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

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Introduction

Last week the Federal Trade Commission (FTC) settled a privacy case – *In the Matter of Nomi Technologies, Inc.* – that, on its face, will seem banal, but actually raises significant questions about the FTC's understanding of its broad consumer protection authority, especially as applied to cutting-edge technologies. *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.

Specifically, the *Nomi* case illustrates that the FTC doesn't think it needs to establish that a misrepresentation was "material" to consumers before finding a statement deceptive under Section 5 of the FTC Act — the very thing that the FTC's 1983 Deception Policy Statement (DPS) was intended to prevent. Effectively nullifying the materiality requirement at the core of the DPS means the FTC is more likely to mis-prioritize its limited enforcement resources, proscribe conduct that actually benefits consumers, and impose remedies that make consumers worse off.

Indeed, that appears to be precisely what will happen here: Out of a desire to encourage — effectively require — companies to disclose data collection, the FTC is actually discouraging companies from doing so (at least in the short run), as Commissioners Ohlhausen and Wright note in their dissents. The FTC majority's blindness to this obvious, but perverse, result suggests that the real purpose of the settlement is strategic: to set a quasi-precedent[1] that the Commission will leverage in the future – probably in harder cases involving more ambiguous conduct – and perhaps also to advance a larger political agenda.

Indeed it is not difficult to guess at what the majority's real agenda is: changing what counts as "reasonable consumer expectations" with regard to tracking and data collection activities generally in order to justify even more aggressive use of Section 5 in the future. Specifically:

1. With this case the FTC is trying to change what it asserts are reasonable consumer expectations about whether consumers are being tracked *without notice* — here, specifically offline, in retail stores, but the same principle could extend to online contexts as well. The majority likely sees *Nomi* as a wedge in this regard, because it believes that it can plausibly (although, as we discuss below, erroneously) make the assertion that "for users who were on notice that tracking might occur, it is reasonable to expect *not* to be tracked without notice."
2. If the FTC enshrines this assertion in enough consent decrees, eventually it will plausibly support a broader assertion that *overall* consumer expectations are that tracking will not occur

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[1] Settlements are not, of course, binding precedent, *see, e.g.*, Altria Group, Inc. v. Good, 555 U.S. 70, 89 n. 13 (2008) (noting that an FTC "consent order is... only binding on the parties to the agreement"), but they do have a quasi-precedential effect. *See* CONSUMER PROTECTION & COMPETITION REGULATION IN A HIGH-TECH WORLD: DISCUSSING THE FUTURE OF THE FEDERAL TRADE COMMISSION, REPORT 1.0 OF THE FTC: TECHNOLOGY & REFORM PROJECT 24 (Dec. 2013), *available at* http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf.

without express notification, regardless of whether consumers were specifically put on notice about a *particular* tracking service.

3. Once that asserted transition in consumer expectations occurs, the Commission will be able to bring omission cases against any retailer or any tracking service that engages in data collection (online *or* offline) without conspicuous notice. And once that happens, retailers will also demand that services like Nomi provide notice.
4. In the end, with everyone providing notice all the time, the FTC will eventually bring cases challenging the efficacy of the very opt-out notices it required, and will effectively require *opt-in* to ensure that consumers are not deceived and/or a technological solution that will "push" notifications to consumers' devices in real time (in addition to passive notification like online privacy policies and in-store signage).
5. As a practical matter, the FTC will likely outsource implementation of such a system, which would be difficult to design through the settlement process, to the multistakeholder processes convened by the National Telecommunications and Information Administration (NTIA).

In short, this case is about (i) planting the flag for "proving" that consumer expectations have changed, (ii) getting intermediaries (like retailers) on the hook, (iii) ultimately demanding opt-in for all data-collection and (iv) forcing technological intermediaries like Google and Apple to figure out how to make it all work seamlessly. In effect, the FTC is trying to create, *de facto* and without complicity from Congress, exactly what the Administration's proposed privacy legislation would mandate.[2]

Whatever one thinks about this ultimate outcome, the *process* by which the FTC arrives there should be troubling to everyone. If we are right about what is really going on, that process entails:

- Generously employing the DPS's presumption of materiality to skip ever having to show materiality;
- Subverting the limitations in the DPS by interpreting the presumption of materiality never to require consideration of context, proof of intent or to allow for evidence to rebut the presumption;
- Using case-by-case enforcement (as opposed to industry-wide regulation) to truncate the analysis of key claims to produce "rough cut" ("close enough for government work!") approximations of what the law is; and
- Relying on the propensity of FTC defendants to settle in order to bootstrap those assertions from previous cases into effective "established truths" in subsequent cases without any judicial review.

This would be perhaps the very definition of "abuse of discretion." It would put the "National Nanny" FTC of the 1970s to shame.

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[2] *See* Administration Discussion Draft: Consumer Privacy Bill of Rights Act of 2015, THE WHITE HOUSE (Feb. 27, 2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/legislative/letters/cpbr-act-of-2015-discussion-draft.pdf.

The Nomi Case

Nomi Technologies offers retailers an innovative technological means 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 MAC (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 through a one-way hash, 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.

Nomi's website promised 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." But Nomi never actually offered an opt-out in-store — and Nomi's retail partners never posted notices in their stores to inform consumers that they were using Nomi, or that they could exercise the opt-out. Instead of suing the retailers for failing to disclose this data collection, the FTC alleged that Nomi had committed two deceptive practices:

- Count I (Express Claim): Failing to offer an in-store opt-out
- Count II (Implied Claim): Failing to offer in-store notices

Nomi marks the first time the FTC has made such claims regarding in-store tracking, or regarding an alleged failure to provide an in-store opt-out. Because the case was settled out of court, the majority did little to explain its analysis. In fact, both claims stand on shaky legal ground.

Materiality under the FTC's Deception Policy Statement

In theory, the FTC's Section 5 authority is supposed to be used to protect consumers by reaching conduct in interstate commerce not sufficiently handled by common law and contract remedies.[3] In the 1970s, a broadly worded Supreme Court decision combined with Naderite criticism of the agency inspired a frenzy of activity.[4] That, in turn, provoked a backlash from the deregulatory Carter-era Democrats. Congress forced the agency to set boundaries on both unfairness (1980)[5] and deception (1983).[6] But the FTC has effectively circumvented those constraints little by little through enforcement actions such as that against Nomi.[7]

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[3] *See, e.g.*, Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 590-606 (2013).

[4] *See* J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (speech given at the Marketing and Public Policy Conference, May 30, 2003), *available at* https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection; FTC v. Sperry & Hutchinson Trading Stamp Co., 405 U.S. 233 (1972).

