Before the
FEDERAL TRADE COMMISSION

In the matter of	)	
	)	FTC Docket No. C-4264
Sears Holdings Management Corporation	)	
	)	

COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, AND THE CENTER FOR DIGITAL DEMOCRACY ON PETITION OF SEARS HOLDINGS MANAGEMENT CORPORATION TO REOPEN AND MODIFY FINAL ORDER

December 8, 2017

Introduction

Consumers Union, Consumer Federation of America, and the Center for Digital Democracy, by its counsel the Institute for Public Representation, submit these comments in response to the request of the Federal Trade Commission ("FTC" or "Commission") for public comment on the October 30, 2017, Petition of Sears Holdings Management Corporation ("Sears") to Reopen and Modify Final Order.[1] Sears has requested that the Commission modify

[1] Consumers Union is the policy and mobilization division of Consumer Reports, an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts its policy work in the areas of privacy and data security, food and product safety, financial reform, telecommunications reform, health care reform, antitrust and competition policy, and other areas.

Consumer Federation of America (CFA) is an association of more than 250 nonprofit consumer organizations across the United States. CFA was founded in 1968 to advance the consumer interest through research, advocacy and education.

The Center for Digital Democracy (CDD) is recognized as one of the leading consumer protection and privacy organizations in the United States. Since its founding in 2001 (and prior to that through its predecessor organization, the Center for Media Education), CDD has been at the forefront of research, public education, and advocacy protecting consumers in the digital age.

its 2009 consent order to allow the company to collect certain data from its mobile applications without prominent disclosure and affirmative consent. Although we do not oppose modifying the 2009 order, we ask the Commission to clarify the exception that Sears requests to more closely align with other FTC orders and policy guidance. Specifically, we ask the Commission to limit the language of Sears's third requested exception to the definition of ""Tracking Application"" to apply only to instances in which information to be obtained is reasonably expected and necessary to perform a service or transaction the consumer has requested.

The language Sears requests for the third exception to ""Tracking Application"" is ambiguous and potentially overbroad. Limiting the language would better align with reasonable consumer expectations, as well as language used by the Commission in recent final orders in the *Lenovo*, *Compete*, and *UPromise* tracker cases and the Commission's 2012 Privacy Report. Further, clarifying this language as we propose would prevent potential misinterpretations or overbroad applications to all instances in which a consumer interacts with the application.

Factual Background

I. Sears Final Order and Request for Modification

In April 2007, Sears Holdings Management Corporation ("Sears") began inviting some of its customers to join its "My SHC Community" market research group.[2] The offer touted the opportunity for "community members" to earn $10, have a chance to win sweepstakes prizes every two months, be the first to try new products, and "partner directly with employees of

[2] Complaint, *In re Sears Holdings Management Corporation*, FTC Docket No. C-4264, at 1 (Sept. 9, 2009).

Sears."[3] What the offer did *not* disclose, unless a user read ten on-screen pages into a fifty-four-page Privacy Statement full of legalese at the end of a multi-step registration process, was that Sears would also install tracking software that recorded all of the user's web browsing activity.[4] The software monitored consumers' secure sessions and captured sensitive data that could include, among other data, "the contents of shopping carts, online bank statements, drug prescription records, video rental records, library borrowing histories, and the sender, recipient, subject, and size for web-based e-mails."[5]

In 2009, the Commission unanimously approved a consent order with Sears over the matter. According to the FTC's administrative complaint, Sears's failure to "disclose adequately the scope of consumers' personal information it collected via a downloadable software application" was deceptive and violated the FTC Act.[6] The order requires Sears to disclose to consumers the types of information its applications will collect prior to the consumers using the application, thus prohibiting Sears from continuing to collect personal information from consumers without their knowledge or consent.[7]

On October 30, 2017, Sears filed a petition to modify the 2009 order, arguing that changed circumstances of fact and the public interest justify modification.[8] The request claims

