

Analysis of Proposed Consent Order to Aid Public Comment
In the Matter of InMarket Media, LLC, File No. 2023088

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an agreement containing a consent order from InMarket Media, LLC (“InMarket”).

The proposed consent order (“Proposed Order”) has been placed on the public record for 30 days for receipt of public comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement, along with the comments received, and will decide whether it should make final the Proposed Order or withdraw from the agreement and take appropriate action.

Respondent InMarket is a Delaware company with its headquarters in Texas. Respondent is a digital marketing platform and a data aggregator. Since approximately May 2010, InMarket has operated an advertising service that uses mobile device location data to deliver ads to consumers’ mobile devices.

InMarket collects and purchases mobile device location data and uses that data to allow advertisers to target particular groups of consumers. InMarket collects location data directly from mobile devices through its proprietary software development kit (“the InMarket SDK”). The InMarket SDK is incorporated into two mobile apps that InMarket owns and operates: CheckPoints, which offers shopping rewards for completing small tasks, and ListEase, which helps consumers create shopping lists. Respondent also makes the InMarket SDK available to third-party app developers and it has been incorporated into more than 300 third-party apps.

InMarket uses the location data and other personal information it collects to group consumers, identified by mobile device identifiers, into advertising audiences, and then allows advertisers to target these audiences (*e.g.*, “coffee lover”, “pet owner”). Advertisers may target audiences directly through InMarket (that is, the advertisements will appear on mobile devices through the InMarket SDK). They may also purchase “audiences” from InMarket and target their advertisements to these audiences on real-time bidding platforms.

When InMarket’s proprietary apps request consent to access location data, they state that the data will be used for the app’s own function (*e.g.*, to earn extra shopping points or to receive a reminder about items on a shopping list when in the store), and do not disclose that they are collecting the data to target advertising, or that the data may be retained for up to five years. InMarket also does not monitor or keep records of whether the third parties that use the InMarket SDK properly disclose to users that location data will be shared with third parties to target advertising, or that it will be retained for up to five years. InMarket thus fails to obtain informed consumer consent in its proprietary apps, CheckPoints and ListEase, and fails to verify that the third-party apps that incorporate InMarket’s SDK obtain informed consumer consent.

In addition to failing to obtain informed consent, InMarket has retained the collected data for up to five years—far longer than necessary to accomplish the purpose of collection. This unreasonable retention period, combined with InMarket’s comprehensive data collection

practices, significantly increases the risk that the sensitive location data would be disclosed or misused, causing harm to consumers.

The Commission's proposed four-count complaint alleges that Respondent violated Section 5(a) of the FTC Act by (1) unfairly collecting and using consumer location data from its own apps, (2) unfairly collecting and using consumer location data from third party apps, (3) unfairly retaining consumer location data, and (4) deceptively failing to disclose use of location data.

With respect to the first count, the proposed complaint alleges that Respondent failed to fully disclose to users of the InMarket apps the purposes for which the users' location data would be used, such as the creation of consumer profiles and targeting for advertising. As a result, the proposed complaint alleges that Respondent caused or is likely to cause consumers substantial injury in the form of loss of privacy about their day-to-day movements, and a related increased risk of disclosure of such sensitive data.

With respect to the second count, the proposed complaint alleges Respondent collected location data from third-party apps that incorporate its SDK without taking reasonable steps to verify that the consumers were informed that their data would be shared with InMarket and used to develop consumer profiles to target them with advertising. The proposed complaint alleges that this collection of location data without consent verification caused substantial injury to consumers in the form of loss of privacy about their day-to-day movements, and a related increased risk of disclosure of such sensitive data. InMarket's primary mechanism for ensuring that consumers have provided appropriate consent is through contractual requirements with its third-party app partners. However, contractual provisions, without additional safeguards, are insufficient to protect consumers' privacy.

With respect to the third count, the proposed complaint alleges that Respondent retained detailed, sensitive information about consumers' movement for up to five years, which is longer than reasonably necessary to fulfill the purpose for which that information was collected. As a result, the proposed complaint alleges that such retention caused or is likely to cause substantial injury in the form of loss of privacy about day-to-day movements of consumers, and an increased risk of disclosure of such sensitive data.