[5] *See* Letter from Michael Pertschuk, Chairman, FTC, to Hon. Wendell H. Ford, Chairman, Senate Comm. on Commerce, Science and Transportation (Dec. 17, 1980), *appended to* International Harvester Co., 104 F.T.C. 949, 1070 (1984), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

[6] *See* Letter from James C. Miller III, Chairman, FTC, to Hon. John D. Dingell, Chairman, House Comm. on Energy & Commerce (Oct. 14, 1983), *appended to* In re Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984)

The 1983 Deception Policy Statement (DPS) requires the FTC to show that:

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**.[8]

Back in 1965, in *Colgate-Palmolive*, the Supreme Court had essentially abolished the materiality requirement previously recognized by the FTC, allowing the FTC to presume that any statement or omission that a reasonable person would find misleading was deceptive[9] — just as the Court's 1972 decision in *Sperry v. Hutchison* essentially deleted the injury requirement of unfairness.[10] The 1983 DPS was, like the 1980 Unfairness Policy Statement, a compromise — walking the Commission back from its unconstrained activism of the 1970s, but not going as far in constraining the agency as some of its critics wanted.

In Congressional testimony in 1982, FTC Chairman Miller proposed that materiality should require some proof of consumer harm, which would have made deception harder to establish and more like the common law (*e.g.*, the torts of deceit or fraud).[11] In the end, the DPS said instead that materiality was a *proxy* for harm, which generally the FTC would not separately need to prove: "if the practice is material, [then] consumer injury is likely, because consumers are likely to have chosen differently but for the deception."[12] This allowed the FTC to retain authority over misleading practices that would not necessarily violate any common law standard.[13]

At the same time, the FTC retained *some* of the prior presumption of materiality, but the DPS narrowed the scope of the presumption: "[i]n many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary."[14] The DPS left somewhat unclear just how broad the remaining presumption should be. It left even less clear how one could rebut that presumption, and how conflicting evidence about materiality should be resolved without the presumption.

(decision & order), *available at* https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception [hereinafter "Deception Policy Statement" or "DPS"].

[7] *See* FTC, *Retail Tracking Firm Settles FTC Charges it Misled Consumers About Opt-out Choices* (Apr. 23, 2015) (press release), https://www.ftc.gov/news-events/press-releases/2015/04/retail-tracking-firm-settles-ftc-charges-it-misled-consumers.

[8] *See* Deception Policy Statement, *supra* note 6, at 175-76.

[9] FTC v. Colgate-Palmolive Co. 380 U.S. 374 (1965); *see generally* Jef I. Richards & Ivan L. Preston, *Proving & Disproving Materiality of Deceptive Advertising Claims*, 11(2) J. PUB. POL'Y & MARKETING 45, 49 (1992).

[10] *See* FTC v. Sperry & Hutchinson Trading Stamp Co., 405 U.S. 233 (1972).

[11] *See* Richards & Preston, *supra* note 9, at 49-50.

[12] Deception Policy Statement, *supra* note 6, at 176.

[13] *See* Richards & Preston, *supra* note 9, at 49-50.

[14] Deception Policy Statement, *supra* note 6, at 176.

The DPS says that "express claims are material," and quotes the Supreme Court's landmark 1980 *Central Hudson* decision (which extended First Amendment protection to commercial speech for the first time):

> In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.[15]

The Court was talking about the societal value of the speech, but the FTC extended the logic: an advertiser's willingness to make an express claim became a proxy for materiality, which is *itself* a proxy for harm.

In traditional advertising, this "express claim => materiality => harm" formulation may make sense: who knows better than the advertiser whether a claim is likely to influence consumer behavior (*i.e.*, be "material")? But this presumption doesn't *always* make sense, as the Supreme Court noted. Unfortunately, the FTC seems to have forgotten this caveat, and has slipped back into a presumption of materiality that is both sweeping and, in practice, not rebuttable — just as in the pre-1983 era.

The DPS *does* require evidence when claims are merely implied.[16] The FTC must prove either that a seller *intended* to convey an implied claim,[17] or, if the FTC cannot prove intent, it must instead prove materiality, and cannot rely on the presumption.[18]

The DPS extends the presumption of materiality to several other scenarios, such as (i) misleading information or omissions ordinary consumers need to evaluate a product or service or (ii) omissions with which the reasonable consumer would be concerned, such as health or safety.[19] In both cases, though, the FTC must at least present evidence that the omitted information is "necessary" to ordinary consumers or of "concern" to reasonable consumers before the materiality presumption attaches.

Finally, even where the DPS allows the FTC to presume materiality, it makes clear that, contrary to the 1965–1983 period, that presumption is rebuttable: "The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality."[20] In few

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[15] *Id.* at 189 n.49 (quoting Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 567 (1980)).

[16] Deception Policy Statement, *supra* note 6, at 190 ("Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.").

[17] *See id.*

[18] *See id.* at 191.

[19] *See id.* at 189 ("Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false"); *id.* at 190 ("The Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned.").

[20] *Id.* at 189 n.47.

cases, however, has the Commission actually weighed conflicting evidence,[21] and never has the FTC published guidance on what evidence might qualify as "relevant or competent" to rebut the presumption of materiality. And those cases that do exist concern traditional marketing claims, not the kinds of novel fact patterns created by cutting-edge companies like Nomi.

Thus, lawyers advising clients facing a deception enforcement action, or trying to avoid one in the future, must rely primarily on complaints, consent decrees, and agency statements to attempt to predict how the FTC might weigh materiality. Unfortunately, the FTC has, under this Administration, effectively stopped issuing closing letters to explain why it decided *not* to bring an enforcement action,[22] so there is essentially no body of law showing how the FTC decides *not* to bring an enforcement action regarding a claim (or omission) that was misleading but that the FTC decided was *not* actually material. Thus, it is hardly surprising that companies settle essentially all cases the FTC brings — which further compounds the problem, by denying other practitioners litigated cases where the issue has been explored.[23]

Applying the Deception Policy Statement to *Nomi*

Applying the DPS framework to *Nomi* requires first assessing whether the presumption of materiality should apply.

Nomi's Express Promises: The Presumption of Materiality Was Misapplied

Count I of the FTC's *Nomi* complaint rests on applying the presumption of materiality to the following express claim made in the privacy policy on Nomi's website:

> Nomi pledges to… Always allow consumers to opt-out of Nomi's service on its website as well as at any retailer using Nomi's technology.[24]

Everyone agrees that Nomi complied with the first half of this promise by allowing consumers to opt-out on its website.[25] But the FTC alleges that the second half was deceptive because:

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[21] *See, e.g.*, Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000); Kraft Inc. v. FTC, 970 F.3d 311 (7th Cir. 1992).

[22] *See* Geoffrey A. Manne & Ben Sperry, *FTC Process and the Misguided Notion of an FTC "Common Law" of Data Security* 4 (ICLE Working Paper), *available at* http://bit.ly/1byrNS2 ("In order to get a better handle on the universe of [data security] cases at the FTC that didn't result in settlements, we filed a FOIA request with the agency. It showed only seven closing letters and three emails closing investigations without bringing a case.").

[23] *See generally id.*; Berin Szoka, *Indictments Do Not a Common Law Make: A Critical Look at the FTC's Consumer Protection "Case Law"* (2014 TPRC Conference Paper, Aug. 22, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2418572.

[24] In the Matter of Nomi Technologies, Inc., Complaint, at ¶12 (Apr. 23, 2015), *available at* https://www.ftc.gov/system/files/documents/cases/150423nomicmpt.pdf [hereinafter "Nomi Complaint"].

