



Office of the Secretary

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

August 28, 2015

Michelle Lease  
Policy Counsel  
Application Developers Alliance

*Re: In the Matter of Nomi Technologies, Inc., File No. 1323251*

Dear Ms. Lease:

Thank you for your comment on behalf of the Application Developers Alliance regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses, or shares about them or their devices, as well as the extent to which consumers will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

Your comment makes three main points. First, it states that, although Nomi's privacy policy was "inaccurate," the alleged misrepresentation about providing an in-store opt-out was not material to consumers. This issue was addressed in detail in the Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney, issued with the proposed consent agreement ("Majority Statement").<sup>1</sup> As discussed in the Majority Statement, "[t]he basic question [with respect to materiality] is whether the act or practice is likely to affect the consumer's conduct or decision with respect to the product or service."<sup>2</sup> Furthermore, the Commission presumes that an express claim is material, as is "information pertaining to the central characteristics of the product or service."<sup>3</sup> The Majority Statement discusses a number of

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<sup>1</sup> Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney ("Majority Statement") at 2-3; *but cf.* Dissenting Statement of Commissioner Joshua D. Wright at 2-4.

<sup>2</sup> Majority Statement at 2 (quoting Deception Policy Statement § I).

<sup>3</sup> *Id.* (quoting Deception Policy Statement § IV).

reasons why Nomi's claim was material, including that it was an express claim and that consumers reading the claim could reasonably have decided to opt out at retail locations or avoid retail locations where Nomi's Listen service was in use.<sup>4</sup>

Second, your comment expresses concern that "the penalty against Nomi is disproportionate to the offense" and that "an order with a shorter enforcement period or less onerous compliance requirements" would be more appropriate. The relief in this order, however, is directly tied to the deceptive practices alleged in the complaint. Further, the injunctive provisions are, in many respects, less extensive than those obtained by the Commission in other recent cases.

Finally, your comment states that the proposed order will have a chilling effect on technology companies and possibly encourage companies to simplify their privacy policies, resulting in less transparency for consumers about data collection and use practices. The Majority Statement also addressed this issue. As it noted, the Commission encourages companies to provide *truthful* privacy choices to consumers and believes such choices are consistent with growth and innovation. However, the Commission also must take action in appropriate cases to stop companies from providing *false* choices.<sup>5</sup> Further, prior Commission cases like this one have not deterred companies from continuing to provide truthful choices, or from adopting voluntary privacy codes in innovative areas.<sup>6</sup>

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark  
Secretary

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<sup>4</sup> *Id.*

<sup>5</sup> Majority Statement at 4.

<sup>6</sup> The Future of Privacy Forum has developed an entire self-regulatory code that requires mobile device tracking companies to provide such choices. Future of Privacy Forum, Mobile Location Analytics Code of Conduct (Oct. 22, 2013), available at <http://www.futureofprivacy.org/issues/smart-places/>; see also Future of Privacy Forum, K-12 Student Privacy Pledge Announced (Oct. 7, 2014), available at <http://www.futureofprivacy.org/2014/10/07/k-12-student-privacy-pledge-announced/>.



Office of the Secretary

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

August 28, 2015

William L. Kovacs  
Senior Vice President  
Environment, Technology & Regulatory Affairs  
Chamber of Commerce of the United States of America  
1615 H Street, NW  
Washington, D.C. 20062

*Re: In the Matter of Nomi Technologies, Inc., File No. 1323251*

Dear Mr. Kovacs:

Thank you for your comment on behalf of the U.S. Chamber of Commerce regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

Your comment makes two main points. First, it asserts that the Commission's decision to bring an enforcement action in this matter would have a disproportionate impact on small businesses. Specifically, you state that these smaller entities may be dissuaded from voluntarily adopting consumer privacy protections and that the proposed order will discourage innovation. The Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney, issued with the proposed consent agreement ("Majority Statement"), addressed this issue.<sup>1</sup> As it noted, the Commission encourages to provide *truthful* privacy choices to consumers, and believes such choices are consistent with growth and innovation. However, the Commission also

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<sup>1</sup> Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney ("Majority Statement") at 4; *but cf.* Dissenting Statement of Commissioner Maureen K. Ohlhausen at 1; Dissenting Statement of Commissioner Joshua D. Wright at 4.

must take action in appropriate cases to stop companies from providing *false* choices.<sup>2</sup> Further, prior Commission cases like this one have not deterred companies from continuing to provide truthful choices, or from adopting voluntary privacy codes in innovative areas.<sup>3</sup> Additionally, because advances in technology have allowed even small businesses to collect information on large numbers of consumers, it is important that companies of all sizes provide truthful privacy claims to consumers.

