



American Insurance Association

2101 L Street NW  
Suite 400  
Washington, DC 20037  
202-828-7100  
Fax 202-293-1219  
www.aiadc.org

**SUBMITTED VIA WEBLINK**

Federal Trade Commission  
Office of the Secretary, Room H-135  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: Sears, File No. 082 3099

Dear Madam/Sir:

The American Insurance Association (“AIA”) appreciates the opportunity to comment on the Federal Trade Commission’s (“FTC”) proposed consent order with Sears Holdings Management Corporation (“Proposed Order”), which was recently published in the *Federal Register*.<sup>1</sup> AIA is a trade association which represents property and casualty insurers doing business across the country and around the world.<sup>2</sup> While the FTC does not have direct jurisdiction over the business of insurance, AIA is concerned that the Proposed Order, if not modified, may be read to establish a standard for all companies engaged in on-line transactions, including those entities not subject to the FTC’s jurisdiction. Over the past several years, the FTC has regularly established standards for conduct in the privacy and data security area through consent decrees. AIA expects that this Proposed Order could establish new standards for consumer consent and the “conspicuousness” of disclosures which are inconsistent with existing industry practices and would be costly to implement if imposed on all types of on-line transactions regardless of size or subject matter. Therefore, AIA is providing the comments below with the hope that the FTC will modify the Proposed Order to address and mitigate its potential impact on the practices of participants in Internet-based transactions.

---

<sup>1</sup> 74 Fed. Reg. 28244 (June 15, 2009).

<sup>2</sup> AIA member companies offer all types of property - casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage for small businesses, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance.

## Concerns Regarding the Proposed Order

### I. The Proposed Order Imposes Conditions Not Customary in Internet Transactions

The Proposed Order requires that Sears, for any “tracking application” capable of being installed on consumers’ computers, disclose (1) the types of data the tracking application will monitor, record, or transmit; (2) how the data may be used; and (3) whether the data may be used by a third party. This disclosure, pursuant to the Proposed Order, must occur *before*, and *on a separate screen from*, other disclosures such as the terms of use, licensing agreement, or privacy policy. The requirement to display such disclosures before, and separately from, others represents a new and significant expansion of existing legal requirements and the current industry standards for internet disclosure.

The FTC has promulgated and encouraged the use of four “fair information practices.”<sup>3</sup> Those practices include providing consumers with: (a) clear and conspicuous notice of a company’s informational practices (including what data is collected, and how it is collected); (b) a choice of how personal identifying information is used beyond the purpose for which it was provided; (c) access to information a website has collected about them; and (d) reasonable protection of the security of the information collected. These are consistent with the clear and conspicuous disclosure requirements of the Gramm-Leach-Bliley Act<sup>4</sup> as well as State Insurance Information and Privacy Protection laws applicable to AIA members.<sup>5</sup> While the types of data monitored and collected in the My SHC Community program was extensive, AIA believes that the disclosure methods used by Sears were consistent with existing legal requirements and standard industry practices for Internet-based terms and conditions.

Although the disclosure requirements in the Proposed Order apply to the information tracking application, AIA is concerned that, should this standard be applied to other on-line consumer disclosures, it would create a potentially confusing, intensive, and burdensome system of disclosures, both for the consumer and the company. This type of prioritization and separation of consumer disclosures would force companies to decide without additional guidance what type of disclosure should be presented to a consumer first, and what should follow. Not every disclosure can be at the top of a page, or in the first paragraph, and the requirements of this Proposed Order will create uncertainty as companies attempt to determine the appropriate sequence of disclosure.

---

<sup>3</sup> See FTC Report, *Privacy Online: Fair Information Practices in the Electronic Marketplace* (2000).

