



**PUBLIC COMMENTS OF THE APPLICATION DEVELOPERS ALLIANCE  
REGARDING PROPOSED CONSENT AGREEMENT**

*In the Matter of Nomi Technologies, Inc. – Consent Agreement; File No. 132 3251*

**May 26, 2015**

Pursuant to the Request for Comments, the Application Developers Alliance (the “Alliance”) writes in response to the Federal Trade Commission’s (hereinafter the “FTC” or the “Commission”) proposed consent order against Nomi Technologies, Inc., (“Nomi”).

The Alliance, an industry association that supports app developers as creators and innovators, agrees with the Commission that companies should keep commitments included in their privacy policies. Communicating data practices accurately and following through on those commitments is important to build consumer trust.

In this instance Nomi’s privacy policy was inaccurate, but the inaccuracy was de minimis and no consumer harm was alleged or apparent. Thus, the Alliance believes that the penalty against Nomi is disproportionate and heavy-handed, and that its harshness may encourage companies to simplify their data practices and privacy policies to a degree that will always ensure their legality but will also transmit very little information to the consumer. If this occurs then consumer information and consumer choices will diminish.

**I. Background**

From November 2012 until October 22, 2013, Nomi’s privacy policy stated, “Nomi pledges to...[a]lways allow consumers to opt out of Nomi’s service on its website as well as at any retailer using Nomi’s technology.” Nomi does not collect personally identifiable information and, even though it is not required to offer an opt-out, it chose to make this available to consumers.

Nomi offered and continues to offer an opt-out on its website. However, at the time of the alleged violation Nomi did not offer an opt-out in retail locations using Nomi’s services. In its complaint, the Commission alleges that Nomi’s statement quoted above was a false or misleading statement in violation of the FTC Act because consumers could not opt out of Nomi’s service at retail locations, and consumers did not receive notice when a retail location was using Nomi’s service.

Through a twenty-year consent order Nomi is prohibited from misrepresenting consumers’ options for controlling their data and how consumers are noticed about data collection and use. The consent order also imposes various administrative requirements on Nomi. Any violation of the order would subject Nomi to significant fines.

## **II. The Inaccuracy in Nomi's Privacy Policy did not Result in Consumer Harm**

Generally, the FTC acts where there is evidence of consumer harm or a demonstrated need to prevent future harm. In this instance, however, the FTC offered no evidence that the statement in Nomi's privacy policy affected consumer conduct. Nor did the Commission present evidence that consumers altered their behavior because they did not have an in-store opt out, or show that consumers seeking to opt out were unable to do so.

## **III. The Twenty-Year Consent Order is a Disproportionate Penalty**

Given that Nomi is a very young company and that the error in its privacy policy caused no harm, the penalty against Nomi is disproportionate to the offense. Nomi's harmless error could have easily been corrected without a twenty-year consent decree. The FTC could have chosen to flag this misstatement, and allow Nomi to amend its privacy policy or alter its practices. This would have corrected the problem and informed companies and the public that the FTC's resources are being applied where potential harms are greatest.

Alternatively, an order with a shorter enforcement period or less onerous compliance requirements could have been tailored for a startup company that made a harmless error. The FTC rarely if ever deviates from its standard twenty-year duration for consent orders, which often include significant compliance obligations. However, it would be more appropriate for the FTC to be more flexible, especially here where such an order on a startup could cripple the company. The stigma of the order and the cost of compliance could be especially detrimental to a small company.

The Alliance is not advocating that startups and small companies should be immune from complying with the law or treated softly by the Commission. Rather, where there is no consumer injury it seems heavy-handed to impose decades-long compliance orders and programs on companies that could solve problems with simple changes to their website.

## **IV. The Consent Order will have a Chilling Effect on Technology Companies**

The Alliance is concerned that the harsh nature and significant obligations of this Order will have an unfortunate effect on all companies, especially smaller companies. First, the order could encourage companies to simplify their privacy policies. It is less risky for companies to have simplified policies that are less likely to contain inaccuracies about their data practices. For example, companies may change their privacy policies to make broad statements to eliminate or at least mitigate the risk of violating its own promises. However, this simplification results in less transparency for consumers.

Second, the consent order could discourage companies from offering choices to consumers about data collection and use practices. Companies may justifiably be concerned that communicating those options clearly and accurately to consumers is difficult, and that even harmless communications errors will result in harsh penalties.

## V. Conclusion

The FTC has an important role to play in protecting consumers and educating technology companies. However, enforcement actions should be limited to instances of actual consumer harm and proportionate to the offense. The Alliance urges the Commission to consider the negative effects orders such as this have on the industry as a whole, seeing that any company, large or small, can be a target for minor, non-injurious statements.

Respectfully Submitted,

/s/

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