[25] *See* In the Matter of Nomi Technologies, Inc., Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny, at 1-2 (Apr. 23, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/638351/150423nomicommissionstatement.pdf [hereinafter "Majority Statement"]; In the Matter of Nomi Technologies, Inc., Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 1 (Apr. 23, 2015), *available at*

1. Nomi failed to make sure that each retailer in fact offered an in-store opt-out mechanism; or
2. Nomi failed to identify the retailers that used its technology (or failed to cause the retailers to identify themselves).[26]

The first claim appears straightforward: Nomi did not, in fact, offer an in-store opt-out mechanism, in violation of its express promise to do so.[27] For the majority, this is the end of the matter: even though the website portion of the promise was fulfilled, Nomi's failure to comply with the in-store promise portion amounts to an actionable deception.

But bifurcating the privacy policy in this way seems to violate the DPS's requirement that all statements be evaluated in context:

> [T]he Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, in advertising the Commission will examine "the entire mosaic, rather than each tile separately."[28]

Courts have suggested much the same thing:

> [T]he tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context.[29]

The majority dodges the key question: whether the evidence that Nomi accurately promised a *website* opt-out, and that consumers could (and did) opt-out using the website, rebuts the presumption that the inaccurate, in-store opt-out portion of the statement was material, and sufficient to render the statement *as a whole* deceptive. As Stanford Law Professor Richard Craswell has pointed out:

> [S]ome method will have to be devised for determining when a statement that accurately informs in one respect while misleading the listener in another should properly be regarded as deceptive. This determination can be made without any trade-offs only if we are willing to say that any deception of the listener is enough to label the

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https://www.ftc.gov/system/files/documents/public_statements/638361/150423nomiohlhausenstatement.pdf [hereinafter "Ohlhausen Dissent"]; In the Matter of Nomi Technologies, Inc., Dissenting Statement of Commissioner Joshua D. Wright, at 3 (Apr. 23, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/638371/150423nomiwrightstatement.pdf [hereinafter, "Wright Dissent"].

[26] *Cf.* Nomi Complaint, *supra* note 24, at ¶14 ("Nomi represented, directly or indirectly, expressly or by implication, that consumers could opt-out of Nomi's Listen service at retail locations using this service"); *id.* at ¶16 ("Nomi represented, directly or indirectly, expressly or by implication, that consumers would be given notice when a retail location was utilizing Nomi's Listen service").

[27] *Id.* at ¶15.

[28] Deception Policy Statement, supra note 6, at 183 n.31 (quoting FTC v. Sterling Drug, 317 F.2d 669, 674 (2d Cir. 1963)).

[29] Beneficial Corp. v. FTC, 542 F.2d 611, 617 (3d Cir. 1976).

> statement itself deceptive, analogous to holding that an advertisement should be deemed deceptive if it deceives even a single consumer.[30]

Here, as Commissioner Wright argues,

> 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.[31]

As Commissioner Wright points out, the available evidence suggests that consumers were apparently not particularly affected by the inaccurate portion of the statement. He cites evidence that 3.8% of consumers used Nomi's website to opt-out of data collection — a number considerably higher than the less than 1% who opt-out from data collection online more generally.[32] From this, Wright notes, it may be inferred that the consumers who read Nomi's policy and who cared to avoid its technology likely opted-out at the website.[33]

It is of course a valid question whether, even in context, the inaccurate statement amounted to a material deception, and whether the evidence offered by Commissioner Wright was sufficient to rebut the presumption of materiality. Nevertheless, the majority's *approach* to answering those questions (*i.e.*, dismissing or ignoring them) and weighing the evidence (*i.e.*, failing to) betrays the majority's implicit rejection of the DPS's admonishment that context and contrary evidence are essential — and the DPS's promise that "The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality."[34]

The majority *does* offer some theories as to why the inaccurate in-store opt-out statement might have mattered, even to consumers confronted with the additional, website opt-out. Nonetheless, it essentially rejects the idea that there could be a valid trade-off. Instead, the majority seems content to assert that if *any* consumer might have been misled by the in-store opt-out promise, the statement is material. In reality, what the DPS requires is a weighing of the importance of the inaccurate language against the truthfulness of the statement taken as a whole. In other words, it is not enough to suggest (without evidence, of course, but only supposition) that the inaccurate language could have misled some consumers; the DPS requires a showing that the

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[30] Richard Craswell, Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis, 64 S. CAL. L. REV. 549, 594 (1991).

[31] Wright Dissent, *supra* note 25, at 3.

[32] *Id.* at 3, 4.

[33] *Id.*

[34] Deception Policy Statement, *supra* note 6, at 189 n.47.

entire statement, taken as a whole, *tended* to mislead "a consumer acting reasonably in the circumstances."[35] This is quite a different assessment, and one that the majority fails to undertake.

Nomi's (Alleged) Implied Promise: No Presumption of Materiality

In addition to rejecting Commissioner Wright's evidentiary claims regarding Nomi's express promises, the majority attempts to bolster its case by asserting that:

> 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.[36]

As noted above, under the DPS an implied promise merits the presumption of materiality only when there is proof that the implied promise was *intended* by the speaker.[37] In the absence of such proof, the FTC would (at least if it were before a court) have to prove the materiality of the alleged implied promise. In other words, for an implied promise to be deemed material (and thus deceptive) under the DPS, the FTC must adduce *some* proof: either that it was, in fact, *intended*, or that it was, in fact, *material*.

The FTC Failed to Prove Nomi's Intent to Make the Implied Promise of In-Store Notification

The majority attempts to "prove" that Nomi intended to make the implied promise by asserting that such a promise was necessary to the express promise of an in-store opt-out.[38]

But why is such a promise "necessarily" implied by Nomi's statement? One can readily see that in-store opt-out would be *easier* for consumers if stores posted signs or otherwise conspicuously notified their customers that Nomi's technology was in use. But Nomi doesn't make any promise as to the particular mechanism by which in-store opt-out would be available.

It would seem to eviscerate the word "proof" if proof of intent could be satisfied here by a simple assertion of "necessity" when *any* other interpretation is possible. Something more convincing *must* be required — whether evidence of actual intent (*e.g.*, "hot docs" clearly stating the intent of the company) or evidence undermining the other possible interpretations (*e.g.*, evidence that no other company *ever* used such language without intending or assuming that notice was required).

But the FTC offers no such evidence here, and other interpretations *are* possible.

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[35] *Id.* at ("If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.)

[36] Majority Statement, *supra* note 25, at 1.

[37] *See* Deception Policy Statement, *supra* note 6, at 190.

[38] *See* Majority Statement, *supra* note 25, at 1 ("Moreover, the express promise of an in-store opt-out necessarily makes a second, implied promise").

For example, Nomi's technology uses the MAC addresses broadcast by consumers' smartphone Wi-Fi interfaces to track consumers' movements through retail stores.[39] This necessarily means that every tracked consumer was carrying a Wi-Fi equipped mobile device while in-store. It is undisputed that Nomi's website offered the promised opt-out.[40] Thus, its additional promise to make opt-out available "at any retailer using Nomi's technology" could conceivably have been fulfilled by ensuring that the stores' Wi-Fi was connected to the Internet and potentially accessible to consumers — so that consumers could access the website opt-out from their phones while in the store (if they could not already do so from their mobile data connections. If so, consumers planning to avail themselves of in-store opt-out were no more deceived by the absence of in-store notification than were consumers who opted-out at Nomi's website — a claim the majority doesn't make.[41] In either case, they wouldn't have known — or needed to know — which stores used Nomi to exercise the website opt-out.

