

May 26, 2015

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D)
Washington, DC 20580

RE: Nomi Technologies, Inc.; Analysis of Proposed Consent Order, File No. 1323251

To whom it may concern,

On behalf of the Information Technology and Innovation Foundation (ITIF), we are pleased to submit these comments in response to the Federal Trade Commission's (FTC) request for public comment on the consent agreement of "Nomi Technologies, Inc." that settle alleged violations of federal law prohibiting unfair or deceptive acts or practices.¹ ITIF is a nonprofit, non-partisan public policy think tank committed to articulating and advancing a pro-productivity, pro-innovation and pro-technology public policy agenda internationally, in Washington, and in the states. Through its research, policy proposals and commentary, ITIF is working to advance and support public policies that boost innovation, e-transformation, and productivity. In these comments, ITIF argues that the FTC should not have taken action in this case, and by doing so, discourages the type of consumer-friendly innovation the FTC should be encouraging.

The FTC has brought a case against Nomi Technologies, a company that provides in-store retail analytics. Nomi is one of a handful of companies that have pioneered an innovative technique of using the wireless signals emitted by consumers' phones to take a digital headcount of shoppers in retail stores. The company uses this information to offer insights to retailers about consumer traffic patterns, such as the duration of visits, number of repeat customers, and the percentage of consumers who passed by the store without entering it.² Retailers can then use these insights to measure the effectiveness of product offerings, promotions, displays and the set-up of their stores. Consumers benefit because retailers use these insights to create better shopping experiences. To be clear, the FTC has taken no issue with these tracking methods.

¹ "Nomi Technologies, Inc.; Analysis of Proposed Consent Order To Aid Public Comment," *Federal Register*, Vol. 80, No. 84, May 1, 2015, 1-2, www.ftc.gov/system/files/documents/cases/150501nomifrn.pdf.

² Joshua Wright, "Dissenting Statement of Commissioner Joshua D. Wright," *Federal Trade Commission*, April 23, 2015, www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf.

The FTC’s complaint is that Nomi included a partially incorrect statement in its privacy policy about how consumers could opt out of data collection at retail locations—an option that Nomi was under no legal obligation to provide. Nomi collected information about approximately nine million unique mobile devices between January 2013 and September 2013.³ During that time, its privacy policy stated, “Nomi pledges to... always allow consumers to opt out of Nomi’s service on its website as well as *at any retailer using Nomi’s technology*” (emphasis added).⁴ Nomi’s privacy policy clearly contains an error because while it offered consumers the ability to opt out of data collection on its website from all of its retail partners, none of its retailers offered consumers a separate, in-store, opt-out mechanism. It is worth emphasizing again that the FTC did not object to the tracking itself, only the incorrect statement about the existence of a secondary opt-out mechanism.

Importantly, the FTC has provided absolutely no evidence that any consumers were even affected, let alone harmed. In their supporting statement, Chairwoman Ramirez and Commissioners Brill and McSweeney argue that some consumers interested in opting out may have visited Nomi’s website but chose not to do so. They postulate that this group was made up of consumers who found it inconvenient to opt-out online, wanted to see if stores they patronized used this technology, or wanted to “vote with their feet” by not patronizing stores that used the technology rather than opting out.⁵ After all, only 3,840 consumers even downloaded Nomi’s privacy policy.⁶ Of that group, how many read the relevant portion of the policy, chose not to opt-out of all tracking using the website, visited at least one retail partner, carried a mobile phone, and wanted to opt-out at a particular store? The population of potentially affected consumers is miniscule. While the chairwoman and commissioners offer an interesting theory, they have not actually identified any consumers who fit this profile. Indeed, such a consumer may not even exist. Moreover, even if there were one or two consumers who met these criteria, the worst thing that could happen to them is that they were tracked without being notified—a practice that is entirely legal. Therefore, the FTC has chosen to use its unique regulatory authority to take action against a company for what was possibly a lawyer’s mistake in drafting Nomi’s privacy policy despite no evidence that any consumers were actually harmed.

³ “Nomi Technologies, Inc.; Analysis of Proposed Consent Order To Aid Public Comment,” *Federal Register*.