With respect to the fourth count, the proposed complaint alleges that Respondent failed to inform consumers about its location data use practices. Respondent represented that its apps would use the user's location information for shopping-related activities such as earning extra points when walking into stores. Instead, InMarket has supplemented that data with information about users it purchased from other sources, shared that information with third parties for advertising purposes, and has used that information to develop predictions about consumer behavior and characteristics. The proposed complaint alleges that these facts would be material to consumers when deciding whether or not to grant location permissions to InMarket's apps, and their omission was therefore a deceptive act or practice.

Summary of Proposed Order with Respondent

The Proposed Order contains injunctive relief designed to prevent Respondent from engaging in the same or similar acts or practices in the future.

Geolocation data can vary significantly in its precision. The privacy concerns posed by the proposed complaint relate to more precise location data—that is, location data that could be used to identify specific locations a consumer visits. As a result, the Proposed Order is limited to location data that identifies consumers' locations in a geographic area that is equal to or less than the area of a circle with a radius of 1,850 feet.

Provision I prohibits Respondent from misrepresenting (1) the extent to which it collects, maintains, uses, discloses, or deletes location data, and (2) the extent to which such data is deidentified.

Provision II prohibits Respondent from selling or licensing precise location data in exchange for any valuable consideration.

Provision III prohibits Respondent from selling, licensing, transferring, or sharing, any product or service that categorizes or targets consumers based on sensitive location data.

Sensitive locations are defined as those locations associated with: (1) sexual and reproductive health providers, offices of mental health practitioners and related mental health and substance abuse facilities, offices of oncologists and pediatricians; (2) religious organizations; (3) correctional facilities; (4) labor union offices; (5) locations held out to the public as predominantly providing education or childcare services to minors; (6) locations held out to the public as predominantly providing services to LGBTQ+ individuals; (7) locations held out to the public as predominantly providing services based on racial or ethnic origin; (8) locations held out to the public as providing temporary shelter or social services to homeless, survivors of domestic violence, refugees, or immigrants; or (9) locations of public gatherings of individuals during political or social demonstrations, marches and protests.

Provision IV requires that Respondent implement and maintain a sensitive location data program to develop a comprehensive list of sensitive locations and to prevent the use, sale, license, transfer, or disclosure of sensitive location data.

Provision V prohibits Respondent from collecting, using, and disclosing location data from its apps (1) without a record documenting the consumer's affirmative express consent obtained prior to the collection or use of location data, and (2) unless consumers receive a clear and conspicuous reminder every six months about location data being collected.

Provision VI requires that Respondent design and implement an SDK supplier assessment program to help ensure that consumers have provided consent for the collection and use of location data obtained by Respondent through its SDK. Under this program, Respondent must conduct initial assessments of all their SDK data suppliers within 30 days of entering into a data sharing agreement, or within 30 days of the initial date of data collection. The program also

requires that Respondent confirm that consumers provide consent and create and maintain records of SDK suppliers' assessment responses. Finally, Respondent must cease from using, selling, or disclosing location data for which consumers do not provide consent.

Provision VII requires that Respondent provide a simple, easily-located means for consumers to withdraw any consent provided and **Provision VIII** requires that Respondent cease collecting location data within 7 days after Respondent receives notice that the consumer has withdrawn their consent.

Provision IX also requires Respondent to provide a simple, easily-located means for consumers to request that Respondent deletes location data that Respondent previously collected and to delete the location data within 30 days of receipt of such request unless a shorter period for deletion is required by law.

Provision X requires that Respondent (1) document and adhere to a retention schedule for the covered information it collects from consumers, including the purposes for which it collects such information, the specific business needs, and an established timeframe for its deletion, and (2) prior to collecting or using new type of information related to consumers that was not previously collected, and is not described in its retention schedule, update its retention schedule.

Provision XI requires Respondent to provide a notice to each consumer whose location data was collected through the Respondent's apps without Affirmative Express Consent, either via email or in the app itself, notifying the consumer about InMarket's settlement with the Commission.

Provision XII requires that Respondent delete or destroy all historic location data. Respondent has the option to retain historic location data if it has obtained affirmative express consent or it ensures that the historic location data is deidentified or rendered non-sensitive.

Provision XIII requires Respondent to establish and implement, and thereafter maintain, a comprehensive privacy program that protects the privacy of consumers' personal information.

Provisions XIV-XVII are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring Respondent to provide information or documents necessary for the Commission to monitor compliance.

Provision XVIII states that the Proposed Order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the Proposed Order, and it is not intended to constitute an official interpretation of the complaint or Proposed Order, or to modify the Proposed Order's terms in any way.