.*, incapable of locating a consumer within a circle with a radius of 1,850 feet).¹⁹ Similarly, for companies that do incorporate precise geolocation directly into their data products, some choose to take additional steps to minimize information related to reproductive healthcare by maintaining a directory of known reproductive healthcare facilities and suppressing any consumer precise geolocation that is associated with those facilities.²⁰

As discussed in more detail below, the Agency should in its reporting requirements under the Delete Act²¹ distinguish between businesses that Minimize their processing of RHCD or precise geolocation and businesses that collect RHCD and precise geolocation for other commercial purposes.

¹⁹ See CAL. CIV. CODE § 1798.140(w). The NAI has also published guidance on rendering location information imprecise. See generally GUIDANCE FOR NAI MEMBERS: DETERMINING WHETHER LOCATION IS IMPRECISE (2020), https://thenai.org/wp-content/uploads/2021/07/nai_impreciselocation2.pdf

²⁰ See generally NAI Precise Location Information Solution Provider Voluntary Enhanced Standards, NETWORK ADVERT. INITIATIVE (June 22, 2022), <https://thenai.org/accountability/precise-location-information-solution-provider-voluntary-enhanced-standards/>.

²¹ See CAL. CIV. CODE § 1798.99.82(b)(2)

The Delete Act requires a business registering with the Agency as a data broker to indicate whether the business collects certain types of information, including precise geolocation and RHCD.²² As discussed in more detail above²³ – and consistent with the Agency’s statements in the ISOR²⁴ – the NAI understands the main purpose of these disclosures to be in service of transparency to consumers who review the list of businesses on the Registry, which in turn helps those consumers in exercising their CCPA rights with those businesses.

However, the reporting requirements in the Delete Act do not explicitly account for the fact that some businesses take proactive steps to Minimize information that may otherwise qualify as RHCD or precise geolocation (or both). If a business that Minimizes its processing of these data types is nonetheless required to report to the Agency that it collects RHCD and/or precise geolocation – and is subsequently identified to the public on the Registry as a business that collects those types of information – that result does not increase transparency for consumers or assist them in exercising their CCPA rights. Instead, it is more likely to mislead consumers toward the conclusion that businesses Minimizing their processing of potentially sensitive information are the same as companies that collect and process such information directly for commercial purposes.

To prevent this outcome, the Agency should distinguish in the Delete Act’s reporting requirements between businesses that Minimize RHCD and/or precise geolocation from businesses that collect those types of data for other commercial purposes. There is strong precedent for making this type of distinction, both in industry self-regulatory practices as well as in FTC enforcement actions.

As to industry self-regulation, the NAI’s Precise Location Information Solution Provider Voluntary Enhanced Standards (the “VES”) led the way in 2022 by requiring VES signatories to proactively identify and suppress sensitive points of interest, including locations associated with reproductive health care such as fertility or abortion clinics.²⁵ This includes an obligation for VES signatories to never use, allow the use of, sell, or share any information about device or user activity correlated to a known sensitive point of interest such as a reproductive health care facility.²⁶ But the NAI recognized that in order for signatories to meet this obligation, they may need to undertake certain limited processing of data associated with sensitive points of interest

²² See *id.* § 1798.99.82(b)(2)(D)-(E).

²³ See *supra* section I.

²⁴ See ISOR at 1.

²⁵ See generally *NAI Precise Location Information Solution Provider Voluntary Enhanced Standards*, NETWORK ADVERT. INITIATIVE (June 22, 2022), <https://thenai.org/accountability/precise-location-information-solution-provider-voluntary-enhanced-standards/>.

²⁶ *Id.* § I(C).

– for example, transferring that information to a service provider to the extent doing so is necessary to facilitate compliance with the VES.²⁷

Recent enforcement actions from the FTC – which largely track the principles underlying the NAI’s VES – also focused on the processing of information associated with sensitive points of interest such as reproductive health care facilities.²⁸ However, in the settlement agreements associated with those enforcement actions, the FTC also allowed for certain limited processing of information associated with sensitive points of interest for compliance purposes, including to render the information non-sensitive. Specifically, although the respondent in one settlement agreement was prohibited from selling, licensing, transferring, sharing, disclosing, or otherwise using sensitive location data;²⁹ the respondent was also required to process that same information in order to comply by “deleting or rendering non-sensitive” the sensitive location data at issue.³⁰ In another settlement agreement, the respondent agreed to delete certain sensitive location data it had already collected by ensuring such data were “deleted, de-identified or rendered non-sensitive.”³¹ In both cases, the FTC recognized that the respondents, in order to minimize processing of sensitive information already collected, would need to conduct limited further processing solely to delete, de-identify, or render non-sensitive the information at issue.