But even if we assume that the promised in-store opt-out could only reasonably have been assumed to use a different mechanism than the website opt-out, it still doesn't *require* in-store notification that Nomi's technology was in use. Again, while such notification would have made opt-out *easier*, it is not clear that a consumer, having read Nomi's simple, one-page privacy policy, couldn't have been reasonably expected to assume that *every* store might be using Nomi's technology and obligated to ask a store employee if he wanted to use the retail opt-out. The opt-out itself does, after all, require the consumer to engage in an affirmative act to avoid tracking. In fact, in a world in which various forms of tracking, monitoring and surveillance are effectively ubiquitous (not least because government surveillance has made this world a reality), such an assumption might be fairly realistic.

If this harsh truth seems unacceptable, note two things. First, the consumer at issue was not powerless: he was given an easy, comprehensive opt-out, which he could exercise without any special notification and at trivial cost. Second, this case does nothing to avoid the lack of in-store notification — indeed, it probably makes it more likely, by discouraging disclosure generally, as explained below. The FTC could, in theory, have brought an unfairness case against Nomi for failing to disclose its collection to all tracked consumers, or either a deception or unfairness case against retailers for failing to notify their customers that they were being tracked. Any of these cases would have dealt directly with what would seem to be the source of the FTC majority's real discomfort: tracking without conspicuous notification to all consumers. But the Commission brought no such cases. Instead it seems content to try to extend its limited deception authority beyond its legal limits in a misguided effort to locate a generalized disclosure requirement for data collection and tracking activity in that authority.

In recent years, the FTC has brought a series of cases aimed at mandating disclosure and/or dictating how disclosure must formatted, configured or delivered — without regard for countervailing economic considerations, and with little humility about the FTC's ability to create effec-

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[39] Nomi Complaint, *supra* note 24, at ¶4.

[40] *Id.* at ¶11.

[41] *See* Majority Statement, *supra* note 25, at 2-3.

tive user interfaces from the top down.[42] The FTC considerably stepped up this approach with its recent settlements against Apple, Google, and Amazon regarding precisely how they configured their online stores to prevent children from making app purchases without their parents' authorization.[43] Taken together with *Nomi,* it is difficult not to see in this set of cases an effort by the FTC to bootstrap into its deception and unfairness authority an ability to mandate some form of conspicuous notification for offline consumer tracking — ideally through notifications "pushed" to consumers' mobile devices in real time to notify them of potential tracking.

While that may (or may not) be a desirable policy, it is not one that the FTC's Section 5 authority permits the FTC to mandate. Indeed, the fact that Section 5 does *not* confer such broad authority is a key reason why FTC has sought the authority to mandate specific forms of disclosure as part of "comprehensive baseline privacy legislation" under Democratic Administrations (in 2000, and again more recently).

Only by stretching Section 5 across a series of un-adjudicated settlements can the FTC possibly create such a legal disclosure requirement. Whatever the merits of such an outcome, contorting Section 5 to reach it creates a host of problems. The constraints of the DPS (like those of the UPS and Section 5(n)) are not simply legalistic obstacles to be overcome: they help to ensure that the FTC doesn't run roughshod over innovative technologies, micro-manage design choices, and unduly intrude on companies' reasonable economic decision-making. To be sure, there may be perfectly valid constraints on these imposed by the FTC. But the FTC's apparent effort to escape *any* constraints on its own authority to dictate even the most trivial details of disclosures, privacy policies and notifications (particularly when data collection is involved) will not serve consumers well on balance.[44]

The FTC Failed to Prove that Nomi's (Alleged) Implied Promise of In-Store Notification Was Material

In the absence of proof of intent (and even if it *is* present, given the DPS's requirement that the FTC "always consider relevant and competent evidence offered to rebut presumptions of materiality"), the FTC must prove that an implied promise was material.[45] Here again the majority fails.

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[42] *See* Solove & Hartzog, *supra* note 3, at 658-61 (and enforcement actions cited therein).

[43] *See* In the Matter of Apple, Inc., Complaint, (Jan. 15, 2014), *available at* https://www.ftc.gov/sites/default/files/documents/cases/140115applecmpt.pdf; In the Matter of Google, Inc., Complaint, (Sept. 4, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/140904googleplaycmpt.pdf; FTC v. Amazon.com, Inc., Complaint, (W.D. Wash., Jul. 10, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/140710amazoncmpt1.pdf.

[44] *See* Geoffrey Manne & Ben Sperry, *Debunking the Myth of a Data Barrier to Entry for Online Services*, TRUTH ON THE MARKET (Mar. 26, 2015), http://truthonthemarket.com/2015/03/26/debunking-the-myth-of-a-data-barrier-to-entry-for-online-services/.

[45] *See* Deception Policy Statement, *supra* note 6, at 191 ("Where the Commission cannot find materiality based on the above analysis, the Commission may require evidence that the claim or omission is likely to be considered important by consumers. This evidence can be the fact the product or service with the feature represented

As the DPS notes:

> Because this presumption [of materiality for express statements] is absent for some implied claims, the Commission will take special caution to ensure materiality exists in such cases.[46]

The majority showed no such caution and adduced no such evidence to support its presumption of materiality for the implied statement.[47] Moreover, the violation of the asserted implied promise of in-store notification is logically unlikely to be material because, whatever precisely Nomi's statement reasonably *implied*, it *expressly* required some affirmative action by the consumer to opt-out.

The DPS states:

> In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transactions.[48]

The majority asserts that notice of in-store tracking at each location was material because

> 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 *not* use Nomi's services. Nomi's express representations regarding how consumers may opt-out of its location tracking services go to the very heart of consumers' ability to make decisions about whether to participate in these services. Thus, we have ample reason to believe that Nomi's opt-out representations were material.[49]

But the relevant knowledge required for consumers to have the "ability to make decisions about whether to participate in these services" isn't whether Nomi's services were in use at any particular location; it's whether the consumer has, in fact, made an effective choice whether to participate. In other words, what matters is a consumer's knowledge of whether he or she actually opted-out. And *every consumer* who read the privacy policy had that notice.

If consumers saw Nomi's website privacy policy and *still* went shopping knowing that they hadn't ever taken the affirmative step of opting-out (whether online or in-store), they weren't "deceived" by the absence of in-store notifications.

Again, to some, this might sound harsh: "You're on notice now that the world has changed, so *caveat emptor*!" But remember that any consumer who saw the notice was empowered to opt-out

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costs more than an otherwise comparable product without the feature, a reliable survey of consumers, or credible testimony").

[46] *Id.* at 189 n. 48.

[47] *See* Majority Statement, *supra* note 25, at 2-3.

[48] *See* Deception Policy Statement, *supra* note 6, at 177.