<sup>4</sup> See 15 U.S.C. §6803

<sup>5</sup> See for example, Ark. Admin. R. and Reg. 74; Ariz. Rev. Stat. §20-2104; Ca. Ins. Code §791.04; Conn. Gen. Stat. §38a-979; Haw. Rev. Stat. §§431:3A- 201 through 431:3A-206; 215 Ill. Comp. Stat. §5/1005, 50 Il. Admin. Code §4002.60 through 4002.90; 24-A Me. Rev. Stat. §§2206 and 2208; Mass. Gen. Laws ch. 175I, §4; Mich. Comp. Stat. §§500.503, 500.507 and 500.515; Mont. Code §33-19-202; Neb. Rev. Stat. §§44-903, 44-904 and 44-909; N.H. Ins. Admin. Code 3002.01; N.J. Stat. 17:23A-4; N.M. Admin. Code §§13.1.3.7 and .8; N.C. Gen. Stat. §58-39-27; N.D. Gen. Stat. §58-39-25; Or. Rev. Stat. §746.620; Va. Code §§38.2-604 and 38.2-604.1; Vt. Admin. Reg. IH-2001-01; and W.V. Admin. Code §§114-57-2, 114-57-3 and 114-57-5.

AIA believes that where a “clear and conspicuous” standard applies to information contained in an agreement, that standard may be effectively met through the use of a larger font, bold font, underlining, or all capital letters. In addition, the use of clear headings in the agreement may be used to call attention to the nature of the information provided and make a document easy for a consumer to read or skim. These steps make the separation and prioritization requirements established in the Proposed Order unnecessary.

## II. Consumer Consent Requirement in Proposed Order is Inconsistent with Prior Guidance

The Proposed Order requires that companies obtain express consent from consumers for the download or installation of a tracking application and data collection. While this may seem reasonable, it imposes this requirement by forcing consumers to consent to such processes by affirmatively clicking on a link or button that is clearly labeled and not pre-selected as the default option. This approach is generally consistent with current practices related to obtaining affirmative consent where such affirmative consent is required, but it contravenes general practices with regard to information collection. With regard to online information collection, companies typically have used notice and an opt-out choice, where appropriate and as law permits, consistent with FTC fair information practices. If such a diversion is mandated due to the nature of the information collected or the installation of tracking software, this point should be clarified in the final order.

To the extent the Proposed Order requires the company to confirm that the customer has read or scrolled completely through the disclosures, the Proposed Order is also inconsistent with other federal guidance on consumer disclosures. For example, the Federal Reserve Board, in guidance issued with respect to its Regulation Z<sup>6</sup> has stated that, so long as the consumer cannot not bypass the electronic disclosures for certain lending activities, the consumer is not required to scroll completely through the disclosures, nor is the company required to confirm that the consumer has read the disclosures.<sup>7</sup> If the FTC is trying to broadly impose a new requirement on market participants, AIA believes that there are better ways to effectuate the change, such as through notice and comment rule making. If the requirements set forth in the Proposed Order are only applicable due to the sensitive nature of the information, this point should be noted in the Proposed Order.

## III. Proposed Order Lacks Specificity Regarding Practices the FTC Views as “Deceptive”

The Proposed Order gives little to no guidance as to what elements of Sears’ disclosures for the My SHC Community program the FTC considered “deceptive” and a potential violation of the Federal Trade Commission Act (“FTC Act”). Although

---

<sup>6</sup> 12 C.F.R. Part 226.

<sup>7</sup> See Truth in Lending: Final Rule and Official Staff Interpretation, 72 Fed. Reg. 63462, 63475-77 (Nov. 9, 2007).

insurance companies are not subject to the FTC Act, the FTC's determinations regarding deceptive practices is often precedent setting and has ramifications for all market participants. Therefore, unless modified, the Proposed Order may create uncertainty for companies engaging in Internet transactions.

AIA requests that the FTC clarify the Proposed Order to provide guidance or standards for deceptive practices involving Internet-based transactions or expressly limit its scope. Based upon a review of the Proposed Order, it is unclear whether the scope of information collected, or the sensitivity of the information collected triggered a heightened disclosure requirement. Furthermore, there is no indication whether the FTC would apply these standards to all types of consumer disclosures or just those involving tracking software. There is a wide continuum of information collection practices on the internet – from tracking transactions on a company's own site to improve the navigation of the site, to the other end of the scale as in this case where passwords, account numbers and secure transactions from unrelated sites were gathered. If the practices in this case necessitate a more stringent standard than less invasive practices, this sliding scale approach should be clearly articulated and the scope of the Proposed Order narrowed accordingly.

AIA members would appreciate more clarity and guidance from the FTC, even though they are not subject to the FTC jurisdiction. If you have any questions or need additional information, please contact the undersigned.

Respectfully submitted,

/s/

Angela Gleason  
Associate Counsel