By making a similar distinction in the Delete Act’s reporting requirements and allowing businesses to indicate that they do not collect RHCD and/or precise geolocation if their processing is limited to Minimizing those data types, the Agency can create an incentive for data brokers to minimize their processing of those categories of sensitive information while preserving consumers’ ability to understand which registered data brokers processes those categories directly for commercial purposes.

²⁷ See *id.* at 3 (setting forth in commentary limited exceptions for processing sensitive points of interest for compliance purposes).

²⁸ See In the Matter of X-Mode Social, Inc., FTC C-4802 Complaint at ¶44 (Apr. 11, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/X-ModeSocialComplaint.pdf (alleging that X-Mode data could be used to “track consumers who have visited women’s reproductive health clinics[.]”); In the Matter of InMarket Media, LLC, FTC C-4803 Complaint at ¶6, https://www.ftc.gov/system/files/ftc_gov/pdf/InMarketMedia-Complaint.pdf (alleging that InMarket “collects sensitive information from consumers, including . . . where they receive medical treatment[.]”).

²⁹ In the Matter of X-Mode Social, Inc., FTC C-4802 Decision and Order at § II (Apr. 11, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/X-ModeSocialDecisionandOrder.pdf.

³⁰ See *id.* § III.G; *id.* § XIII(B) (referring to processing certain location data to delete, deidentify, or render non-sensitive).

³¹ In the Matter of InMarket Media, LLC, FTC C-4803 Decision and Order at § XII. (Apr. 29, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/InMarketMedia-Complaint.pdf.

B. Recommended amendments to the proposed regulations to address disclosure obligations related to limited processing of RHCD and precise geolocation.

To address the issues discussed above, the NAI recommends that the Agency add a new subsection (e) to section 7603 of the proposed regulations to distinguish between businesses that process RCHD and/or precise geolocation only to Minimize it and those that process those data types for other commercial purposes, as follows:

§ 7603. Registration Information Requirements.

(a) A data broker must provide only true and correct responses when submitting the registration information required by Civil Code section 1798.99.82.

(b) All website links and email addresses provided in the registration must be accurate and functioning.

(c) In addition to the information required by Civil Code section 1798.99.82, a data broker must include the business's trade name (i.e., "DBA"), if applicable, and provide the Agency with a point of contact, including name, email, and phone number. The point of contact information will not be posted on the public data broker registry.

(d) When reporting the extent to which the data broker is regulated by the other laws described in Civil Code section 1798.99.82(b)(2)(H), a data broker must describe:

(1) The types of personal information the data broker collects and sells that are subject to the enumerated laws;

(2) The specific product(s) or services covered by the enumerated state or federal law;

(3) 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 (i.e., percentage of their general data broker activities).

(e) When submitting the registration information required by Civil Code section 1798.99.82(b)(2), a data broker is not required to indicate to that it collects the following types of data if its collection and processing of such data is limited solely to the short-term, transient use of such data for purposes of deleting, de-identifying, aggregating, or

rending non-sensitive the relevant data type(s), and the data broker does not use such data directly for any other commercial purpose:

(1) Reproductive health care data;

(2) Precise geolocation.

Adopting these changes to the proposed regulations would improve transparency for consumers by highlighting only those businesses on the Registry that directly commercialize RHCD and/or precise geolocation and would create a clear incentive for businesses to minimize their processing of those data types by easing a reporting requirement.

III. Conclusion

The NAI appreciates the opportunity to submit comments to the Agency on the proposed data broker registration regulations. If we can provide any additional information, or otherwise assist your office as it continues to engage in the rulemaking process, please do not hesitate to contact me at tony@networkadvertising.org, or David LeDuc, Vice President, Public Policy, at david@networkadvertising.org.

Respectfully Submitted,



Tony Ficarrotta

Vice President & General Counsel
Network Advertising Initiative (NAI)