



COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

FEDERAL TRADE COMMISSION

Disposal Rule, 16 CFR part 682, Project No. 165410

Disposal of Consumer Report Information and Records

[Docket No. 2016-22198]

November 21, 2016

By notice published on September 15, 2016, the Federal Trade Commission (“FTC”) requests public comments on its rule regarding Disposal of Consumer Report Information and Records (“Disposal Rule”).¹ Pursuant to this notice, the Electronic Privacy Information Center (“EPIC”) submits these comments to support the continued enforcement of the Disposal Rule

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging privacy and related human rights issues, and to protect privacy, the First Amendment, and constitutional values. EPIC has particular interest in preserving and enhancing privacy safeguards. EPIC routinely submits comments to various federal agencies concerning privacy safeguards for information that consumers provide to

¹ *Disposal of Consumer Report Information and Records*, 81 Fed. Reg. 63,435 (Sep. 15, 2016).

various financial, educational, and commercial organizations.² EPIC has played a leading role in developing the authority of the FTC to address emerging privacy and security issues.³ EPIC supported implementation of the Disposal Rule in 2004.⁴ EPIC offers the following comments to underscore the need for continued enforcement of the Disposal Rule and to suggest ways in which it can be improved.

The FTC asks if there is “a continuing need for specific provisions of the Rule[.]”⁵ EPIC strongly believes that there is. Identity theft continues to be one of the leading concerns for consumers.⁶ The FTC must require entities that collect personal information to dispose of it in a way that protects consumer data from misuse, including secondary use, breach, and theft. The Disposal Rule is an important step in protecting consumers from identity theft and other types of fraud.

² See e.g., *Comments of the Electronic Privacy Information Center to the Federal Trade Commission “Public Workshop and Request for Public Comments and Participation”* May 27, 2011, https://epic.org/privacy/idtheft/EPIC_Debt_Collection_Comments.pdf (“EPIC Debt Collection Comments”); *Comment of the Electronic Privacy Information Center to The Office of Science and Technology Policy Request for Information: Big Data and the Future of Privacy*, Apr. 4, 2014, <https://epic.org/privacy/big-data/EPIC-OSTP-Big-Data.pdf>; *EPIC Comments In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Jul. 6, 2016, <https://www.epic.org/apa/comments/EPIC-FCC-Privacy-NPRM-2016.pdf>.

³ See, e.g., Letter from EPIC Exec. Dir. Marc Rotenberg to FTC Comm'r Christine Varney (Dec. 14, 1995) (urging the FTC to investigate the misuse of personal information by the direct marketing industry), http://epic.org/privacy/internet/ftc/ftc_letter.html; DoubleClick, Inc., FTC File No. 071-0170 (2000) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/internet/ftc/DCLK_complaint.pdf; Microsoft Corporation, FTC File No. 012 3240 (2002) (Complaint and Request for Injunction, Request for Investigation and for Other Relief), http://epic.org/privacy/consumer/MS_complaint.pdf; Choicepoint, Inc., FTC File No. 052-3069 (2004) (Request for Investigation and for Other Relief) , <http://epic.org/privacy/choicepoint/fcraltr12.16.04.html>; In the Matter of Snapchat, Inc. (2013) (Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/ftc/EPIC-Snapchat-Complaint.pdf>; In the Matter of Scholarships.com, LLC (2013) (Complaint, Request for Investigation, Injunction, and Other Relief), <https://epic.org/privacy/student/EPIC-FTC-Compl-Scholarships.com.pdf>.

⁴ *Comments on FACTA Disposal Rule*, PRIVACY RIGHTS CLEARING HOUSE, Jul. 22, 2004, <https://www.privacyrights.org/blog/comments-facta-disposal-rule-rin-3064-ac77-fair-and-accurate-credit-transaction-act-disposal>.

⁵ *Disposal of Consumer Report Information and Records*, 81 Fed. Reg. 63,435 (Sep. 15, 2016).

⁶ *FTC Releases Annual Summary of Consumer Complaints*, FEDERAL TRADE COMMISSION, Mar. 1, 2016, <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-releases-annual-summary-consumer-complaints>.

The FTC also poses the following question:

Under the current Disposal Rule, “Consumer information does not include information that does not identify individuals, such as aggregate information or blind data.” Should the Rule be modified to change the definition of “consumer information”? Should the definition of “consumer information” include information that can be reasonably linked to an individual in light of changes in relevant technology or market practices?⁷

EPIC supports modifying the definition of “consumer information” to include information that is linked or linkable to an individual. In general, EPIC supports a broad definition of identifying information and commends the Commission for recognizing that this provision should be updated to reflect the reality of modern data practices. This proposed definition is also consistent with existing state and federal law, which routinely defines personally identifying information (“PII”) to include information that both identifies or could identify an actual individual.⁸

As Professor Jerry Kang explains in his analysis of the collection and use of consumer information by internet firms, the definition of PII is not limited to names and addresses; the term “describes a relationship between the information and a person, namely that the information—whether sensitive or trivial—is somehow identifiable to an individual.”⁹ Information can be “identifiable” to a person in one of three ways: (1) authorship, (2) description, or (3) instrumental mapping.¹⁰ Information that an individual creates and claims authorship over is identifiable, as is information that “could describe the individual in some manner” including

⁷ *Disposal of Consumer Report Information and Records*, 81 Fed. Reg. 63,435, 63,437 (Sep. 15, 2016).

⁸ See, e.g., California Online Privacy Protection Act, Cal. Bus. & Prof. Code §§ 22575–22579 (2014) (including information that “permits the physical or online contacting of a specific individual”); E-Government Act of 2002, 44 U.S.C. § 3501 *et seq.* (2014) (including both “direct” and “indirect” identifiers); Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506 (2014) (including “persistent identifiers that can be used to recognize a user over time and across different Web sites or online services”).

⁹ Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1207 (1998).

¹⁰ *Id.*

characteristics like age and sex. Persistent identifiers (like Social Security numbers, usernames, IP addresses, and unique device addresses) that can be used to map an individual's interactions with an institution are also identifiable.¹¹

The FTC should apply a broad definition of consumer information or PII to all of the statutes and regulations within its jurisdiction. The “linked or linkable” definition represents a more flexible, technology neutral approach that is consistent with the reality of modern business practices.

Given the growing problems of identity theft and financial fraud across a wide array of industries and organizations, the FTC should continue robust enforcement of the Disposal Rule. The Commission should also broaden application of the Rule to all information that is linked or linkable to an individual. This will benefit consumers and companies alike by minimizing the myriad costs that result from inadequate data security and disposal practices.

Respectfully Submitted,

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¹¹ *Id.*