---

[3] Benjamin Edelman, *Installation Sequence - Screenshots*, BenEdelman.org, http://www.benedelman.org/spyware/images/shc-comscore/sequence.html (last visited Dec. 8, 2017).
[4] Benjamin Edelman, *The Sears "Community" Installation of ComScore*, BenEdelman.org (Jan. 1, 2008), http://www.benedelman.org/news/010108-1.html.
[5] *Id.*
[6] Press Release, FTC Approves Final Consent Order Requiring Sears to Disclose the Installation of Tracking Software Placed on Consumers Computers (Sept. 9, 2009), https://www.ftc.gov/news-events/press-releases/2009/09/ftc-approves-final-consent-order-requiring-sears-disclose.
[7] Decision and Order, *In re* Sears Holdings Management Corporation, FTC Docket No. C-4264, at 3 (Aug. 31, 2009).
[8] Petition of Sears to Reopen and Modify Final Order at 1 (Oct. 30, 2017) ("Sears Petition").

that the company's transformation, increased focus on online growth, the dramatic growth in mobile applications, and consumer expectations of tracking together make a satisfactory showing warranting a modification. The request also claims that FTC orders following Sears's used the same types of exceptions that Sears now requests. The company seeks to modify the order's definition of "Tracking Application" by including three exceptions in which disclosure would not be required:

> [Disclosure is not required if] the information monitored, recorded, or transmitted is limited solely to the following: (a) the configuration of the software program or application itself; (b) information regarding whether the program or application is functioning as represented; or (c) information regarding consumers' use of the program or application itself.[9]

This revised definition would remove the requirement that Sears provide a disclosure and obtain consent before collecting the information described in the proposed exceptions.

Legal Background

FTC regulations state that anyone subject to a final order may request that the Commission reopen the proceeding to consider whether the order should be modified.[10] Such a request must show either (1) that changed conditions of law or fact require the order to be modified or (2) that the public interest so requires.[11]

The burden of making the necessary showing is, with good reason, a heavy one. A requester may not "obtain reopening of an order merely by showing that its conduct is restricted while that of its competitors not under order is not limited."[12] For example, "the costs of

[9] *Id*. at 2.
[10] 16 C.F.R. § 2.51(a).
[11] 16 C.F.R. § 2.51(b).
[12] Modifying Order, *In re* California & Hawaiian Sugar Co., FTC Docket No. 2858, at 4 (Jan. 17, 1995).

complying with a disclosure requirement to cure past deception ordinarily will not warrant reopening, even though the cost of making the disclosure falls only on the petitioner."[13] Citing *Rufo*, the seminal Supreme Court case establishing the satisfactory showing standard, the Commission added that reopening an order is not warranted simply because "it is no longer convenient to live with the terms of the consent order." [14]

A satisfactory showing requires more than "merely conclusory" statements.[15] The satisfactory showing must demonstrate *in detail* the nature of changed conditions and the reasons that those conditions require modification or the reasons that the public interest requires a modification.[16] To establish changed conditions, the request must identify "significant changes in circumstances and show that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition."[17] To establish that modification is in the public interest, the request must show that modification would "relieve any impediment to effective competition."[18]

Two examples within the Consumer Protection Bureau demonstrate the high threshold required for a modification: Phusion Projects, LLC ("Phusion") and California and Hawaiian Sugar Company ("C&H"). In *Phusion*, the Commission issued a final order against the maker of the alcoholic drink Four Loko for deceptively advertising the alcohol content of its product.[19]

---

[13] *Id*.
[14] *Id*. (quoting *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992)).
[15] 16 C.F.R. § 2.51(b)(1).
[16] 16 C.F.R. § 2.51(b)(1).
[17] S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979).
[18] Decision and Order, *In re* Digital Equipment Corp., FTC Docket No. C-3818, at 3 (Feb. 10, 2000).
[19] Press Release, FTC Requires Packaging Changes for Fruit-Flavored Four Loko Malt Beverage (Oct. 3, 2011), https://www.ftc.gov/news-events/press-releases/2011/10/ftc-requires-packaging-changes-fruit-flavored-four-loko-malt.

The order prohibited the company from selling Four Loko until it changed its packaging to comply with a specific disclosure labeling requirement.[20] After the FTC's order, the Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau ("TTB") changed its policies regarding the size, location and content of such disclosures, creating a conflict between the consent order and TTB policy.[21] The Commission granted a modification of its order to allow disclosures that were consistent with TTB's revised policy.[22]

In *C&H*, the Commission issued a final order against a sugar manufacturer for making unsubstantiated claims regarding the superiority of Hawaiian cane sugar compared to other sugars.[23] Roughly 16 years later, C&H filed a request to modify the order under changed law and public interest grounds.[24] The order, C&H asserted, prevented the company from making the types of claims that it could now support with reliable scientific evidence and that its competitors regularly made in advertisements.[25] The Commission found that the request made a satisfactory showing.[26] The Commission revised the order on public interest grounds to allow C&H to offer reliable evidence to substantiate its claims regarding its product's nutritional quality, positive effects on health, and purity.[27]