[49] Majority Statement, *supra* note 25, at 2.

quite easily. And the record contains no evidence that, once put on notice, even a single consumer tried to opt-out in-store and was thwarted.[50]

Nothing Nomi did (or didn't do) with respect to notice necessarily affected consumers' failure to affirmatively opt-out if they didn't do so on the website — unless the claim is that they all *forgot* about the tracking once they left the website without opting-out, and the absence of conspicuous notices to remind them caused them to act against their intentions.

But the majority doesn't make this argument. And it would be difficult to square with the majority's assertion (which it is forced to make in order to counter Commissioner Wright's argument that the website opt-out alone was sufficient) that the harmed consumers were particularly privacy-sensitive:

> 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.[51]

The majority goes on to hypothesize several scenarios in which these privacy-sensitive consumers might still have chosen not to opt-out on the website:

> 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 website-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.[52]

All but the first of these are indeed plausible. (The first isn't plausible because even if Nomi had offered an opt-out in-store, consumers presumably would *still* have had to provide a MAC address. At most, perhaps some consumers might have felt somewhat more comfortable providing a MAC address in-person rather than online, but this is highly speculative — the kind of evidence that perhaps the Commission might have weighed among other evidence, but hardly an argument for insisting on the presumption of materiality, which avoids *any* evidentiary inquiry.)

But while in-store notices might have made it *easier* for consumers who preferred to opt-out in-store, nothing changes the fact that, as long as they *didn't* opt-out, every consumer who read Nomi's website policy and continued to shop nonetheless was on notice that they might be tracked.

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[50] *Cf.* Nomi Complaint, *supra* note 24, at ¶13.

[51] Majority Statement, *supra* note 25, at 2.

[52] *Id.*

The closest the majority comes to making a viable argument for the materiality of the implied promise to provide in-store notices is its claim that "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 *not* use Nomi's services."[53]

Unfortunately for the majority, however, in the absence of proof that Nomi intended to make such a (false) promise (presumably, it would be to induce consumers to infer that stores without notices did not use Nomi's services), the materiality of such a promise can't be presumed. And a mere statement by three FTC commissioners asserting that consumers "would have reasonably" interpreted the absence of notices to mean Nomi's services weren't present is insufficient — particularly with respect to nascent technology and the rapidly evolving world of consumer data collection and privacy.

As even Dan Solove and Woody Hartzog, defenders of the FTC's "common law of settlements" and the Commission's general approach to privacy and data security, point out:

> Social science research is revealing that consumers do not read or understand privacy policies, are heavily influenced by the way choices are framed, and harbor many pre-existing assumptions that are incorrect. For example, according to one study, "64% [of the people surveyed] do not know [or falsely believed] that a supermarket is allowed to sell other companies information about what they buy" and that 75% falsely believe that when "a website has a privacy policy, it means the site will not share my information with other websites or companies."[54]

There is much we don't know about consumers' assumptions (and their reasonableness) regarding privacy policies and their implications. Assuming without evidence that consumers would have reasonably interpreted the absence of notices to mean no tracking was present is an unwarranted leap.

The FTC Failed to Adequately Consider Factors that Rebut the Presumption of Materiality

The Deception Policy Statement carefully quotes *Central Hudson*, including this critical proviso:

> *[I]n the absence of factors that would distort the decision to advertise*, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.[55]

In *Nomi* the majority fails to consider those factors, which increasingly distinguish the marketing claims of the 1980s from today's privacy policies — not just in this case, but across the privacy and data security cases brought by the agency.

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[53] *Id.*

[54] Solove & Hartzog, *supra* note 3, at 667.

[55] *See* Deception Policy Statement, *supra* note 6, at 189 n.49 (quoting Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 567 (1980)).

For materiality to make sense as a proxy for consumer harm, it must be reasonable to assume that an express statement in fact induced (or was likely to induce) harmful actions. That may be the case when advertising states that a product contains no nuts, say — a clear attempt to induce even those consumers who are allergic to nuts to purchase the product. It is reasonable to assume that such a statement, if false, could cause harm. Importantly, the harm would be caused by the action intended to be caused by the statement: purchase and consumption of the product, even by consumers who are allergic to nuts.

But several factors distinguish statements like the Nomi's privacy policy from traditional marketing claims. First, in this case (and others like it), refuting or confirming the alleged misrepresentation is wholly within the consumer's control. If, after viewing the privacy policy, a consumer shops anywhere without affirmatively opting-out, the consumer knows he hasn't opted-out; he hasn't been deceived and he's in full awareness of all the relevant facts. He doesn't have to *know* whether any particular store uses Nomi's services or not to know with certainty that he hasn't opted-out.

In other words, absent an affirmative opt-out by the consumer, it's impossible to assume that the implied (or express, for that matter) statement was material to the consumer's choice and thus that it caused any harm. The intervening step — opt-out by the consumer — can't just be ignored. For consumers who chose to shop without opting-out (or trying to opt-out), Nomi's inaccurate statement simply can't be presumed to have been material without proof.

Second, the choice at issue here is not the consumption of a product; it is the exercise of an opt-out. To the extent that the ability to opt-out from tracking may be an important characteristic of a product being consumed, it is either a characteristic of the product that *retailers* are purchasing from Nomi, or else it is a characteristic of the product that consumers are purchasing from *retailers*. It makes no difference that the opt-out *mechanism* may be offered to consumers directly by Nomi. The decision to consume a retailer's product and the decision to track consumers (whether or not they can opt-out of such tracking) are not part of the same "product," and they are not made by the same party. The inclusion of an opt-out gives consumers some influence over the retailer's decision (or ability) to track, but whether the efficacy of that influence comports with a retailer's expectations is a contractual matter between Nomi and the retailer. This presents a dramatically different dynamic, and different set of incentives, than the marketing statements traditionally at issue in deception cases.

Third, and related, remember that the basis for presuming that express statements are material is that, if the marketer invests in an advertisement, it expects that advertisement to sell more of its products. The presumption rests on the marketer's self-interest: in legal terms, the marketer is *estopped* from claiming, after the fact, that a statement that it made precisely because it was material to consumers was not, in fact, material after all.

But with privacy policies, any correlation between the company's self-interested calculation of relevance at the time it made the claim and the actual materiality to consumers can be, and likely is, far more attenuated. Some claims about privacy might well be equivalent to traditional marketing claims (such as an ad touting the privacy features of a product over one's competitors). But in general, it cannot be presumed that all privacy policies are intended to convince consumers to use the product — and certainly not to persuade them to opt-out from the product,

the very opposite of what the company wants! Privacy policies may sometimes, in fact, be required by law,[56] and their contents reflect considerable pressure from the FTC itself, among other government actors, to disclose more about a company's privacy practices. Finally, privacy policies, unlike ads, generally do not reflect the investment of money into a campaign intended to persuade consumers.

These points, combined with the FTC majority's theoretical (rather than evidence-based) rejection of the evidence adduced by Commissioner Wright that consumers used the website opt-out at a greater-than-typical rate, render the assumption of materiality for *both* the express and implied statements tenuous. These are all important issues that the FTC *should* have addressed — and likely would have *had* to address, had it taken the case to court, instead of simply settling it.