Second, your comment proposes that the Commission should be more lenient in its enforcement actions against small companies, taking into account factors such as good faith efforts to comply with the law. The Commission is sensitive to the concerns of small businesses and provides numerous free resources through the BCP Business Center webpage, <https://www.ftc.gov/tips-advice/business-center>, to assist businesses of all sizes in complying with the law.<sup>4</sup> Further, in this case the Commission considered that Nomi made the alleged misrepresentation for almost a year and that at no point during that time period did Nomi actually provide the promised in-store opt-out. Additionally, the injunctive provisions are, in many respects, less extensive than those obtained by the Commission in other recent cases.

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark  
Secretary

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<sup>2</sup> Majority Statement at 4.

<sup>3</sup> The Future of Privacy Forum has developed an entire self-regulatory code that requires mobile device tracking companies to provide such choices. Future of Privacy Forum, Mobile Location Analytics Code of Conduct (Oct. 22, 2013), available at <http://www.futureofprivacy.org/issues/smart-places/>; see also Future of Privacy Forum, K-12 Student Privacy Pledge Announced (Oct. 7, 2014), available at <http://www.futureofprivacy.org/2014/10/07/k-12-student-privacy-pledge-announced/>.

<sup>4</sup> The Commission also considers the concerns of placing burdens on small businesses with respect to its policy recommendations. See, e.g., FTC, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), at 15-16 available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf> (stating that the Commission's privacy framework does not apply to companies that collect only non-sensitive data from under 5,000 consumers a year and do not share that data with third parties).



Office of the Secretary

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

August 28, 2015

Bijan Madhani  
Public Policy & Regulatory Counsel  
Computer & Communications Industry Association  
900 Seventeenth Street, NW  
11<sup>th</sup> Floor  
Washington, D.C. 20006

*Re: In the Matter of Nomi Technologies, Inc., File No. 1323251*

Dear Mr. Madhani:

Thank you for your comment on behalf of the Computer & Communications Industry Association regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

Your comment makes four main points. First, it states that Nomi's alleged misrepresentation did not result in consumer harm and therefore was not material. This issue was addressed in detail in the Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney, issued with the proposed consent agreement ("Majority Statement").<sup>1</sup> As discussed in the Majority Statement, "[t]he basic question [with respect to materiality] is

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<sup>1</sup> Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney ("Majority Statement") at 2-3; *but cf.* Dissenting Statement of Commissioner Joshua D. Wright at 2-4.

whether the act or practice is likely to affect the consumer's conduct or decision with respect to the product or service."<sup>2</sup> Furthermore, the Commission presumes that an express claim is material, as is "information pertaining to the central characteristics of the product or service."<sup>3</sup> The Majority Statement discusses a number of reasons why Nomi's claim was material, including that it was an express claim and that consumers reading the claim could reasonably have decided to opt out at retail locations or avoid locations where Nomi's Listen service was in use.<sup>4</sup>

Second, your comment states that evidence showing that 3.8% of those who viewed the webpage containing Nomi's opt-out promises utilized the available online opt-out, rebuts any presumption that Nomi's promise was material, in part because the opt-out rate is higher than that reported for some online behavioral advertising opt-outs. The Majority Statement discusses a number of reasons why the fact that 3.8% of visitors to Nomi's online privacy statement opted out via the online mechanism is insufficient evidence to evaluate the choices the other 96.2% of visitors intended to make, given the promises Nomi made about their options.<sup>5</sup>

Third, your comment states that a consumer who wished to opt out in a store, but was unable to because of the lack of the promised in-store opt-out, could still opt out by using the online mechanism. However, because consumers were not informed when they were in a location that utilized Nomi's services, they would not know to re-visit the website opt-out. In fact these consumers may have reasonably concluded, in the absence of signage and the promised opt-outs, that those locations did not use Nomi's services and that no further action on their part was necessary.

