

Last week, the FTC announced its [complaint](#) and [consent decree](#) with Nomi Technologies for failing to allow consumers to opt-out of cell phone tracking while shopping in retail stores.

Whatever one thinks about

*Nomi*

itself, the FTC's enforcement action represents another step in the dubious application of its enforcement authority against deceptive statements.

In response, Geoffrey Manne, Ben Sperry, and Berin Szoka have written a new ICLE [White Paper](#),

titled,

In the Matter of Nomi, Technologies, Inc.: The Dark Side of the FTC's Latest Feel-Good Case

Nomi Technologies offers retailers an innovative way to observe how customers move through their stores, how often they return, what products they browse and for how long (among other things) by tracking the Wi-Fi addresses broadcast by customers' mobile phones. This allows stores to do what websites do all the time: tweak their configuration, pricing, purchasing and the like in response to real-time analytics — instead of just eyeballing what works. Nomi anonymized the data it collected so that retailers couldn't track specific individuals. Recognizing that some customers might still object, even to "anonymized" tracking, Nomi allowed anyone to opt-out of all Nomi tracking on its website.

The FTC, though, seized upon a promise made within Nomi's privacy policy to provide an additional, in-store opt out and argued that Nomi's failure to make good on this promise — and/or notify customers of which stores used the technology — made its privacy policy deceptive. Commissioner [Wright](#) dissented, noting that the majority failed to consider evidence that showed the promise was not material, arguing that the inaccurate statement was not important enough to actually affect consumers' behavior because they could opt-out on the website anyway. Both Commissioners Wright's and Commissioner

[Ohlhausen](#)

's dissents argued that the FTC majority's enforcement decision in

*Nomi*

amounted to prosecutorial overreach, imposing an overly stringent standard of review without any actual indication of consumer harm.

The FTC's deception authority is supposed to provide the agency with the authority to remedy

consumer harms not effectively handled by common law torts and contracts — but it's not a blank check. The [1983 Deception Policy Statement](#) requires the FTC to demonstrate:

1. There is a representation, omission or practice that is likely to mislead the consumer;
2. A consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and
3. The misleading representation, omission, or practice is material (meaning the inaccurate statement was important enough to actually affect consumers' behavior).

Under the DPS, certain types of claims are treated as presumptively material, although the FTC is always supposed to “consider relevant and competent evidence offered to rebut presumptions of materiality.” The *Nomi* majority failed to do exactly that in its analysis of the company's claims, as Commissioner Wright [noted](#) in his dissent:

the Commission failed to discharge its commitment to duly consider relevant and competent evidence that squarely rebuts the presumption that Nomi's failure to implement an additional, retail-level opt out was material to consumers. In other words, the Commission neglects to take into account evidence demonstrating consumers would not “have chosen differently” but for the allegedly deceptive representation.

As we discuss in detail in the white paper, we believe that the Commission committed several additional legal errors in its application of the Deception Policy Statement in *Nomi*, over and above its failure to adequately weigh exculpatory evidence. Exceeding the legal constraints of the DPS isn't just a legal problem: in this case, it's led the FTC to bring an enforcement action that will likely have the very opposite of its intended result, *discouraging* rather than encouraging further disclosure.

Moreover, as we write in the white paper:

*Nomi* is the latest in a long string of recent cases in which the FTC has pushed back against both legislative and self-imposed constraints on its discretion. By small increments (unadjudicated consent decrees), but consistently and with apparent purpose, the FTC seems to be reverting to the sweeping conception of its power to police deception and unfairness that led the FTC to a titanic clash with Congress back in 1980.

The *Nomi* case presents yet another example of the need for FTC process reforms. Those reforms could ensure the FTC focuses on cases that actually make consumers better off. But given the FTC majority's unwavering dedication to maximizing its discretion, such reforms will likely have to come from Congress.

Find the full white paper [here](#) .