What *Nomi* Means and What to Do About It

In effect, the *Nomi* settlement seems to stand for the disturbing proposition that the presumption that an express statement is material can *never* be rebutted — not even by evidence that it didn't change, and couldn't have changed, consumers' choices. As Commissioner Ohlhausen says, this amounts to a strict liability standard, without any need to establish either materiality or harm — precisely the unconstrained 1965 version of deception rejected by the Commission in the Deception Policy Statement.[57]

In summary, we believe the Commission is committing four legal errors in its application of the Deception Policy Statement:

1. Failing to adequately weigh evidence that the materiality presumption has been rebutted;
2. Treating claims in isolation, rather than in their full context;
3. Assuming, without proof, that Nomi intended to make the implied claim about in-store notices; and
4. Similarly, even when the presumption does not apply (such as for an implied claim that the FTC has not proven the defendant intended to make), failing to offer sufficient evidence to prove materiality.

Had this case gone to a court, we believe a court might well have rejected these arguments, or the FTC might not have made these arguments in the first place for fear that a court would

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[56] CAL. BUS. & PROF. CODE §§22575-79, *available at* http://leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=22001-23000&file=22575-22579. Although Nomi didn't "collect[] personally identifiable information through the Web site or online service," as the California law requires, it's not much of a stretch to assume that a young technology company like Nomi might post such a policy out of an abundance of caution. And California is in the process of amending its law to apply to all data collection. Proposed laws like the proposed White House Privacy Bill, moreover require such disclosures more broadly. *See* Administration Discussion Draft: Consumer Privacy Bill of Rights Act of 2015, THE WHITE HOUSE (Feb. 27, 2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/legislative/letters/cpbr-act-of-2015-discussion-draft.pdf.

[57] Ohlhausen Dissent, *supra* note 25, at 1 ("we should not apply a de facto strict liability approach to a young company that attempted to go above and beyond its legal obligation to protect consumers but, in so doing, erred without benefiting itself").

reject them — but it is difficult to say given the lack of relevant adjudicated precedent, and the general tendency of courts to defer to administrative agencies in such contexts. Both because litigation on these issues is unlikely and because, even if litigation does occur, it may not correct these errors, we believe that Congress (or the FTC itself) must require the FTC to bring its approach in line with the DPS.

In addition, while the FTC may be accurately reading the plain text of the DPS ("the Commission presumes that express claims are material"), we question whether it makes sense to extend the presumption to express statements that differ fundamentally from the type of claims with which the Commission was primarily concerned back in 1983, such as in privacy policies like Nomi's, for all the reasons explained above.

Of course, it is true that, even in 1983, the Commission had long applied deception not only to marketing claims in advertisements, but also to warranties and contracts — and, presumably, when the DPS "presumes that express claims are material," it includes claims in these documents as well as in advertisements. Those documents might resemble today's privacy policies or terms of service in some respects: many are lengthy and legalistic. But on the whole, they are significantly different from privacy policies like Nomi's in the key respect that matters: they are, like advertisements, intended to help convince consumers to buy a product.

In 1983, the Commission did not have to grapple with this question because it could safely assume that all express statements were essentially similar: whatever their length or format, they reflected the same basic alignment of incentives. Today, the world of express statements made by companies has grown considerably. It may be time to consider clarifying whether the presumption of materiality applies to these statements at all, or only to express statements made to persuade a consumer to purchase (or consume) a product. Some privacy policies might well qualify for the presumption, like those of consumer-facing services, but Nomi's likely would not. Of course, a privacy policy like Nomi's could well still be material, but the FTC would bear *some* burden of proving this.

To a large degree, this concern could be addressed simply by ensuring that the FTC made good on the DPS's promise to "always consider relevant and competent evidence offered to rebut presumptions of materiality."[58] This would not entirely correct the problem, of course; the burden would remain upon the defendant to rebut the presumption. And in some of those cases, it may be the FTC that should bear the burden for all the reasons expressed above. But it would at least be a significant improvement over the status quo.

Finally, like Commission Ohlhausen, we question the FTC's use of its prosecutorial discretion: it is difficult to see how this case will actually make consumers better off. Yet we recognize that, as a legal matter, the FTC enjoys broad deference on this point. Indeed, the FTC Act does not actually specify *any* legal standard the FTC must satisfy before settling a case (which itself suggests that the Congress that took such great pains to constrain the FTC's rulemaking authority

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[58] Deception Policy Statement, *supra* note 6, at 189 n.47.

with the Magnuson-Moss Act of 1980 and to force the FTC to narrow its understanding of unfairness would be shocked to discover that the FTC today operates entirely by settlement).

By their own terms, the FTC's settlements claim only to satisfy Section 5(b), which requires only that the decision to bring an enforcement action (not a settlement) be supported by (i) "reason to believe" a violation of the Act occurred and (ii) the Commission's belief that an investigation would be in the public interest.[59] As Commissioner Wright argues, "that threshold should be at least as high as for bringing the initial complaint."[60] We agree — but so long as there is no clear standard, any three Commissioners will retain broad discretion to settle cases that may have highly questionable benefits for consumers and may, over time, skew the FTC's understanding of its guiding doctrines.

What to Do about These Problems: Potential Reforms

In principle, the Commission *could* make significant improvements on each of these three problems. Yet the agency has had 32 years to clarify materiality and has failed to do so; indeed, the Commission has actually reverted to a less sensible approach. And the "common law of consent decrees" problem has greatly accelerated in the last 18 or so years as the Commission has applied both deception and unfairness in novel ways that push the boundaries of both policy statements — all without effective judicial oversight.

We believe that real, lasting reform will likely require Congressional intervention — and that Congress has essentially three options:

1. Require the FTC to issue a policy statement on materiality, within certain parameters;
2. Constrain the FTC by statute, akin to adding Section 5(n) in 1994, and
    a. Attempt to craft limiting principles itself; or
    b. Outsource the task of deciding on limits to a Privacy Law Modernization Commission, such as we have previously proposed, and then implement the recommendation in legislation; and/or
3. Focus on process reforms that will make the FTC more likely to have to litigate in court — so that the courts will be in a position to insist that the FTC better explain its analysis.

We believe all three may be necessary, but that the second two are especially critical in the long term: Commissioners will come and go but the FTC should remain laser-focused on consumer injury.

A New Policy Statement on Materiality?

Congress could ask or even require the FTC to issue a Policy Statement on Materiality — or, perhaps "guidelines" — making clear that these are intended to elaborate upon and clarify, not supersede, the Deception Policy Statement. This could mark a substantial improvement over the

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[59] 45 U.S.C. § 45(b).

[60] Wright Dissent, *supra* note 25, at 2.

status quo, in much the same way that, at least for a time, the UPS and DPS served to constrain the FTC's uses of unfairness and deception.

In short, a new policy statement would likely be better than nothing — if it actually happened. Given the refusal of Chairwoman Ramirez even to entertain the proposals by Commissioners Wright and Ohlhausen for a Policy Statement on Unfair Methods of Competition (the third major area of the FTC's Section 5 authority, which the FTC has never defined and which simply was not at issue in the 1970s/80s fights over consumer protection[61]), it seems likely that significant political pressure would have to be exerted to force the FTC to do something it does not want to do — effort that we believe would be better spent on legislative solutions.