Fourth, your comment states that the proposed consent order fails to prevent future injury, will reduce transparency, and will deter companies from offering consumers privacy choices. The relief in this order, however, is directly tied to the deceptive practices alleged in the complaint. The Majority Statement also addressed this issue. As it noted, the Commission encourages companies to provide *truthful* privacy choices to consumers, and believes such choices are consistent with growth and innovation. However, the Commission also must take action in appropriate cases to stop companies from providing *false* choices.<sup>6</sup> Further, prior Commission cases like this one have not deterred companies from continuing to provide truthful choices, or from adopting voluntary privacy codes in innovative areas.<sup>7</sup>

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<sup>2</sup> Majority Statement at 2 (quoting Deception Policy Statement § I).

<sup>3</sup> *Id.* (quoting Deception Policy Statement § IV).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 2-3.

<sup>6</sup> Majority statement at 4.

<sup>7</sup> The Future of Privacy Forum has developed an entire self-regulatory code that requires mobile device tracking companies to provide such choices. Future of Privacy Forum, Mobile Location Analytics Code of Conduct (Oct. 22, 2013), available at <http://www.futureofprivacy.org/issues/smart-places/>; see also Future of Privacy Forum, K-12 Student Privacy Pledge Announced (Oct. 7, 2014), available at <http://www.futureofprivacy.org/2014/10/07/k-12-student-privacy-pledge-announced/>.

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark  
Secretary



Office of the Secretary

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

August 28, 2015

James C. Cooper  
George Mason University School of Law

*Re: In the Matter of Nomi Technologies, Inc., File No. 1323251*

Dear Mr. Cooper:

Thank you for your comment regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

Your comment makes three main points. First, it states that the Commission should not apply the presumption of materiality to statements companies make in privacy policies. However, there is longstanding precedent addressing the presumption of materiality,<sup>1</sup> and we see no reason to distinguish between different types of claims made directly to consumers and designed to influence consumer behavior. This is particularly true in this case, where Nomi's privacy statement – titled "Privacy is Our First Priority" – clearly was directed to consumers and designed to ease their concerns about Nomi's information collection practices.

Second, your comment questions whether the Commission had reason to believe that consumers' behavior would have been affected if they had been aware of Nomi's tracking. This issue was addressed in detail in the Statement of Chairwoman Ramirez, Commissioner Brill, and

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<sup>1</sup> Deception Policy Statement § IV.



Commissioner McSweeney, issued with the proposed consent agreement (“Majority Statement”).<sup>2</sup> The Majority Statement discusses a number of reasons why Nomi’s claim was material, including that consumers reading the claim could reasonably have decided to opt out at retail locations or avoid retail locations where Nomi’s service was in use.

Third, your comment states that the proposed consent agreement will threaten Nomi’s ability to compete and may chill innovation. The relief in the proposed consent agreement is directly tied to the deceptive practices alleged in the complaint – practices that harm consumers and honest businesses alike. As the Majority Statement noted, the Commission encourages companies to provide *truthful* privacy choices to consumers and believes such choices are consistent with growth and innovation. However the Commission also must take action in appropriate cases to stop companies from providing *false* choices.<sup>3</sup> Further, prior Commission cases like this one have not deterred companies from continuing to provide truthful choices, or from adopting voluntary privacy codes in innovative areas.<sup>4</sup>

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission’s website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark  
Secretary

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<sup>2</sup> Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney (“Majority Statement”) at 2; *but cf.* Dissenting Statement of Commissioner Joshua D. Wright at 2-4.

<sup>3</sup> Majority Statement at 4.

<sup>4</sup> The Future of Privacy Forum has developed an entire self-regulatory code that requires mobile device tracking companies to provide such choices. Future of Privacy Forum, Mobile Location Analytics Code of Conduct (Oct. 22, 2013), available at <http://www.futureofprivacy.org/issues/smart-places/>; see also Future of Privacy Forum, K-12 Student Privacy Pledge Announced (Oct. 7, 2014), available at <http://www.futureofprivacy.org/2014/10/07/k-12-student-privacy-pledge-announced/>.



