

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

WILLIAM L. KOVACS
SENIOR VICE PRESIDENT
ENVIRONMENT, TECHNOLOGY &
REGULATORY AFFAIRS

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5457

May 22, 2015

Mr. Donald S. Clark
Secretary of the Commission
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave, N.W.
Suite CC-5610(Annex D)
Washington, D.C. 20580

Dear Mr. Clark:

RE: Nomi Technologies, Inc.—Consent Agreement; File No. 1323251

The U.S. Chamber of Commerce (“Chamber”), the world’s largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, submits these comments on the Federal Trade Commission’s (“Commission”) proposed consent order in the *Nomi Technologies, Inc.* matter.¹ More than 96% of Chamber member companies have fewer than 100 employees. We therefore understand the challenges facing smaller businesses.

The Chamber is concerned about the disproportionate impact that the Commission’s aggressive enforcement of Section 5 actions could have on smaller entities, which may dissuade them from voluntary adoption of consumer privacy protections and stifle entrepreneurship and innovation in technology. The Chamber: (1) supports the thoughtful dissents filed by Federal Trade Commissioners Ohlhausen and Wright, and (2) strongly urges the Commission to vacate the proposed consent order and in its place formulate a policy to guide its decision to prosecute unfair and deceptive trade practices based on the spirit and principles of the Small Business Regulatory Enforcement and Fairness Act of 1996 (“SBREFA”) and the Commission’s own 1997 civil penalty leniency policy.²

Keenly aware that small businesses bear a disproportionate share of regulatory costs and burdens, Congress enacted SBREFA in 1996, in part “to make [f]ederal regulators more accountable

¹ See NOMI TECHNOLOGIES, INC.; ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT, 80 Fed. Reg. 24923 (May 1, 2015).

² SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT, Pub. L. No. 104-121, § 223 (1996).; REPORT TO CONGRESS, SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT (March 1998) *available at* <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-congress-concerning-small-business-regulatory-enforcement-fairness/sbrefa98.pdf>.

for their enforcement actions by providing small entities with a meaningful opportunity for redress of excessive enforcement actions.”³ SBREFA requires agencies that regulate small businesses to establish policies or programs that either waive or reduce civil penalties for small businesses.⁴ Agencies may consider the ability of a small business to pay a civil penalty in determining an entity’s eligibility for waiver or penalty reduction.⁵ Examples of other considerations for civil penalty leniency programs, subject to other statutes, include requiring small entities to correct violations within a reasonable time period and whether a small entity has made a good faith effort to comply with the law.⁶

In response to the enactment of SBREFA, the Commission adopted a civil penalty leniency program in 1997 which incorporated the following factors in determining eligibility for civil penalty waivers or reductions:⁷

1. The small entity reported the violation to the Commission promptly after discovering it.
2. The small entity corrected the violation within a reasonable time, if feasible.
3. The small entity had a low degree of culpability....
4. The small entity is financially unable to pay the usual penalty, or the usual penalty would impair the small entity’s ability to do business or to compete effectively.
5. The small entity has not been subject to any previous enforcement action by the Commission, or other federal, state, or local law enforcement jurisdiction for the same or similar conduct for which the small entity is being considered for leniency....
6. The small entity’s violations did not involve willful or criminal conduct.
7. The violations did not pose a serious health, safety, environmental, or economic threat to the consumers or the public.

Nomi Technologies, Inc. (“Nomi”) is a start-up data analytics firm that collected and hashed non-personal identifiers emitted by some mobile devices in order to assess for merchants which store areas received the most traffic in order to more effectively design retail space.⁸ Nomi brings online data analytics to the brick-and-mortar retail context and endeavored to do so in a way that protected consumer privacy. The Commission has entered into a proposed consent order with Nomi for allegedly violating Section 5’s prohibition against deceptive trade practices by not providing an in-store opt out mechanism for consumers despite claims to the contrary in the

³ Pub. L. No. 104-121, §§ 202(2), 203(7).

⁴ *Id.* at § 223(a).

⁵ *Id.*

⁶ *Id.* at § 223(b)

⁷ See REPORT TO CONGRESS, SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT, *supra* at 13, 15-16.

⁸ DISSENTING STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT, *In the Matter of Nomi Technologies, Inc.* (Apr. 23, 2015) available at https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf.

company's privacy policy. Nomi also offered and provided an easily accessible online opt out for consumers.

Although SBREFA's relief to small businesses only applies to civil penalties, the Chamber believes it would be beneficial for the Commission to adopt a policy based on the law's regulatory fairness principles to guide its decisions concerning the prosecution of Section 5 claims against small businesses. Unlike many other agencies which engage in rulemaking, the Commission has established a *de facto* common-law regulatory system through consent orders for Section 5 violations. Many of these consent orders remain in force for as long as twenty years and require compliance costs which may hamper small business development.⁹ The Commission could adopt a framework which grants small start-ups with a clean record the ability to correct mistakes made in good faith without the need for disproportionately large consent decree compliance costs. Nomi, a small business which has not been the subject of prior Commission enforcement and corrected its alleged misstatements about opt out choices for the underlying lawful practice of analyzing non-personal information from customers who visit retail stores¹⁰, could benefit from such a policy change.

The Chamber respectfully requests that the Commission vacate the proposed consent order and develop a framework and principles similar to SBREFA and the Commission's civil penalty leniency program in making determinations to prosecute small businesses for alleged unfair and deceptive trade practices. Taking into consideration such factors as good faith efforts to comply with the law and allowing small entities to correct mistakes within a reasonable timeframe regarding their privacy statements makes good policy sense. Adopting a SBREFA-like approach will best alleviate the burden of audit compliance costs imposed by consent orders on small and start-up businesses which make minor mistakes in good faith. An approach adopting SBREFA principles will enable the Commission to more efficiently use its limited resources while balancing consumer privacy and small business innovation interests.

If you have any questions, please feel free to contact me.

Sincerely,



William L. Kovacs

⁹ See, e.g. DECISION AND ORDER, *In the Matter of Chitika, Inc.* June 7, 2011, available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/06/110617chitikado.pdf>.

¹⁰ See OUR PRIVACY POLICY (last viewed May 15, 2015), <http://www.nomi.com/homepage/privacy/>.