But, in addition, we see several obvious drawbacks to this approach:

1. **The FTC can revoke a policy statement at any time** without any notice or public input.[62] This is precisely what the FTC did in 2012, summarily revoking a policy the Commission's 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases (better known as the "Disgorgement Policy Statement") — over the loud dissent of Commission Ohlhausen.[63]
2. Even while in effect, **policy statements aren't actually binding upon the FTC** — as explained below.
3. **The FTC has little incentive to constrain its discretion**, so the any policy statement it did produce would likely only formalize its current, expansive views of materiality.

Putting the Deception and Unfairness Policy Statements in Context

Crafting effective legislation requires understanding the historical perspective of both the Deception and Unfairness Policy Statements, which the Commission offered to forestall further legislative reforms (as Congress had curtailed FTC rulemaking earlier in 1980).[64] It's difficult to overstate the importance of the 1980 Unfairness Policy Statement in the history of the FTC: Narrowing the scope of unfairness to focus on consumer injury was essential to ensuring the political survival of the FTC as an institution — so damaged was its credibility by its adventur-

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[61] *See* Commissioner Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act (June 19, 2013), *available at* http://www.ftc.gov/speeches/wright/130619umcpolicystatement.pdf; Commissioner Maureen K. Ohlhausen, Section 5: Principles of Navigation (July 25, 2013), Remarks at the U.S. Chamber of Commerce, *available at* http://ftc.gov/speeches/ohlhausen/130725section5speech.pdf.

[62] *See, e.g.*, FTC Withdraws Agency's Policy Statement on Monetary Remedies in Competition Cases Will Rely on Existing Law (Jul. 31, 2012), *available at* https://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies.

[63] *See* Statement of Commissioner Maureen K. Ohlhausen, Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (Jul. 31, 2012), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120731ohlhausenstatement.pdf.

[64] *See* Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Lemon Law), Pub. L. No. 93-637, 88 Stat. 2183 (codified at 15 U.S.C. §§ 2301-2312 (2000)); *see also* Beales, *supra* note 4.

ism and boundless legal claims of authority in the 1970s.[65] It's not surprising, then, that Congress in 1994 (a heavily Democratic Congress, as in 1980) codified the UPS into law.[66] Indeed, the 1994 amendment actually narrowed the scope of unfairness even further in a way so subtle it is rarely acknowledged: by clarifying that "public policy considerations may not serve as a primary basis for [determining that a practice is unfair],"[67] something the UPS *had* allowed.

The 1983 Deception Policy Statement was less politically contentious, but in substantive ways no less important. Just as the UPS resolved a heated debate about the need for the FTC to establish *consumer injury*, the DPS resolved a heated debate about the need for the FTC to establish *materiality*.[68] In both cases, the FTC abandoned the position it had taken in the 1970s: that it had free rein to act without evidence of harm or materiality — which, it clarified in the UPS, was simply a proxy for injury.[69] Both Statements also reflected compromises between the FTC's earlier positions and more radical curtailing of the FTC's authority: abolishing unfairness altogether or abolishing the presumption of materiality.

Yet the two Statements differ in one crucial respect: Congress has never codified, let alone curtailed, the DPS. The 1994 codification of the UPS marks not only the last time Congress modified the FTC Act, but also the last time it reauthorized the Commission.[70] This means that, strictly speaking, the Deception Policy Statement isn't actually binding on the FTC the way that a statute or judicial decision is; subject to certain constraints, the FTC can always change its mind.[71]

Back in 1999, in the FTC's very first "information broker" case (*TouchTone*), the Commission found that the "pretexting" company had deceived not consumers but the banks that held their information when its representatives pretended to be the customer in order to gain access to information about the customer.[72] In addition to its unfairness claim, the Commission insisted that the DPS:

> was not issued by this agency to serve as a straitjacket for Section 5's deception authority. This Commission has never so held. And, with due respect to [dissenting Commissioner Swindle's] unduly narrow interpretation, no Court of Appeals has

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[65] *See* Beales, *supra* note 4.

[66] Codified at 15 U.S.C. §45 (2012).

[67] *Id.* at §45(n).

[68] *See* Deception Policy Statement, *supra* note 6.

[69] *Id.* at 191("Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept.").

[70] The FTC has thus been operating for 21 years — an entire generation — on short-term appropriations, something that is highly unusual even in today's era of a dysfunctional legislative branch.

[71] *See supra* n.51 and accompanying text.

[72] *See* FTC v. TouchTone, Complaint, Civil Action No. 99-WM-783 (D. Colo. 1999), *available at* https://www.ftc.gov/sites/default/files/documents/cases/1999/04/ftc.gov-touchtonecomplaint.htm.

> found the Statement to preclude challenging as deceptive certain acts or practices that were not foreseen at the time or described within its four corners.[73]

In other words, the FTC refuses to be constrained by its own policy statement. It has brought at least some cases that appear to go beyond the "four corners" of the DPS. A year after *Touch-Tone*, the FTC brought another enforcement action based on business-to-business deception, this time claiming that tech giant eBay was deceived by the upstart Reverse Auction.[74] More recently, the Commission has wielded its deception authority in business-to-business conduct concerning standard-essential patents — over the strong dissent of Commissioner Ohlhausen.[75]

FTC Process Reform Legislation

At a minimum, Congress could pass legislation that looked something roughly like Section 5(n) of the FTC Act:

> The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.[76]

Language written at this high conceptual level could help — simply by codifying what the DPS already says. But to actually address the problem illustrated by the *Nomi* settlement, the legislation would likely have to be more granular. Where Congress was able to distill the key provisions of the UPS into one sentence, and narrow it further with another, clarifying the definition of materiality would be harder. It would likely require more clearly defining the *process* by which materiality is defined, including:

Appropriately constraining the FTC's discretion without hamstringing the agency's legitimate consumer protection efforts — creating an administrable rule but not a blank check — would not be easy, just as it was not when the FTC wrote either Policy Statement, either. But Congress could draw on at least three sources of authority to assist it:

1. FTC Commissioners, each of which could be invited to suggest language;

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[73] In the Matter of Touch Tone Information, Inc., File No. 982-3619, Statement of Chairman Pitofsky & Commissioners Anthony & Thompson, *available at* https://www.ftc.gov/sites/default/files/documents/cases/1999/04/ftc.gov-majoritystatement.htm.

[74] FTC v. ReverseAuction.com, Inc., Complaint. *available at* http://www.ftc.gov/sites/default/files/documents/cases/2000/01/www.ftc_.gov-reversecmp.htm.

[75] *See* In re Robert Bosch GmbH, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen, at 3- 4 (Nov. 26, 2012), *available at* http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf.

[76] 15 U.S.C. § 45(n) (2012).