⁴ “In the Matter of Nomi Technologies, Inc.: Complaint,” *Federal Trade Commission*, accessed May 18, 2015, www.ftc.gov/system/files/documents/cases/150423nomicmpt.pdf.

⁵ Edith Ramirez, Julie Brill, and Terrell McSweeney, “Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney,” *Federal Trade Commission*, April 23, 2015, www.ftc.gov/system/files/documents/public_statements/638351/150423nomiccommissionstatement.pdf.

⁶ Joshua Wright, “Dissenting Statement of Commissioner Joshua D. Wright,” *Federal Trade Commission*.

The FTC has proposed a 20 year consent decree without civil penalties to settle this case.⁷ The consent decree prohibits Nomi from misrepresenting the options available to consumers to control what information Nomi collects and uses about them. To comply, Nomi only has to remove the line from its privacy policy listing the incorrect option. While the FTC's proposed settlement terms are somewhat restrained, by formally taking action when there was no injury to consumers, the FTC will likely encourage companies to spend more time on corporate lawyers and less time delivering value to consumers, including through developing privacy-enhancing technologies. After all, companies like Nomi would be better off providing no privacy guarantees to their consumers that way they will not fall victim to gotcha-style regulatory enforcement actions. Rather than encouraging companies to invest more in protecting consumers from harm, the takeaway for most companies will be: if you do not want the FTC to come after you, do the bare-minimum on privacy.

The FTC should remember that innovation, by its very nature, involves risks and mistakes. Tech companies publish written policies describing their products and services, but due to the rapid pace of change, these descriptions can fall out of sync with the latest versions.⁸ While companies should strive to keep these updated, in the race to innovate, it is not surprising that occasionally something gets overlooked. Certainly, companies should not face punitive measures for actions that were taken in good faith and did not cause consumer harm. This would create perverse incentives for companies to slow down the pace of innovation.⁹

To be clear, ITIF does not condone Nomi's mistake. Nor should it be acceptable behavior to knowingly misrepresent privacy policies to the public. But rather than bringing a case and settlement against the company, the FTC should have shown some regulatory restraint by simply notifying the company of the problem and verifying that it had been corrected. Instead, the FTC has done the equivalent of calling in the SWAT team to take down a driver for a broken tail light. This is a waste of valuable agency resources that could better be spent pursuing cases involving actual consumer harm. In these matters, ITIF commends both

⁷ "In the Matter of Nomi Technologies, Inc.: Agreement Containing Consent Order," *Federal Trade Commission*, accessed May 18, 2015, www.ftc.gov/system/files/documents/cases/150423nomiorder.pdf.

⁸ Daniel Castro and Alan McQuinn, "How and When Regulators Should Intervene," *Information Technology and Innovation Foundation*, February 2015, www2.itif.org/2015-how-when-regulators-intervene.pdf.

⁹ Daniel Castro, "Latest Privacy Kerfuffle Shows Limits of Proposed Privacy Legislation," *Innovation Files*, February 21, 2012, www.innovationfiles.org/latest-privacy-kerfuffle-shows-limits-of-proposed-privacy-legislation/.

Commissioners Ohlhausen and Wright for their dissenting statements affirming that the FTC should have shown more restraint.¹⁰

The FTC can use its regulatory authority to encourage consumer-friendly innovations, but only if it exercises discretion in when it chooses to take action. In particular, the FTC should focus its resources on cases where there is direct and tangible consumer harm so that companies prioritize internal actions that prevent consumer harm.¹¹ By bringing action against a company that made a fairly insignificant mistake where there was no evidence of consumer harm, the FTC is signaling to companies that they should direct limited resources away from other innovations and towards corporate lawyers. The result is a net loss for consumers.

Sincerely,

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¹⁰ Maureen Ohlhausen, “Dissenting Statement of Commissioner Maureen K. Ohlhausen,” *Federal Trade Commission*, April 23, 2015, www.ftc.gov/system/files/documents/public_statements/638361/150423nomiohlhausenstatement.pdf; Joshua Wright, “Dissenting Statement of Commissioner Joshua D. Wright,” *Federal Trade Commission*.

¹¹ Daniel Castro and Alan McQuinn, “How and When Regulators Should Intervene,” *Information Technology and Innovation Foundation*.