



David A. Paterson  
Governor

STATE OF NEW YORK  
EXECUTIVE DEPARTMENT  
CONSUMER PROTECTION BOARD

Mindy A. Bockstein  
Chairperson and Executive Director

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BY E-MAIL AND U.S. MAIL

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

**Re: Sears Holdings, File No. 0823099**

Dear Commissioners:

As New York State's top consumer watchdog and think tank in the Executive Branch, the New York State Consumer Protection Board ("CPB") is involved in a wide array of consumer issues. The CPB conducts consumer investigations, research and analysis; develops legislation; consumer education programs and materials; responds to individual complaints by working with the parties to settle disputes through voluntary agreements; and, represents the interests of consumers before the Public Service Commission and other State and federal agencies.

In 2008 and in the first half of 2009, the CPB handled more than 750 Internet-related complaints and queries, and has significantly expanded its portfolio of responsibility in 2009 with the introduction of its Identity Theft Prevention and Mitigation Program. Under Governor David A. Paterson, information privacy, consumer understanding and control over the online collection and use of personal information, and the maintenance of consumer trust in their online transactions have become critical issues for the CPB. As inadequate disclosure related to spyware impacts all of these issues, and significantly, the preservation of consumer trust, we write today to offer comment on the Proposed Consent Order in the Matter of Sears Holdings Management Corporation, issued on June 4, 2009, by the Federal Trade Commission ("FTC").

**Discussion**

The Proposed Consent Order requires that, prior to installing any tracking application on a consumer's computer, Sears must provide full disclosure of the scope of data collection and obtain the consumer's express consent in a standalone notice that is positioned prior to the acceptance of any license agreement or privacy policy. We



applaud these provisions and, while the facts of the case focus on an especially invasive type of tracking, we believe that the core principle of the case has broader application beyond the Sears facts.

According to this principle, the reasonable Internet consumer is entitled to full, upfront disclosure of the collection and use of his or her data as a material term of the consumer's transaction with the Company. Thus, we encourage the FTC to extend this principle through the development and implementation of a policy to advance full, upfront disclosure of a company's collection and use of tracking data. This policy should include (1) a standard disclosure content framework modeled after the framework provided in the Proposed Order (Agreement Containing Consent Order, File No. 0823099, at p. 4), and (2) a standard placement for the disclosure text at the point-in-time in the communication when the consumer is first informed of the proposed tracking. This disclosure could be accomplished either in the text itself, or through a conspicuous hyperlink that alerts the reader to click on the link for more information (See, Federal Trade Commission, Dot Com Disclosures, pps. 7-10). Such approach would provide the consumer with an important tool for understanding vague and overbroad phrases, like "online browsing," and facilitate clarification of the exact nature of the proposed collection and use for all tracking applications. A policy implementing this process would be an important first step in clarifying the fundamental rights and expectations of the reasonable Internet consumer, and would also provide the industry with much needed guidance and direction.

## Conclusion

It is urgent that the primary privacy communication tools of notice and consent be strengthened and made more effective. Consumers need better protection and industry needs better guidance. Through proactive policies, Government can provide both, and the Sears case can serve as a guidepost.

Thank you for your consideration of these comments.

Sincerely,

Mindy A. Bockstein  
Chairperson and Executive Director

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