

entities and other stakeholders potentially affected by the process. The structure and responsibilities of the Committee are unchanged from when it was originally established in May 2011. The Committee will continue to operate in accordance with the provisions of the Federal Advisory Committee Act.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert E. Feldman, Committee Management Officer of the FDIC, at (202) 898-7043.

Dated: April 28, 2015.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

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## FEDERAL DEPOSIT INSURANCE CORPORATION

### FDIC Advisory Committee on Economic Inclusion (Come-IN); Notice of Meeting

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice of open meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, notice is hereby given of a meeting of the FDIC Advisory Committee on Economic Inclusion, which will be held in Washington, DC. The Advisory Committee will provide advice and recommendations on initiatives to expand access to banking services by underserved populations.

**DATES:** Friday, May 15, 2015, from 9 a.m. to 3 p.m.

**ADDRESSES:** The meeting will be held in the FDIC Board Room on the sixth floor of the FDIC Building located at 550 17th Street NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Committee Management Officer of the FDIC, at (202) 898-7043.

**SUPPLEMENTARY INFORMATION:**

The agenda will be focused on affordable small-dollar loans and youth financial education opportunities. The agenda may be subject to change. Any changes to the agenda will be announced at the beginning of the meeting.

The meeting will be open to the public, limited only by the space available on a first-come, first-served basis. For security reasons, members of the public will be subject to security screening procedures and must present a valid photo identification to

enter the building. The FDIC will provide attendees with auxiliary aids (e.g., sign language interpretation) required for this meeting. Those attendees needing such assistance should call (703) 562-6067 (Voice or TTY) at least two days before the meeting to make necessary arrangements. Written statements may be filed with the committee before or after the meeting. This Come-IN meeting will be Webcast live via the Internet at: <http://www.fdic.gov/come-in/>. Questions or troubleshooting help can be found at the same link. For optimal viewing, a high speed internet connection is recommended. The Come-IN meeting videos are made available on-demand approximately two weeks after the event.

Dated: April 27, 2015.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

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As the Commission alleges in its complaint, however, this express promise was false. At no time during the nearly year-long period that Nomi made this promise to consumers did Nomi provide an in-store opt out at the retailers using its service. Moreover, the express promise of an in-store opt out necessarily makes a second, implied promise: That retailers using Nomi's service would notify consumers that the service was in use. This promise was also false. Nomi did not require its clients to provide such a notice. To our knowledge, no retailer provided such a notice on its own.

The proposed order includes carefully-tailored relief designed to prevent similar violations in the future. Specifically, it prohibits Nomi from making future misrepresentations about the notice and choices that will be provided to consumers about the collection and use of their information.

Nevertheless, Commissioner Wright argues in his dissent that Nomi's express promise to provide an in-store opt-out was not material because a Web site opt-out was available, and that, in any event, the Commission should not have brought this action because it will deter industry from adopting business practices that benefit consumers. In a separate statement, Commissioner Ohlhausen dissents on grounds of prosecutorial discretion. This statement addresses both dissents' arguments.

**I. Nomi's Express Opt-Out Promise Was False and Material, and Therefore Deceptive**

According to the Commission's Deception Policy Statement, a deceptive representation, omission, or practice is one that is material and likely to mislead a consumer acting reasonably under the circumstances. "The basic question [with respect to materiality] is whether the act or practice is likely to affect the consumer's conduct or decision with respect to the product or service."<sup>2</sup> Furthermore, the Commission presumes that an express claim is material,<sup>3</sup> as is "information pertaining to the central characteristics of the product or service."<sup>4</sup>

Importantly, Section 5 case law makes clear that "[m]ateriality is not a test of the effectiveness of the communication in reaching large numbers of consumers. It is a test of the likely effect of the claim on the conduct of a consumer who has been reached and deceived."<sup>5</sup>

Consumers who read the Nomi privacy statement would likely have been privacy-sensitive, and claims about how and when they could opt out would likely have especially mattered to them. Some of those consumers could reasonably have decided not to share their MAC address with an unfamiliar company in order to opt out of tracking, as the Web site-based opt-out required. Instead, those consumers may reasonably have decided to wait to see if stores they patronized actually used Nomi's services and opt out then. Or they may have decided that they would simply not patronize stores that use Nomi's services, so that they could effectively "vote with their feet" rather than exercising the opt-out choice. Or consumers may simply have found it inconvenient to opt out at the moment they were viewing Nomi's privacy policy, and decided to opt out later.

