

Before the
Federal Trade Commission
Washington, DC

In the Matter of
Nomi Technologies, Inc.

File No. 132 3251

**COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION**

Pursuant to the request for comments¹ issued by the Federal Trade Commission (FTC or the Commission), the Computer & Communications Industry Association (CCIA) submits the following comments on the subject of the Commission's grounds for an enforcement action against Nomi Technologies, Inc. (Nomi) and subsequent proposed consent order.

CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 600,000 workers and generate annual revenues in excess of \$465 billion.²

I. Introduction

CCIA writes in support of the reasoning offered by Commissioners Ohlhausen and Wright in their dissents to the FTC's acceptance of the proposed consent order with Nomi. The FTC should pursue enforcement action in cases where a deceptive act has led, or is likely to lead, to consumer harm. The facts underlying the Commission's complaint and proposed consent

¹ *Proposed Consent Agreement and Request for Public Comments*, File No. 132 3251, available at

² A list of CCIA members is available at <http://www.cciagnet.org/members>.

order in its case against Nomi do not meet the legal and policy requirements for bringing an enforcement action for a deceptive practice. The complaint and proposed consent order also do not serve to protect consumers from current injury or prevent future harm. Rather, cases akin to the 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.

II. The FTC should only pursue enforcement action in cases where a material misrepresentation has led, or is likely to lead, to consumer harm.

Section 5(b) of the Federal Trade Commission Act requires that before issuing any complaint the Commission must establish “reason to believe that [a violation has occurred] and that an enforcement action would be in the interest of the public.”³ With the public interest in mind, the Commission’s Policy Statement on Deception requires a material misrepresentation that is likely to mislead a consumer acting reasonably under the circumstances.⁴ This means that the representation, omission, or practice must be “likely to affect the consumer’s conduct or decision with regard to the product or service.”⁵ The Commission may presume materiality, and thus likely consumer injury, for express statements, but such presumptions can be rebutted in the face of competent evidence.⁶ In the case of the allegedly deceptive statement in Nomi’s privacy policy, the weight of the evidence shows that there was no injury or materiality to consumers.

Nomi provided a third-party tracking service to retailers using aggregate data gleaned from the presence of shoppers’ smartphones. On its website, Nomi presented a privacy policy

³ 15 U.S.C. 45(b); *see also* Nomi Technologies, Inc.; Analysis of Proposed Consent Order to Aid Public Comment, 80 Fed. Reg. 24,928 (May 1 2015) [hereinafter “Nomi Consent Order Analysis”].

⁴ Fed. Trade Comm’n, Policy Statement on Deception (1983), appended to *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 175 (1984), available at <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

⁵ *Id.*

⁶ *Id.* at n.47.

and offered two options for consumers to opt out of the tracking: an online mechanism, and an additional retail-level tool, which it failed to provide. Materiality requires that an allegedly deceptive express statement have affected consumer conduct—essentially, “but for” the statement, a reasonable consumer would have chosen differently.⁷ There is ample evidence that privacy-conscious consumers were satisfied by the option to use the online opt-out mechanism, as 3.8% of those that visited Nomi’s privacy policy proceeded to the functioning online option, a high rate.⁸ There is no evidence that having read the privacy policy and seen the link to the online mechanism, any consumers sought to choose the secondary, more tedious option presented, to later opt-out when in a physical store, where they were then stymied. The full universe of consumers potentially harmed by Nomi’s failure to provide an in-store opt-out for its smartphone tracking service is necessarily comprised of actual smartphone users. Given that fact, when potentially confronted with the lack of a physical opt-out, this entire class of allegedly harmed consumers would be able to simply return to the online opt-out mechanism immediately via the same smartphones being tracked.

The FTC should not to pursue enforcement in cases where the presumed materiality of an alleged misrepresentation is countered by empirical evidence. The facts and surrounding circumstances in this case reflect that standard, and demonstrate that Nomi’s failure to implement an additional in-store option for its smartphone retail-tracking program, as mentioned in its privacy policy, was immaterial to reasonable consumers, and therefore does not provide grounds for enforcement.

⁷ Nomi Consent Order Analysis at 24,928.

⁸ *Id.* at 24,929; *see also id.* at 24,929 n.15.

III. The proposed consent order fails to prevent future injury.

The FTC generally acts where there is evidence of consumer harm, or an opportunity to protect against future harm. As demonstrated above, there is no evidence in this case of actual or likely injury to consumers from Nomi's alleged material misrepresentation. The proposed consent order also does not prevent any future injury to consumers, nor does it otherwise enhance consumer privacy.

Nomi has already removed its representation about a retail-level opt-out from its privacy policy and no longer offers the same tracking technology to non-legacy customers.⁹ The order does not compel Nomi to offer the additional retail-level opt-out, nor does it compel Nomi to list the retailers using its tracking technology.¹⁰ Furthermore, the order does not, and cannot, compel retailers to disclose the tracking technology that they are using.¹¹ As a result, consumers remain unable to use the in-store opt-out, without which the Commission alleges they have and will be harmed, and the order does not the privacy-conscious among them with additional information that might be useful in making informed choices about where to shop.

IV. The FTC's enforcement action and proposed consent order will ultimately reduce transparency and deter organizations from offering privacy-protective choices to consumers.

A harms-based perspective is critical to assuring that an agency without unlimited resources is directing its attention towards only those incidents that could conceivably result in injury to consumers. Prosecutorial discretion is necessary to ensure appropriate allocation of resources and to avoid disincentivizing consumer-protective behavior.

⁹ *Id.* at 24,929.

¹⁰ In the Matter of Nomi Technologies, Inc., FTC File No. 132–3251, Proposed Consent Order Part I (Apr. 23, 2015).

¹¹ Nomi Consent Order Analysis at 24,929.

Cases like Nomi’s, where an organization goes beyond minimum legal requirements and subsequently errs to neither its own benefit nor consumers’ detriment, are not those where strict liability should be the rule.¹² Commissioner Wright notes that doing so will send “a dangerous message to firms weighing the costs and benefits of voluntarily providing information and choice to consumers.”¹³ Seeking enforcement action for innocuous missteps will lead to businesses making decisions that avoid the perceived risk of exposure to FTC enforcement. Organizations will only offer the notice and choice required by law over additional voluntary tools or information, which simply reduces the potential protection and transparency consumers might have otherwise enjoyed.

V. Conclusion

CCIA encourages the Commission to consider the effects of its complaint and proposed consent decree in this case and others like it. Seeking enforcement in circumstances where the legal and policy bases hinge on facts that do not demonstrate any likelihood of harm to reasonable consumers unnecessarily uses limited agency resources and will lead to reduced transparency and privacy protections for those same consumers.

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Respectfully submitted,

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¹² *Id.* at 24,927.

¹³ *Id.* at 24,929.