---

[20] Decision and Order, *In re* Phusion Projects, LLC, FTC Docket No. C-4382, at 1 (Feb. 6, 2013).
[21] Press Release, FTC Approves Modified Final Order in Four Loko Deceptive Advertising Case (July 25, 2014), https://www.ftc.gov/news-events/press-releases/2014/07/ftc-approves-modified-final-order-four-loko-deceptive-advertising.
[22] *Id*.
[23] Decision and Order, *In re* California & Hawaiian Sugar Co., FTC Docket No. 2858, at 1 (Jan. 6, 1977).
[24] Modifying Order, *In re* California & Hawaiian Sugar Co., FTC Docket No. 2858, at 2 (Jan. 17, 1995). The Commission did not consider C&H's claim that changes in law required a modification because it found that the public interest warranted a modification. *Id*.
[25] *Id*. at 4.
[26] *Id*.
[27] *Id*. at 5.

Argument

I. If the Commission Chooses to Modify the Order, It Should Limit the Language of the Exception to Preserve Notice and Consent Principles.

Sears has requested that the Commission grant a rare order modification to allow it to more easily distribute applications for mobile platforms that were relatively new at that time. In evaluating this request, the Commission should look to comparable recent orders that have imposed reasonable limitations on first-party data collection as well as policy guidance that emphasizes that data collection should be consistent with the context of an interaction as well as consumer expectations. In light of these precedents, Sears's proposed third exception—for "information regarding consumers' use of the program or application itself"—could potentially be interpreted to allow overly broad collection of consumer information without disclosure or consent. Although many modern applications communicate with the cloud, users do not necessarily expect that *everything* they do related to an application will be recorded. For example, while Google Docs users expect that their work will be saved in the cloud because of the nature of the product, Microsoft Word users would likely be surprised if Microsoft were remotely collecting every keystroke in creating a document. Instead of granting a broad and unprecedented exception for all first-party data collection, the Commission should follow its precedents and narrowly tailor this proposed exception from disclosure and consent requirements to data collection that is reasonably necessary and is consistent with user expectations.

A. The Modification Sears Seeks Goes Beyond FTC Precedent

FTC orders following the Sears order have not included the type of broad exceptions to the disclosure and consent requirements that Sears is now requesting. Rather, the Commission has generally required disclosure and consent for out-of-context data collection. The 2017 Vizio order, like Sears's, did not include any exceptions to the disclosure and consent requirements for

the transmission of viewing data to Vizio. Other orders have included narrow exceptions to the disclosure requirement for information that is transmitted regarding (1) the configuration of the program and (2) the proper functioning of the program, though the exact language varied in each order. The first two exceptions contained in the Sears modification track these two exceptions.[28] However, Sears's third requested exception to the definition of "tracking application"—information regarding consumers' use of the program or application itself—is not comparably found in these other orders, as shown in section I.A.2 below; rather, these other orders use narrower language that limits the extent to which disclosure would not be required.

1. Vizio

In 2014, Vizio manufactured televisions that continuously tracked what consumers were watching and provided that data to third parties over a roughly two-year period. In 2017, the Commission filed a complaint for permanent injunction and monetary relief against Vizio.[29] The Commission claimed that the company's tracking software that collected consumers' viewing data on a second-by-second basis occurred without the consumers' knowledge or consent,[30] much like the functioning of the Sears application. The stipulated order requires Vizio, prior to collecting any viewing data, to prominently disclose to the consumer the types of data collected, the types of data that will be shared with third parties and their identities, and the purposes of sharing the information,[31] again similar to the requirements under the Sears order.

---

[28] *Sears Petition* at 2.
[29] Complaint for Permanent Injunction and Other Equitable and Monetary Relief, *FTC v. Vizio, Inc.*, No. 2:17-cv-00758 at 1 (D.N.J. Feb. 6, 2017).
[30] *Id*. at 6.
[31] Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Vizio, Inc.*, Case No. _____ at 4 (Feb. 6, 2017).

This order does not enumerate instances in which viewing data collection would be permissible even without disclosure and consent. Rather, it simply states that Vizio must provide disclosure, receive consumer consent, and provide instructions for opting out of data collection irrespective of the category of information that is collected or transmitted.