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August 28, 2015

Daniel Castro, Vice President  
Alan McQuinn, Research Assistant  
The Information Technology & Innovation Foundation  
1101 K Street, NW  
Suite 610  
Washington, D.C. 20005

*Re: In the Matter of Nomi Technologies, Inc., File No. 1323251*

Dear Mr. Castro and Mr. McQuinn:

Thank you for your comment on behalf of the Information Technology & Innovation Foundation regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

Your comment makes two main points. First, it claims that there is no evidence of actual harm to consumers from Nomi's alleged misrepresentation. In particular, you state that "the worst thing that could happen to [consumers who wanted to exercise the promised, but unavailable, in-store opt-out] is that they were tracked without being notified – a practice that is entirely legal." The Commission's goal in bringing this case is to stop and deter deceptive

claims.<sup>1</sup> The fact that a company's information collection practices are legal does not give that company license to deceive consumers about those practices.

Second, you assert that the proposed consent agreement will encourage companies to “do the bare-minimum on privacy” and “slow down the pace of innovation.” This issue was addressed in the Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney, issued with the proposed consent agreement (“Majority Statement”).<sup>2</sup> As it noted, the Commission encourages companies to provide *truthful* privacy choices to consumers and believes such choices are consistent with growth and innovation. However, the Commission also must take action in appropriate cases to stop companies from providing *false* choices.<sup>3</sup> Further, prior Commission cases like this one have not deterred companies from continuing to provide truthful choices, or from adopting voluntary privacy codes in innovative areas.<sup>4</sup>

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark  
Secretary

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<sup>1</sup> See *U.S. v. Google Inc.*, No. CV 12-04177, (N.D. Cal. Nov. 16, 2012) (stipulated injunction) (\$22.5 million settlement over Google's allegedly deceptive opt out, which did not work on the Safari browser); *Chitika, Inc.*, No. C-4324 (June 7, 2011) (consent order) available at <http://www.ftc.gov/enforcement/cases-proceedings/1023087/chitika-inc-matter> (alleging that advertising network deceived consumers by not telling them that their opt out of behavioral advertising cookies would last only 10 days); *U.S. Search, Inc.*, No. C-4317 (Mar. 14, 2011) (consent order) available at <http://www.ftc.gov/enforcement/cases-proceedings/us-search-inc> (alleging that a data broker deceived consumers by failing to disclose limitations of its opt out).

<sup>2</sup> Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney (“Majority Statement”) at 4; *but cf.* Dissenting Statement of Commissioner Maureen K. Ohlhausen at 1; Dissenting Statement of Commissioner Joshua D. Wright at 4.

<sup>3</sup> Majority Statement at 4.

<sup>4</sup> The Future of Privacy Forum has developed an entire self-regulatory code that requires mobile device tracking companies to provide such choices. Future of Privacy Forum, Mobile Location Analytics Code of Conduct (Oct. 22, 2013), available at <http://www.futureofprivacy.org/issues/smart-places/>; see also Future of Privacy Forum, K-12 Student Privacy Pledge Announced (Oct. 7, 2014), available at <http://www.futureofprivacy.org/2014/10/07/k-12-student-privacy-pledge-announced/>.



Office of the Secretary

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

August 28, 2015

Geoffrey A. Manne  
R. Ben Sperry  
International Center for Law & Economics  
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Berin Szoka  
Tom Struble  
TechFreedom  
110 Maryland Ave. NE, Suite 407  
Washington, DC 20002

*Re: In the Matter of Nomi Technologies, Inc., File No. 1323251*

Dear Mr. Manne, Mr. Sperry, Mr. Szoka and Mr. Struble:

Thank you for your comment on behalf of the International Center for Law & Economics and TechFreedom regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

Your comment makes three main points. First, it states that Nomi's alleged misrepresentation about providing an in-store opt-out was not material to consumers. This issue was addressed in detail in the Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney, issued with the proposed consent agreement ("Majority Statement").<sup>1</sup> As discussed in the Majority Statement, "[t]he basic questions [with respect to materiality] is whether the act or practice is likely to affect the consumer's conduct or decision with respect to the product or service."<sup>2</sup> Furthermore, the Commission presumes that an express claim is material, as is "information pertaining to the central characteristics of the product or service."<sup>3</sup> In addition, Section 5 case law makes it clear that, "[m]ateriality is not a test of the effectiveness of the communication in reaching large numbers of consumers. It is a test of the likely effect of the claim on the conduct of a consumer who has been reached and deceived."<sup>4</sup> The Majority Statement discusses a number of reasons why Nomi's claim was material, including that it was an express claim; that consumers who clicked on the privacy policy and read the claim were likely to be privacy sensitive and thus likely to find the claim material; and that, based on the claim, consumers could reasonably have decided to opt out at retail locations or avoid retail locations where Nomi's Listen service was in use.<sup>5</sup>