These choices were rendered illusory because of Nomi's alleged failure to ensure that its client retailers provide any signs or opt-outs at stores. Further, consumers visiting stores that used Nomi's services would have reasonably concluded, in the absence of signage and the promised opt-outs, that these stores did

... 222' ... 222 3.8% ... 19.66%

<sup>2</sup> Deception Policy Statement § I.

<sup>3</sup> Deception Policy Statement § IV.

<sup>4</sup> .

<sup>5</sup> In the Matter of Novartis, 1999 FTC LEXIS 63 \*38 (May 27, 1999).

<sup>6</sup> Statement of Commissioner Wright at 4.

<sup>7</sup> . at 3 & n.15.

<sup>8</sup> [New Study: Consumers Overwhelmingly Reject In-store Tracking by Retailers](#), OpinionLab, March 27, 2014, [http://www.opinionlab.com/blog/new-study-consumers-overwhelmingly-reject-in-store-tracking-by-retailers/](#) (44% of survey respondents indicated that they would be less likely to shop at a store that uses in-store mobile device tracking); [Privacy: Consumers Want to Know How Retailers Use Their Location Data](#), [http://www.182251.com/182251/140219](#) (stating that a study of 4600 Americans showed that consumers are reluctant to give up their location histories).  
<sup>9</sup> Order § I.





Brill, and Commissioner McSweeney 5 n.14 (Apr. 23, 2015).

<sup>13</sup>Stephanie Clifford & Quentin Hardy, *New York Times* (July 14, 2013), [http://www.nytimes.com/2013/07/15/](#)

<sup>14</sup>The Associated Press, *Huffington Post* (Apr. 30, 2013), [http://www.huffpost.com/2013/05/01/](#)

<sup>15</sup>In perhaps the most comparable circumstance—Do Not Track mechanisms—the opt-out rate is extremely low. Jack Marshall, *Digiday* (Feb. 27, 2012), [http://www.digiday.com/](#) (“[a]ccording to data from Evidon, which facilitates the serving of those icons, someone clicks and goes through the opt-out process once for every 10,000 ad impressions served”); Matthew Creamer, *Advertising Age* (May 31, 2011), [http://www.advertisingage.com/2011/05/31/](#)

227828/ (“Evidon, which has the longest set of data, is seeing click-through of 0.005% with only 2% opting out from 30 billion impressions”). Richard Beaumont, *The Cookie Collective* (Feb. 19, 2014), [http://www.cookiecollective.com/2014/2/19/](#)

<sup>16</sup>In the Matter of Nomi Technologies, Inc., FTC File No. 132–3251, Proposed Consent Order Part I (Apr. 23, 2015).

<sup>17</sup>In addition, Nomi arguably offered a product that was more privacy-protective than other, more intrusive methods that retailers currently employ, such as video cameras. Clifford & Hardy, note 14 (“Cameras have become so sophisticated, with sharper lenses and data-processing, that companies can analyze what shoppers are looking at, and even what their mood is.”).

<sup>18</sup>Amy Hollyfield, *ABC 7 News* (May 29, 2014), [http://www.abc7.com/2014/05/29/](#) 83943/; Peter Cohan, *ABC 7 News* (May 9, 2013), [http://www.abc7.com/2013/05/09/](#)

<sup>19</sup>Siraj Datto, *The Guardian* (Oct. 3, 2013), [http://www.guardian.co.uk/2013/10/03/](#) (“If customers create accounts on the wireless network—something millions have done—they first have to accept terms and conditions that opts them in to having their movements monitored when inside the stores”); Jess Bolluyt, *The Guardian* (Oct. 3, 2013), [http://www.guardian.co.uk/2013/10/03/](#)