



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

August 31, 2009

Angela Gleason
Associate Counsel
American Insurance Association
2101 L Street, NW
Washington, D.C. 20037

**Re: Sears Holdings Management Corporation
FTC Matter No. 0823099**

Dear Ms. Gleason:

Thank you for your comment regarding the above-referenced matter. Your comment was placed on the public record pursuant to Section 2.34 of the Commission's Rules of Practice, 16 C.F.R. § 2.34, and was given serious consideration by the Commission.

In your comment, you express concern that the proposed order, by requiring Sears to disclose certain information prior to, and on a separate screen from, any end user license agreement ("EULA") or similar document, is an attempt to set a new standard of disclosure for all online disclosures in general. You further voice concern about the proposed order's requirement that Sears obtain consumers' express consent before installing any tracking application. Specifically, you note that, when collecting information online, most companies provide notice and an opt-out choice, rather than obtain express consent, *i.e.*, opt-in. Finally, you argue that the proposed order lacks specificity regarding the practice the Commission viewed as deceptive.

The proposed consent order does not create a new standard of disclosure for Internet transactions in general. Indeed, its provisions regarding separate screen notice and express consent are very similar to provisions in recent consent orders approved by the Commission. *See Zango, Inc.*, FTC Docket No. C-4186 (2007); *see also Direct Revenue, LLC*, FTC Docket No. C-4194 (2007). In those cases and in this one, such provisions relate to the particular conduct and software at issue and are designed to ensure that these respondents do not engage in similarly deceptive or unfair practices.

Nevertheless, as the Commission pointed out in response to a comment in *Zango*,¹ it is

¹ *Zango, Inc.*, FTC Docket No. C-4186, letter responding to comment from Mark Bohannon, Software & Information Industry Ass'n (Mar. 7, 2007) *available at* <http://www.ftc.gov/os/caselist/0523130/0523130c4186lettercommenterSIIA.pdf>.

important for industry to recognize that a EULA is a contract, and, as with any contract, there are occasions when disclosure in a EULA alone may not be sufficient to correct a misleading impression created elsewhere. *See, e.g., FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (fine print contractual notices are insufficient to undo deceptive net impression); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944, 956 (9th Cir. 2001) (disclaimers and truthful statements that are made outside the context of a deceptive representation (such as a contract) do not automatically undo the deception and exonerate deceptive activities); *cf. FTC, Dot Com Disclosures* (adequacy of disclosure required to prevent deception is based on the overall net impression) (available at www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.html). Accordingly, the Commission will approach the validity of EULA-only disclosure on a case-by-case basis, weighing what information is material to consumers and the overall, net impression upon the consumer regarding the transaction.

In addition, the proposed complaint in this case precisely lays out the conduct the Commission alleged was deceptive. Accordingly, even though the proposed consent order contains much broader relief, the combined complaint and consent order provide ample guidance to the public as to what conduct the Commission alleges was deceptive.

After considering your comments, the Commission has determined that the public interest would best be served by issuing the Decision and Order in final form without modification. A copy of the final Decision and Order, and other relevant materials, are available on the Commission's website at <http://www.ftc.gov>.

Thank you again for your comments. It helps the Commission's analysis to hear from a variety of sources in its work, and we appreciate your interest in this matter.

By direction of the Commission.



Donald S. Clark
Secretary