

Analysis of Proposed Consent Order to Aid Public Comment
In the Matter of X-Mode Social, Inc., File No. 2123038

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an agreement containing a consent order from X-Mode Social, Inc. and Outlogic, LLC (collectively “X-Mode”).

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, withdraw from the agreement and take appropriate action.

Respondent X-Mode is a Delaware corporation with its headquarters in Virginia. Respondent Outlogic is a Virginia limited liability company and is the successor-in-interest to Respondent X-Mode. X-Mode is a data broker that collects or purchases precise geolocation data for its customers.

With respect to the second count, the proposed complaint alleges that X-Mode failed, between June 2018 and July 2020, to honor the privacy choices of some consumers who had enabled the “Opt out of Ads Personalization” control on their Android mobile phones. X-Mode’s consumers were unaware that their privacy choices were not being honored by X-Mode and the company failed to employ the necessary technical safeguards and oversight to ensure that consumers’ privacy choices were honored. The proposed complaint alleges that this failure caused or was likely to cause substantial injury by failing to honor the privacy decisions made by the consumers.

With respect to the third count, the proposed complaint alleges that X-Mode failed to notify users of its own apps (Drunk Mode and Walk Against Humanity) the purposes for which their location data would be used. As a result, the proposed complaint alleges that X-Mode caused or was likely to cause consumers substantial injury by collecting and selling the consumers’ sensitive data without consumers’ consent.

With respect to the fourth count, the proposed complaint alleges that X-Mode failed to verify that third-party apps incorporating its SDK obtain informed consent from consumers to have the consumers’ location data collected, used, and sold. X-Mode’s primary mechanism for ensuring that consumers have provided appropriate consent is through contractual requirements with its suppliers. However, contractual provisions, without additional safeguards, are insufficient to protect consumers’ privacy.

With respect to the fifth count, the proposed complaint alleges that it was an unfair practice for X-Mode to categorize consumers based on sensitive characteristics. X-Mode entered into an agreement with a privately held clinical research company to trace consumers in Ohio within a 200-meter radius of Cardiologist offices, Gastroenterologist offices, Endocrinologist offices, Pharmacies, and Drugstores. X-Mode licensed these segments for advertising or marketing purposes.

With respect to the sixth count, the proposed complaint alleges that X-Mode represented to users of the X-Mode apps that their data would be used for certain purposes, but failed to disclose it would be provided to government contractors for national security purposes. Such a failure to disclose is material to consumers and is likely to mislead consumers who have no way of determining the truth. As a result, this conduct is deceptive under Section 5.

With respect to the seventh count, the proposed complaint alleges that X-Mode has furnished third party app publishers with language for consumer disclosures that mislead consumers about the purposes for which their location may be used, such as by failing to disclose that consumer’s location would be provided to government contractors for national security purposes. Furnishing such materials provided the sd being to discl Se (pu)5 (r)3 (pgoBDC 3 -21 (f)-2 (de)-be)--

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Part VII requires that Respondents implement a supplier assessment program designed to ensure that consumers have provided consent for the collection and use of location data obtained by Respondents. Under this program, Respondents must conduct initial assessments of all their 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 Respondents confirm that consumers provide consent and create and maintain records of suppliers' assessment responses. Finally, Respondents must cease from using, selling, or disclosing location data for which consumers have not provided consent.

Part VIII requires that Respondents provide a clear and conspicuous means for consumers to request the identity of any entity, business, or individual to whom their location data has been sold, transferred, licensed, or otherwise disclosed or a method to delete the consumers' location data from the databases of Respondents' customers. Respondents must also provide written confirmation to consumers that the deletion requests have been sent to Respondents' customers.

Part IX requires that Respondents provide a simple, easily-located means for consumers to withdraw any consent provided and **Part X** requires that Respondents cease collecting location data within 15 days after Respondents receive notice that the consumer withdraws their consent.

Part XI also requires that Respondents provide a simple, easily-located means for consumers to request that Respondents delete location data that Respondents 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.

Part XII requires that Respondents (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, Respondents must update its retention schedule.

Part XIII requires that Respondents delete or destroy all historic location data and all data products. Respondents have 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. Respondents must inform all customers that received location data from Respondents within 3 years prior to the issuance date of this Order, of the Commission's position that such data should be deleted, deidentified, or rendered non-sensitive.

Part XIV requires Respondents to establish and implement, and thereafter maintain, a comprehensive privacy program that protects the privacy of consumers' personal information.

Parts XV-XVIII 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.

Part XIX 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.