Second, your comment states that the Commission dismissed evidence showing that 3.8% of those who viewed the webpage containing Nomi's opt-out promises utilized the available online opt-out, which you argue might rebut the presumption that Nomi's promise was material, in part because the opt-out rate is higher than that reported for some online behavioral advertising opt-outs. The Majority Statement discusses a number of reasons why the fact that 3.8% of visitors to Nomi's online privacy statement opted-out via the online mechanism is insufficient evidence to evaluate the choices the other 96.2% of visitors intended to make, given the promises Nomi made about their options.<sup>6</sup>

Third, your comment suggests that the FTC should undertake a number of process reforms. Because these suggestions are beyond the scope of the issues under consideration in this matter, we do not address them here.

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<sup>1</sup> Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney ("Majority Statement") at 2-3; *but cf.* Dissenting Statement of Commissioner Joshua D. Wright at 2-4.

<sup>2</sup> Majority Statement at 2 (quoting Deception Policy Statement § I).

<sup>3</sup> *Id.* (quoting the Deception Policy Statement § IV).

<sup>4</sup> *In the Matter of Novartis*, 1999 FTC LEXIS 63, at \*38 (May 27, 1999).

<sup>5</sup> Majority Statement at 2.

<sup>6</sup> *Id.* at 2-3.

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark  
Secretary



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UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

August 28, 2015

A. Kelley  
State of Illinois

*Re: In the Matter of Nomi Technologies, Inc., File No. 1323251*

Thank you for your comment regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

Your comment conveys your support for the FTC's enforcement action in this matter and requests a list of the retailers that were using Nomi Technologies, Inc.'s ("Nomi") service without notifying consumers.

The complaint in this matter alleges that Nomi violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

With respect to your request for information regarding the retailers that were using Nomi's service, we are unable to provide non-public information or additional facts beyond the information that is already contained within the public documents regarding this matter. Because the complaint in this matter alleges violations of Section 5 only by Nomi, the consent agreement addresses Nomi's conduct by prohibiting it from making similar misrepresentations in the future, which will ensure that consumers receive accurate information about the choices available to them.

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark  
Secretary





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UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

August 28, 2015

Carl Szabo  
Policy Counsel  
NetChoice  
1401 K Street, NW, Suite 502  
Washington, D.C. 20005

*Re: In the Matter of Nomi Technologies, Inc., File No. 1323251*

Dear Mr. Szabo:

Thank you for your comment on behalf of NetChoice regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

Your comment makes four main points. First, it states that Nomi's alleged misrepresentation was not material to consumers. This issue was addressed in detail in the Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney, issued with the proposed consent agreement ("Majority Statement").<sup>1</sup> As discussed in the Majority Statement, "[t]he basic question [with respect to materiality] is whether the act or practice is likely to affect the consumer's conduct or decision with respect to the product or service."<sup>2</sup> Furthermore, the Commission presumes that an express claim is material, as is "information pertaining to the central characteristics of the product or service."<sup>3</sup> The Majority Statement

<sup>1</sup> Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney ("Majority Statement") at 2-3; *but cf.* Dissenting Statement of Commissioner Joshua D. Wright ("Wright Statement") at 2-4.

<sup>2</sup> Majority Statement at 2 (quoting Deception Policy Statement §I).

<sup>3</sup> *Id.* (quoting Deception Policy Statement §IV).

discusses a number of reasons why Nomi's claim was material, including that it was an express claim and that consumers reading the claim could reasonably have decided to opt out at retail locations or avoid retail locations where Nomi's Listen service was in use.<sup>4</sup>

Second, your comment states that there was clear evidence to rebut the presumption of materiality in this case – i.e., data showing that a meaningful number of consumers used Nomi's online opt out. The Majority Statement discusses a number of reasons why the opt-out rate in this case (3.8% of visitors to Nomi's online privacy statement) is insufficient evidence to evaluate the choices the other 96.2% of visitors intended to make, given the promises Nomi made about their options.<sup>5</sup>

Third, you state that a consumer searching for a missing in-store opt-out could quickly use their phones to opt out by using the online mechanism. However, because consumers were not informed when they were in a location that utilized Nomi's services, they would not know to revisit the website opt-out. In fact, these consumers may have reasonably concluded, in the absence of signage and the promised opt-outs, that those locations did not use Nomi's services and that no further action on their part was necessary.

