

Analysis of Proposed Consent Order to Aid Public Comment
In the Matter of Nomi Technologies, Inc.,
File No. 132 3251

The Federal Trade Commission has accepted, subject to final approval, a consent order applicable to Nomi Technologies, Inc. (“Nomi”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

Nomi uses mobile device tracking technology to provide analytics services to brick and mortar retailers through its “Listen” service. Nomi has been collecting information from consumers’ mobile devices to provide the Listen service since January 2013. Nomi places sensors in its clients’ retail locations that detect the media access control (“MAC”) address broadcast by a mobile device when it searches for WiFi networks. A MAC address is a 12-digit identifier that is unique to a particular device. Alternatively, in some instances Nomi collects MAC addresses through its clients’ existing WiFi access points. In addition to the MAC address, Nomi also collects the following information about each mobile device that comes within range of its sensors or its clients’ WiFi access points: the mobile device’s signal strength; the mobile device’s manufacturer (derived from the MAC address); the location of the sensor or WiFi access point observing the mobile device; and the date and time the mobile device is observed.

Nomi cryptographically hashes the MAC addresses it observes prior to storing them on its servers. Hashing obfuscates the MAC address, but the result is still a persistent unique identifier for that mobile device. Each time a MAC address is run through the same hash function, the resulting identifier will be the same. For example, if MAC address 1A:2B:3C:4D:5E:6F is run through Nomi’s hash function on ten different occasions, the resulting identifier will be the same each time. As a result, while Nomi does not store the MAC address, it does store a persistent unique identifier for each mobile device. Nomi collected information about approximately nine million unique mobile devices between January 2013 and September 2013.

Nomi uses the information it collects to provide analytics reports to its clients about aggregate customer traffic patterns such as: the percentage of consumers merely passing by the store versus entering the store; the average duration of consumers’ visits; types of mobile devices used by consumers visiting a location; the percentage of repeat customers within a given time period; and the number of customers that have also visited another location within the client’s chain. Through October 22, 2013, Nomi’s Listen service had approximately 45 clients. Some of these clients deployed the service in multiple locations within their chains.

Nomi has not published, or otherwise made available to consumers, a list of the retailers that use or used the Listen service. Nomi does not require its clients to post disclosures or otherwise notify consumers that they use the Listen service. Through October 22, 2013, most, if

not all, of Nomi's clients did not post any disclosure, or otherwise notify consumers, regarding their use of the Listen service.

From at least November 2012, until October 22, 2013, Nomi disseminated or caused to be disseminated privacy policies on its website, nomi.com or getnomi.com, which included the following statement:

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.

Nomi provided, and continues to provide, an opt out on its website for consumers who do not want Nomi to store observations of their mobile device. In order to opt out of the Listen service on Nomi's website, consumers were required to provide Nomi with all of their mobile devices' MAC addresses, without knowing whether they would ever shop at a retail location using the Listen service. Once a consumer has entered the MAC address of their device into Nomi's website opt out, Nomi adds it to a blacklist of MAC addresses for which information will not be stored. Consumers who did not opt out on Nomi's website and instead wanted to make the opt out decision at retail locations were unable to do so, despite the explicit promise in Nomi's privacy policies. Consumers were not provided any means to opt out at retail locations and were unaware that the service was even being used.

The Commission's complaint alleges that Nomi's privacy policy represented that: (1) consumers could opt out of Nomi's Listen service at retail locations using this service, and (2) that consumers would be given notice when a retail location was utilizing Nomi's Listen service. The complaint alleges that Nomi violated Section 5 of the Federal Trade Commission Act by misleading consumers because, contrary to its representations, Nomi did not provide an opt-out mechanism at its clients' retail locations and neither Nomi nor its clients disclosed to consumers that Nomi's Listen service was being used at a retail location.

The proposed order contains provisions designed to prevent Nomi from engaging in the future in practices similar to those alleged in the complaint. Part I of the proposed order prohibits Nomi from misrepresenting: (A) the options through which, or the extent to which, consumers can exercise control over the collection, use, disclosure, or sharing of information collected from or about them or their computers or devices, or (B) the extent to which consumers will be provided notice about how data from or about a particular consumer, computer, or device is collected, used, disclosed, or shared.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Nomi to retain documents relating to its compliance with the order. The order requires that all of the documents be retained for a five-year period. Part III requires dissemination of the order now and in the future to all current and future subsidiaries, principals, officers, directors, and managers, and to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Nomi submit a compliance report to the FTC within 90 days, and periodically thereafter as requested. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed complaint or order or to modify the order's terms in any way.