2. The Toolbar Cases

Three recent orders—the 2017 Lenovo order, 2013 Compete order, and 2012 UPromise order—present similar situations that the Commission has faced in consumer privacy enforcement. In *Lenovo*, the Commission found that the company's pre-installed software, VisualDiscovery, collected a user's personal information, including login credentials, medical information, social security numbers, and financial information, and delivered advertisements when a user visited certain websites.[32] The order requires Lenovo to obtain a consumer's affirmative express consent and provide information about opting out of data collection prior to using the software.[33] The order defines the type of software requiring notice and consent, but carves out exceptions for certain instances when information is transmitted or collected, one of which is: "[the transmission is] reasonably necessary for the software to perform a function or service that the consumer requests or otherwise interacts with."[34]

In *Compete*, the Commission found that the company's Compete Toolbar collected much more personal information than the company disclosed, including "credit card numbers, financial

[32] Complaint, *In re* Lenovo (United States), Inc., FTC Docket No. _____ (Sept. 5, 2017); *see also* Press Release, Lenovo Settles FTC Charges it Harmed Consumers With Preinstalled Software on its Laptops that Compromised Online Security (Sept. 5, 2017), https://www.ftc.gov/news-events/press-releases/2017/09/lenovo-settles-ftc-charges-it-harmed-consumers-preinstalled.
[33] Agreement Containing Consent Order, *In re* Lenovo, FTC File No. 152 3134, at 9 (Sept. 5, 2017).
[34] *Id*. at 8.

account numbers, security codes and expiration dates, usernames, passwords, search terms, or Social Security numbers."[35] The final order requires Compete to make disclosures and obtain express affirmative consent from consumers regarding its data collection practices.[36] This order again defines the type of software requiring notice and consent, and carves out exceptions for certain instances, one of which is for any activity "that involves a consumer's interactions with respondent's websites and/or forms."[37]

In *UPromise*, the Commission found that the company's UPromise TurboSaver Toolbar collected "the names of all websites visited, all links clicked, and information that consumers entered into some web pages such as usernames, passwords, and search terms" and in some cases credit card information and Social Security numbers.[38] Again, this data collection transpired without consumer knowledge. The final order requires UPromise to disclose the types of data its tool will collect and to obtain express affirmative consent from the consumer before a consumer may enable the tool.[39] The order again defines the type of software requiring notice and consent, and provides narrow exceptions for limited instances, such as "a consumer's interactions with respondent's websites, services, applications, and/or forms [so long as] that information is collected, retained, or used only as necessary for the purpose of providing the customer's reward service benefits for transactions involving those merchants."[40]

---

[35] Complaint, *In re* Compete, Inc., FTC Docket No. C-4384, at 3 (Feb. 23, 2013).
[36] Decision and Order, *In re* Compete, Inc., FTC Docket No. C-4384, at 4 (Feb. 25, 2013).
[37] *Id*. at 3.
[38] Complaint, *In re* UPromise, Inc., FTC Docket No. C-4351, at 3 (Apr. 3, 2012).
[39] Decision and Order, *In re* UPromise, Inc., FTC Docket No. C-4351, at 4–5 (Apr. 3, 2012).
[40] *Id*. at 3–4.

3. The 2012 Privacy Report

The FTC's 2012 Privacy Report also dictates against providing for a blanket exception for all first-party data collection.[41] Rather, the FTC notes that although some data collection may be intrinsic to any given practice, companies should give consumers choice around data collection and usage that is "outside the context of the interaction."[42] The Commission outlines certain practices that inform when data collection is "in context," and identifies narrow categories such as "product fulfillment," "internal operations," and "fraud prevention" as likely to be in context. However, the Report is careful to note that these exceptions are not all-encompassing, noting for example that "there may be contexts in which the 'repurposing' of data to improve existing products or services would exceed the internal operations concept."[43] Moreover, the Report emphasizes that companies should exercise special discretion in collecting and using *sensitive* information. Thus, the Report states that companies should typically collect sensitive information only with a user's express affirmative consent for certain purposes.[44] Certainly, in some instances, it may be obvious to a user that an application is collecting sensitive data about the user—for example, when the user initiates the purchase of a health-related product. However, given that the Sears order applies to all software applications that can collect and use personal information, a blanket exception for any software-related data collection is unwarranted and unnecessary when a narrower, more carefully tailored exception will do.

