

**Dissenting Statement of Commissioner Maureen K. Ohlhausen
In the Matter of Nomi Technologies, Inc.
Matter No. 1323251
August 28, 2015**

On April 23, 2015, a divided Commission issued a complaint and accepted a proposed consent order with regard to the practices of Nomi Technologies, Inc., a startup company offering its retail merchant clients the ability to analyze aggregate data about consumer traffic in the merchants' stores.¹ The Commission subsequently published a description of the consent agreement package in the Federal Register, seeking public comment.² The comment window closed on May 25, 2015.³

The record now before the Commission confirms that the FTC should not have adopted this complaint and order because it undermines the Commission's own goals of increased consumer choice and transparency of privacy practices and because the order imposes a penalty far out of proportion to the non-existent consumer harm.

The FTC has long called on companies to implement best practices "giving consumers greater control over the collection and use of their personal data through simplified choices and increased transparency."⁴ Consistent with such best practices, Nomi went beyond its legal duty by offering increased transparency and consumer choice through an easy and effective global opt-out. Granted, part of Nomi's privacy policy was inaccurate because the company promised, but failed to implement, an additional privacy choice for consumers. However, by applying a *de facto* strict liability deception standard absent any evidence of consumer harm, the proposed complaint and order inappropriately punishes a company that acted consistently with the FTC's privacy goals by offering more transparency and choice than legally required.

The record demonstrates that this enforcement action may, ironically, undermine the FTC's own established privacy goals. Commenters generally agree that the order will diminish companies' incentives to be transparent about their privacy practices.⁵ Commenters also

¹ In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251, Compl. ¶ 3 (Apr. 23, 2015). I dissented in this matter, as did Commissioner Wright. See Dissenting Statement of Commissioner Maureen K. Ohlhausen (April 23, 2015), available at

https://www.ftc.gov/system/files/documents/public_statements/638361/150423nomiohlhausenstatement.pdf; Dissenting Statement of Commissioner Joshua D. Wright (April 23, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf.

² Nomi Technologies, Inc., Analysis of Proposed Consent Order to Aid Public Comment, 80 Fed. Reg. 24923 (May 1, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150501nomifrn.pdf>.

³ *Id* at 24924.

⁴ Fed. Trade Comm'n, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE, at i, (Mar. 2012).

⁵ Comments of Application Developers Alliance, at 2 (May 26, 2015) ("[C]ompanies may change their privacy policies to make broad statements to eliminate or at least mitigate the risk of violating its own promises... result[ing] in less transparency for consumers.") ("ADA Comments"); Comments of Computer & Communications Industry Association at 2 (May 26, 2015) ("[T]he FTC's action against Nomi will ultimately result in adverse outcomes for consumer protection by leading to reduced transparency and fewer privacy-protective choices for consumers.");

generally agree that the Order will discourage companies from offering privacy choices to consumers. As one commenter explained, “[T]he consent order could discourage companies from offering choices to consumers about data collection and use practices...” because “[c]ompanies may be justifiably concerned that communicating those options clearly and accurately to consumers is difficult, and that even harmless communications errors will result in harsh penalties.”⁶ Another commenter concluded, “This enforcement action sends a message to any business considering privacy-by-design: if you attempt to protect consumers’ privacy in multiple ways, you multiply your legal risk of FTC prosecution.”⁷

I share one commenter’s particular concern that “the takeaway for most companies will be: if you do not want the FTC to come after you, do the bare-minimum on privacy.”⁸ In response to the case’s release, one legal analyst advised readers that “giving individuals more information is not better” and that where notice is not legally required, companies should “be sure the benefits of notice outweigh potential risks.”⁹ Another pointed out that “[t]he ironic upshot of the majority decision is that Nomi could have avoided the FTC enforcement action altogether by not posting a privacy policy, not describing its practices to consumers, and not offering an opt-out mechanism at all.”¹⁰ Indeed, upon learning of the Commission’s investigation, Nomi simply eliminated a potential privacy choice from its privacy policy.

This record contradicts the majority’s belief that its decision in this case will not “deter companies from providing truthful choices.”¹¹ The majority justifies this belief by arguing that some companies continue to voluntarily adopt privacy commitments despite past deceptive opt out cases. However, the responses of commenters and the reaction of analysts show that this order will certainly deter some companies from providing truthful consumer privacy choices.

Comments of Information Technology & Innovation Foundation, at 3 (May 26, 2015) (“[C]ompanies like Nomi would be better off providing no privacy guarantees to their consumers...” (“ITIF Comments”)); Comments of the International Center for Law & Economics and TechFreedom, att. at 2 (May 26, 2015) (“Out of a desire to encourage – effectively require – companies to disclose data collection, the FTC is actually discouraging companies from doing so.”). *See also*, Comments of Chamber of Commerce, at 1 (May 22, 2015) (arguing that such aggressive Section 5 enforcement could “dissuade [smaller entities] from voluntary adoption of consumer privacy protections.”). All public comments on this matter are available at <https://www.ftc.gov/policy/public-comments/initiative-608>.

⁶ ADA Comments at 2.

⁷ Comments of NetChoice, at 3 (May 26, 2015) (“NetChoice Comments”).

⁸ ITIF Comments at 3.

⁹ Elizabeth Litten, *When Privacy Policies Should NOT Be Published – Two Easy Lessons from the FTC’s Nomi Technologies Case*, HIPPA, HITECH & HIT (May 26, 2015), <http://hipaahealthlaw.foxrothschild.com/2015/05/articles/privacy/when-privacy-policies-should-not-be-published-two-easy-lessons-from-the-ftcs-nomi-technologies-case/>.

¹⁰ James DeGraw, David Cohen and Joe Cleemann, *Nomi Highlights Risks of Publicizing Privacy Policies*, LAW360 (May 27, 2015), <http://www.law360.com/articles/659398/nomi-highlights-risks-of-publicizing-privacy-policies>.

¹¹ In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251, Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney (April 23, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/638351/150423nomicommissionstatement.pdf.

Thus, the record clearly demonstrates that overly aggressive deception enforcement comes at a cost to the FTC's privacy goals and to consumers.

Furthermore, the record supports rejecting the order as too severe given the nature of Nomi's violation. Commenters argue that the proposed order "is disproportionate and heavy-handed" and "the equivalent of calling in the SWAT team to take down a driver for a broken tail light."¹² Several argue that because there was no evidence of consumer harm in this case, the more appropriate response would have been for FTC staff to notify the company of the problem and verify that it was corrected.¹³ Alternatively, one commenter suggested "an order with a shorter enforcement period or a less onerous compliance requirement could have been tailored for a startup company that made a harmless error."¹⁴

For the reasons discussed above, I conclude that the comments on the record and the marketplace reaction to the complaint and order provide additional persuasive evidence that the costs of this enforcement action outweigh the benefits. The Commission therefore ought to vacate the proposed complaint and consent order. Because the majority declines to do so, I dissent.

¹² ADA Comments at 1; ITIF Comments at 3. *See also*, Comments of James C. Cooper at 5 (May 26, 2015) ("[I]t is simply not in the public interest to subject an innovative firm to an invasive twenty-year order for an oversight that harmed no one" because this will "hobble Nomi's ability to compete [and] threatens to chill innovation more generally...").

¹³ ITIF Comments at 3; NetChoice Comments at 3-4; ADA Comments at 2.

¹⁴ ADA Comments at 2.