

# Morrison & Foerster Client Alert

April 28, 2015

## FTC Case Could Be a Harbinger of a Notice and Choice Regime for Brick-and-Mortar Retailers Engaged in Tracking

By David F. McDowell, Julie O'Neill, and Adam Fleisher

In law school, everybody learns the adage that hard cases make bad law. When it comes to the Federal Trade Commission ("FTC"), a better aphorism might be, "easy cases make new law." The FTC's recent settlement with Nomi Technologies, Inc. ("Nomi") is, as the FTC's [press release](#) notes, the "FTC's first against a retail tracking company." On its face, the case is like many FTC privacy cases: it challenges a statement in the company's privacy policy for allegedly being inconsistent with the company's actual practices and thus deceptive. Under the surface, however, the case may open the door for the FTC to create a notice-and-choice regime for the physical tracking of consumers, analogous to its well-established notice-and-choice regime for online tracking.

### "RETAIL TRACKING" AND NOMI'S ALLEGEDLY DECEPTIVE PRACTICES

Retail tracking occurs when retailers, or their third-party service providers, capture and track the movements of consumers in and around stores through their mobile devices, such as through the use of WiFi or beacons, in order, for example, to better understand store traffic or serve targeted offers.<sup>1</sup> Given the potential lack of transparency around the practice and the corresponding privacy implications, it is not surprising that the FTC decided to address the practice.

It is also not surprising that the FTC has moved cautiously into this space. The facts of *In re Nomi*, as alleged in the [complaint](#), are simple. Nomi provided mobile device tracking technology that enabled its clients, brick-and-mortar retailers, to receive analytics reports about aggregate customer traffic patterns — that is, how long consumers stay in the store and in which sections, how long they wait in line, what percentage of consumers pass by the store altogether, and so on. Nomi represented in the privacy policies posted on its website that it would "[a]lways allow consumers to opt out of Nomi's service on its website as well as at any retailer using Nomi's technology." While Nomi offered an opt-out on its website, it allegedly did not provide an opt-out mechanism at its clients' retail locations, thus rendering its privacy policy promise deceptive, in violation of

### UNITED STATES

#### California

Tiffany Cheung	(415) 268-6848
Kimberly R. Gosling	(858) 314-5478
Rebekah Kaufman	(415) 268-6148
Christine E. Lyon	(650) 813-5770
David F. McDowell	(213) 892-5383
Purvi G. Patel	(213) 892-5296
Andrew Serwin	(858) 720-5134
Stephanie Sharron	(650) 813-4018
William L. Stern	(415) 268-7637
Nancy R. Thomas	(213) 892-5561
David M. Walsh	(213) 892-5262

#### New York

Cindy Abramson	(212) 336-4178
Melissa Crespo	(212) 336-4354
John F. Delaney	(212) 468-8040
Michael B. Miller	(212) 468-8009
Sotirios Petrovas	(212) 336-4377
Suhna N. Pierce	(212) 336-4150
Marian Waldmann Agarwal	(212) 336-4230
Miriam H. Wugmeister	(212) 506-7213

#### Washington, D.C.

Patrick Bernhardt	(202) 887-8771
L. Richard Fischer	(202) 887-1566
Adam J. Fleisher	(202) 887-8781
Libby J. Greismann	(202) 778-1607
Julie O'Neill	(202) 887-8764
Cynthia J. Rich	(202) 778-1652
Nathan David Taylor	(202) 778-1644

### EUROPE

#### Berlin

Hanno Timmer	49 30 72622-1346
Lokke Moerel	44 20 79204054
Alex van der Wolk	44 20 79204054

#### Brussels

Karin Retzer	32 2 340 7364
Alja Poler De Zwart	32 2 340 7360

#### London

Susan McLean	44 20 79204045
--------------	----------------

### ASIA

#### Beijing

Paul D. McKenzie	86 10 5909 3366
------------------	-----------------

#### Hong Kong

Gordon A. Milner	852 2585 0808
------------------	---------------

#### Singapore

Daniel P. Levison	65 6922 2041
-------------------	--------------

#### Tokyo

Toshihiro So	81 3 3214 6568
Yukihiro Terazawa	81 3 3214 6585

<sup>1</sup> The practice has been covered by publications including the *New York Times*. See, e.g., Attention, Shoppers: Store Is Tracking Your Cell, *N.Y. Times*, Jul. 14, 2013 (describing efforts by retailers to track their customers' movements using the Wi-Fi signals transmitted by smartphones, and describing the types of services provided by Nomi).

# Client Alert

Section 5 of the FTC Act. The FTC further alleged that Nomi represented, expressly or *by implication*, that consumers would be given notice when they were being tracked at a retail location. The Statement of Chairwoman Ramirez and Commissioners Brill and McSweeney in support of the complaint and proposed order explains 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.” By allegedly failing to provide notice when a retail location was utilizing Nomi’s service to track customers, Nomi’s implied promise to provide notice was also deceptive.

## THE FTC KEEPS *NOMI* NARROW, FOR NOW. WHAT LESSONS CAN OTHERS LEARN?

The proposed order provides for very narrow injunctive relief: it simply enjoins Nomi from misrepresenting how consumers can control the collection, use, disclosure, or sharing of information collected from them or their devices, and from misrepresenting the extent to which consumers will receive notice about such tracking.

*Nomi* is the FTC’s first case involving brick-and-mortar tracking, and the FTC is not yet creating new law: specifically, the proposed order *does not* require the company to provide notice and choice in connection with retail tracking. This raises the question of whether the FTC would ever impose such an obligation. We have no certainty around the FTC’s view, but it is reasonable to anticipate that the FTC will move in a direction that mirrors its position with respect to online tracking — that is, that *at least* when information is collected for targeted advertising purposes, a company should provide meaningful disclosures to consumers about the tracking and choice with respect to whether to allow it.<sup>2</sup> The FTC could ultimately deem a failure to provide such notice and/or choice an unfair and/or deceptive practice under Section 5 of the FTC Act.

What does this mean for retailers and other places of business? In light of *Nomi* and our expectations with respect to the direction the FTC is likely to take, companies that engage in in-store tracking should consider how best to provide their customers with notice and choice. One option is to track only those customers who have downloaded the retailer’s app and agreed to be tracked for identified purposes, such as the delivery of targeted offers. Another option is to use a vendor that subscribes to the Future of Privacy Forum Mobile Location Analytics Code of Conduct,<sup>3</sup> which requires participating mobile location analytics companies to, among other things, provide consumers with appropriate notice and choice.

### About Morrison & Foerster:

We are Morrison & Foerster — a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We’ve been included on *The American Lawyer’s A-List* for 11 straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

Morrison & Foerster has a world-class privacy and data security practice that is cross-disciplinary and spans our global offices. With more than 60 lawyers actively counseling, litigating, and representing clients before regulators around the world on privacy and security of information issues, we have been recognized by *Chambers* and *Legal 500* as having one of the best domestic and global practices in this area.

<sup>2</sup> See FTC Staff Report: Self-Regulatory Principles for Online Behavioral Advertising (Feb. 2009), available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-staff-report-self-regulatory-principles-online-behavioral-advertising/p085400behavadreport.pdf>.

<sup>3</sup> See <http://www.futureofprivacy.org/issues/smart-places/>.

## Client Alert

---

For more information about our people and services and the resources we offer such as our treatise setting out the U.S. and international legal landscape related to workplace privacy and data security, "[Global Employee Privacy and Data Security Law](#)," or our free online Privacy Library, please visit our [practice page](#) and follow us on Twitter [@MoFoPrivacy](#).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.*