---

[41] FTC Report, *Protecting Consumer Privacy in an Era of Rapid Change*, Federal Trade Commission (Mar. 2012), https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.
[42] *Id.* at 38.
[43] *Id.* at 39.
[44] *Id.* at 60.

II. The Commission Should Limit the Third Exception That Sears Requests to Data Collection that Is Reasonably Expected and Necessary for the Software to Perform a Function or Service that the Consumer Requests.

If the Commission determines that the Sears request makes the requisite showing warranting a modification, then it should clarify the language used in the third exception. Currently, the third exception's broad wording would lead to ambiguity or potentially be misinterpreted to cover any situation involving the consumer and the application. This would directly contravene the order's core purpose of providing notice and receiving consent prior to collecting out-of-context information.

A consumer's use of a mobile application can reveal financial, health, and other sensitive personal information that the consumer would not expect to be collected by the app provider. For example, researchers at Princeton recently found many websites that use scripts to "record your keystrokes, mouse movements, and scrolling behavior, along with the entire contents of the pages you visit, and send them to third-party servers."[45] An app that did the same would arguably be collecting information about "the consumer's use of the program or application itself," but such collection would be intrusive and go far beyond what is necessary. Similarly, consistent with the FTC's Privacy Report, mobile operating systems already require affirmative consent in order to access certain sensitive data—such as geolocation and sensors like cameras and microphones. A blanket exception for all first-party data collection without disclosure or consent would give Sears the right to silently access data for which platforms otherwise mandate informed permission.

[45] Steven Englehardt, *No Boundaries: Exfiltration of Personal Data by Session-Replay Scripts, Freedom to Tinker* (Nov. 15, 2017), https://freedom-to-tinker.com/2017/11/15/no-boundaries-exfiltration-of-personal-data-by-session-replay-scripts/.

If the Commission decides that Sears has met its substantial burden for order modification, it should revise Sears's proposed language in favor of wording that accords with the FTC's guidance around context. For example, Sears's third exception could be limited to an exception for disclosure and consent requirements when the data collection is reasonably expected and necessary for the software to perform a function or service that the consumer requests, and that information is only collected, retained, or used as is necessary for those purposes.[46] This eliminates the ambiguity surrounding Sears's current wording as it limits the disclosure exception to only those interactions that the consumer himself initiates in using the application. None of the intended data practices described by Sears in its petition for modification would be impacted by the more precise formulation that we recommend.[47]

Conclusion

Modification of consent orders is an important tool in ensuring that FTC orders remain consistent with evolving technology. But while technology changes quickly, the fundamental principles of consumer control over their information does not. Technological advancements do not eliminate the need for adequate disclosure requirements that inform consumers about information that will be collected and seek their consent to collect it. Thus, a core requirement of the Commission's final order, preserving notice and consent requirements, is still very much relevant today.

If the Commission grants Sears's petition to modify the 2009 consent order, it should do so in a manner that preserves principles of consumer choice over unexpected uses of their data. Specifically, we ask the Commission to limit the language of any exception for a consumer's use

[46] *See* Decision and Order, *In re* UPromise, Inc., FTC Docket No. C-4351, at 4–5 (Apr. 3, 2012).
[47] *Sears Petition* at 16–18.

of the application itself to instances in which transmitted information is reasonably expected and *necessary* to perform a service or transaction the consumer has requested, and specifically limiting the use to that purpose.

Not only would narrowing this language remove overbroad misinterpretations of the exception Sears is requesting, but it would also better align with FTC precedent that has carefully identified narrow exceptions to the notice and consent requirements in previous final orders and policy guidance.

Respectfully submitted,

/s/ James T. Graves
James T. Graves*
Angela J. Campbell
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Ave NW, Suite 312
Washington, DC 20001
james.graves@georgetown.edu
202-662-9545
Counsel for Center for Digital Democracy

/s/ Katie McInnis
Katie McInnis
Policy Counsel
Consumers Union
1101 17th Street NW #500
Washington, DC 20036

/s/ Susan Grant
Susan Grant
Director of Consumer Protection and Privacy
Consumer Federation of America
1620 I Street NW, Suite 200
Washington, DC 20006

* These comments were drafted primarily by Michael Shammo, a law student in the Institute for Public Representation Communication & Technology Clinic, under the supervision of clinic attorneys.