

Nomi Technologies Inc.,—Consent Agreement; File No. 132 3251
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As the nation's principal privacy regulatory agency, the Federal Trade Commission relies on enforcement actions under Section 5 of the FTC Act as its primary policy tool. From a public policy perspective, the goal of the FTC's enforcement actions should be to maximize net social benefits—defined as social benefits minus social costs. In the case of Nomi Technologies, the Commission failed to show that its Consent Agreement will yield any net benefits. Indeed, it is questionable whether the Agreement will yield any benefits at all. Since the Agreement likely entails some costs, the result will be to produce positive net social costs.

Nomi Technologies provides analytics services to brick and mortar retail clients about consumers' traffic patterns in and around their stores. To do this, Nomi places sensors in its clients' retail locations that detect the movement of consumers' mobile devices. Nomi can measure the percentage of foot traffic passing by a store that actually enters the store; the average duration of customer visits; types of mobile devices used; the percentage of repeat customers in a given time period; and customers who visit multiple stores in a client's chain. From January 2013, when Nomi started providing service through October 22, 2013, Nomi had approximately 45 clients.

Nomi represented that consumers could opt-out of its service through its website or at any retailer using the service. The second part of this representation was not correct. Retailers using Nomi's service did not notify consumers that the service was in use and Nomi did not provide a separate in-store opt-out. By a 3-2 vote, with Commissioners Ohlhausen and Wright dissenting,

the FTC issued a complaint and entered into the proposed Consent Agreement that is now open for comment. In addition to prohibiting Nomi from misrepresenting the options available to consumers, the Agreement contains reporting requirements, document retention requirements, and requirements to disseminate the order, notify the FTC of changes in corporate status, and submit periodic compliance reports to the FTC. The order lasts for 20 years. Infractions are subject to civil penalties.

The threshold question is whether the Consent Agreement produces any benefits at all. Since benefits consist of the reduction of harms, in order to have benefits there must be harms that can be reduced. The dissents of Commissioner Wright and Commissioner Ohlhausen suggest that if there are harms associated with Nomi's misrepresentation they are likely to be small.

Commissioner Wright's and Commissioner Ohlhausen's dissents make the following points in suggesting there was little or no harm: while Nomi tracks individual devices, it doesn't store specific information about the devices beyond type or identify the device owners; Nomi wasn't legally required to offer either the global or the in-store opt-out; the global opt-out (which, in any event, is likely easier for consumers to use than an in-store opt-out) was always available; and Nomi has removed the in-store opt-out representation from its privacy policy.

Commissioner Wright notes that Nomi had a 3.8 percent opt-out rate, substantially higher than the opt-out rate for other online activities, such as for targeted advertising, suggesting that Nomi's online opt-out mechanism was easy to use and available. The statement of Chairwoman Ramirez, Commissioner Brill and Commissioner McSweeney indicates that we don't know whether the opt-out rate would have been higher had the in-store option been available.

However, they do not provide any evidence showing that the opt-out rate would have been

appreciably higher and that, as a consequence, consumers were harmed by the lack of the in-store option.

The costs of the Commission’s policy seem less speculative than the benefits. The policy acts as a tax on the adoption of business practices that benefit consumers. These practices include the provision of services (such as Nomi’s) that “help retailers optimize consumers’ shopping experiences, inform staffing coverage for their stores, and improve store layouts,”¹ In addition, they include privacy-related benefits. As Commissioner Wright notes, “To penalize a company for such a minor shortcoming—particularly when there is no evidence the misrepresentation harmed consumers—sends a dangerous message to firms weighing the costs and benefits of voluntarily providing information and choice to consumers.” The result could be fewer innovative services, less information and fewer choices.

In sum, the Commission should provide evidence that its enforcement actions yield positive net benefits rather than, as Commissioner Ohlhausen notes, “apply a *de facto* strict liability approach to a young company that attempted to go above and beyond its legal obligation to protect consumers but, in so doing, erred without benefiting itself.”²

¹ Wright dissent.

² Ohlhausen dissent.