Fourth, your comment states that the FTC should have exercised its prosecutorial discretion, and declined to take action here, both because Nomi engaged in "privacy by design" and because the FTC could have informally worked with Nomi to remove the alleged misrepresentation from its privacy statement. However, privacy by design means that companies build in privacy at every stage of product development, including by periodically reviewing privacy-related statements they make to consumers. Here, the complaint alleges that the company had a clearly and unequivocally false statement on its website for nearly a year. Further, the order in this case, while narrowly tailored, ensures compliance by Nomi in the future.

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark  
Secretary

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2-3.



Office of the Secretary

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

August 28, 2015

Thomas M. Lenard, PhD  
President and Senior Fellow  
Technology Policy Institute  
1099 New York Ave., NW  
Suite 520  
Washington, D.C. 20001

*Re: In the Matter of Nomi Technologies, Inc., File No. 1323251*

Dear Mr. Lenard:

Thank you for your comment on behalf of the Technology Policy Institute regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

Your comment makes two main points. First, it states that any harms associated with Nomi's misrepresentation are likely to be small, and questions whether the benefits of the consent agreement are outweighed by the costs the agreement may impose. As discussed in the Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney issued with the proposed consent agreement ("Majority Statement"), this case benefits both consumers and honest businesses by stopping and deterring false and misleading claims in the marketplace.<sup>1</sup>

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<sup>1</sup> Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney ("Majority Statement") at 3-4; *but cf.* Dissenting Statement of Commissioner Maureen K. Ohlhausen at 1; Dissenting Statement of Commissioner Joshua D. Wright at 4-5.

In contrast to these important benefits, the consent agreement provides narrowly tailored relief to prevent Nomi from engaging in future violations.

Second, your comment suggests that the relief contemplated in the consent agreement could hinder innovation and choices in the marketplace. As noted in the Majority Statement, the Commission encourages companies to provide *truthful* privacy choices to consumers and believes such choices are consistent with growth and innovation. However, the Commission also must take action in appropriate cases to stop companies from providing *false* choices.<sup>2</sup> Further, prior Commission cases like this one have not deterred companies from continuing to provide truthful choices, or from adopting voluntary privacy codes in innovative areas.<sup>3</sup>

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark  
Secretary

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<sup>2</sup> Majority Statement at 4.

<sup>3</sup> The Future of Privacy Forum has developed an entire self-regulatory code that requires mobile device tracking companies to provide such choices. Future of Privacy Forum, Mobile Location Analytics Code of Conduct (Oct. 22, 2013), available at <http://www.futureofprivacy.org/issues/smart-places/>; see also Future of Privacy Forum, K-12 Student Privacy Pledge Announced (Oct. 7, 2014), available at <http://www.futureofprivacy.org/2014/10/07/k-12-student-privacy-pledge-announced/>.



Office of the Secretary

UNITED STATES OF AMERICA  
Federal Trade Commission  
WASHINGTON, D.C. 20580

August 28, 2015

Zmuda Family  
State of Michigan

*Re: In the Matter of Nomi Technologies, Inc., File No. 1323251*

Dear Zmuda Family:

Thank you for your comment regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. Your comment states that, "[t]his should be an option for all retail, sales promoters, and political organizations."

The Commission believes it is important for consumers to have appropriate choices regarding the collection and use of their personal information, and encourages companies to provide privacy choices to consumers.<sup>1</sup> The complaint in this matter stands for a narrower proposition: when companies promise consumers the ability to make choices, they must follow through on those promises. Therefore, the relief in this order is tied to the deceptive practices alleged in the complaint and prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. The Commission believes that this enforcement action will also more broadly deter companies from offering false privacy choices.

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark  
Secretary

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<sup>1</sup> See, e.g., FTC, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.