2. Congress's usual legislative process, including both hearings and a GAO study; and
3. A Privacy Law Modernization Commission, such as we have proposed.[77]

But if the FTC's experience in recent decades has taught us anything, it is that articulating better substantive standards is only half the problem — whether in policy statements (*e.g.,* UPS, DPS) or in binding, statutory form (*e.g.,* Section 5(n)). These constraints will mean little if the FTC is not subject to some external constraint. Clearer standards might spur more statements by Commissioners and thus more analysis of each case, but they will never supplement for the key missing ingredient: litigated decisions by which Article III courts enforce these limiting principles.[78]

Possible specific reforms Congress should consider include:

1. Creating a standard for settling cases that:
    a. Is higher than the very low bar set by Section 5(b) for *bringing* the investigation;
    b. Requires the FTC to clearly tie the consent decree to the conduct at issue (something that, in theory, is required by the Supreme Court's 1968 *Colgate-Palmolive* decision,[79] but which the Commission has consistently failed to do);
2. Requiring that the FTC say more in each settlement about its legal claims;
3. Making settlements subject to judicial review;
4. Vesting one Commissioner with veto power over a settlement: the right to insist that the matter be referred to a federal court, which would decide whether the FTC had satisfied its burden. In the absence of a defendant willing to litigate the matter, that Commissioner could even be given statutory standing to argue the case in court.
5. Re-examining the Commission's Compulsory Investigative Demand (CID) process to ensure that it does not, through its cost and lack of due process, facilitate the FTC coercing settlements based on questionable legal claims;
6. Requiring the FTC to issue retrospective guidelines summarizing the doctrinal trends in its enforcement actions, akin to the FTC and DOJ's various merger guidelines; and
7. Requiring the FTC to publish more guidance on cases it did *not* bring, either in the form of
    a. Closing letters;
    b. Analysis in guidelines; or

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[77] Comments of TechFreedom & International Center for Law and Economics, In the Matter of Big Data and Consumer Privacy in the Internet Economy, Docket No. 140514424–4424–01, at 4 (Aug. 5, 2014), *available at* http://www.laweconcenter.org/images/articles/tf-icle_ntia_big_data_comments.pdf ("A Privacy Law Modernization Commission could do what Commerce on its own cannot, and what the FTC could probably do but has refused to do: carefully study where new legislation is needed and how best to write it. It can also do what no Executive or independent agency can: establish a consensus among a diverse array of experts that can be presented to Congress as, not merely yet another in a series of failed proposals, but one that has a unique degree of analytical rigor behind it and bipartisan endorsement. If any significant reform is ever going to be enacted by Congress, it is most likely to come as the result of such a commission's recommendations.").

[78] *See* Szoka, *supra* note 23.

[79] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1968) (an order's prohibitions "should be clear and precise in order that they may be understood by those against whom they are directed," and that "[t]he severity of possible penalties prescribed . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.") (internal citations omitted).

c. Annual reports that summarize such cases without identifying the parties;

This is merely an illustrative list of more obvious examples. Since the FTC's processes have not been substantially modified (or probably even re-examined) by Congress since 1980, and even the 1980 assessment focused on rulemaking, not enforcement, any proper reauthorization of the agency will likely involve many more, smaller changes, including reassessment of processes and organizational structure. FTC Commissioners and staff will play one of three roles in such a process, and in helping bring it about:

1. Ideally, they will be an active, constructive participant, helping Congress understand both sides of each issue, the tradeoffs between administrability and rigor of legal standards, and the error costs of both making the FTC's job too easy and making it too hard — just as in 1982-3, Chairman Miller and other Commissioners presented very different visions of deception (require not just materiality but proof of harm vs. allow the Commission to generally presume materiality), and the Commission reached the middle ground of the DPS whose precise application is at issue in *Nomi*.
2. Conversely, the Commission could simply drag its heels, stonewalling any efforts to constrain the FTC's discretion or provide guidance to those regulated by it — as the current FTC leadership has stonewalled proposals by Commissioners Wright and Ohlhausen for a Policy Statement on Unfair Methods of Competition[80] — and these issues will simply fester indefinitely.
3. Congress may simply have to compel the agency to cooperate against its will, just as Congressional leaders of both parties forced the FTC in 1980 to issue the Unfairness Policy Statement.

Conclusion

Nomi will undoubtedly be remembered as the first in what is sure to be a series of cases dealing with collection of data "offline" — a distinction that will likely increasingly seem quaint as the "Internet" permeates our everyday lives. Its true importance, however, has little to do with the specifics of the case (*e.g.*, in-store signage, creative systems for pushing notification to users about tracking) and everything to do with doctrine and process.

The majority's logic reveals its true conception of deception, one in which the materiality requirement so essential to the Deception Policy Statement is reduced to a mere formality. By refusing to adequately weigh competing evidence, the Commission has claimed maximum discretion — the very opposite of "doctrine," which is best understood as a conceptual framework or procedural steps that the agency is supposed to use to decide particular cases.

What the case says about the FTC's processes may be even more disturbing: yet again, completely outside the legal system, the FTC has made a significant leap in doctrine, nullifying *the* core element of what is supposed to be one of its two foundational Policy Statements. Nomi was not willing to litigate the case, and so the matter stands at its unsatisfying end: In a few sentences, the complaint lays out a theory of deception that is difficult to reconcile with the DPS and is

[80] *See supra* note 61.

supported by less than two pages of legal analysis by the majority. Even that much analysis was provided only because of the dissent of Commissioner Wright, who objected to the majority's legal analysis (not merely its exercise of prosecutorial discretion, as did Commissioner Ohlhausen). If anything, the *Nomi* case is remarkable not for how little legal analysis it contains, but for how *much* it contains relative to the many other cases where the FTC made small leaps without objection. This may resemble the "common law" in that it is case-by-case and that it changes over time, but it lacks the essential feature of the common law: rigorous analysis of fine points of doctrine, to ensure that each leap, however small, is actually justified by the overarching doctrines that the FTC is supposed to be applying, understood in their full context.[81]

If "discretion" is the FTC's goal, "attenuation" is the process by which it has achieved that: without judicial review, each case becomes more attenuated from the starting point. Thus the concept of deception has become more attenuated from consumer injury. Materiality was supposed to marry the two, while giving the FTC a more easily administrable rule, yet the FTC has replaced the easier exercise of establishing materiality with a general presumption of materiality, thus attenuating the result even further from the overall purpose of the agency (preventing consumer injury). The same is true for the various factors that are supposed to justify the presumption, like establishing intent (to justify presuming that an omission is material).

At every level of analysis, the pattern is the same: maximize the FTC's discretion and attenuate the analysis as much as possible from an analysis of consumer welfare. Doing so moves the FTC ever further from the compromise enshrined in the DPS, rooted in the uncontroversial recognition that the FTC may sometimes be mistaken in its assessments, and that its interventions may do consumers more harm than good.

That pattern is unlikely to change unless Congress intervenes to return the FTC to the Deception Policy Statement *and* also to ensure that the courts play a greater role in scrutinizing the agency's leaps in the future. Otherwise, the pattern of maximizing discretion through attenuation will simply play out again and again.

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[81] *See* Manne & Sperry, *FTC Process and the Misguided Notion of an FTC "Common Law," supra* note 22 at 8 ("The common law thus emerges through the accretion of marginal glosses on general rules, dictated by new circumstances.").