COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION
Regarding February 4, 2013 "Consensus Draft"
National Telecommunications and Information Administration Multi-Stakeholder Process
Mobile Application Transparency

The Entertainment Software Association (ESA) and its members have a well-respected track record of developing innovative solutions to promote privacy, transparency, and rich user experiences in the video game industry, including on the mobile devices for which many of ESA's members publish games. Games are the most successful apps sold for mobile devices, with game developers accounting for 24 of the top 25 grossing developers in the two most popular app stores.[1] The following comments are designed to allow developers to make more effective privacy disclosures than those proposed under the current "consensus" draft circulated as part of the mobile application transparency multi-stakeholder process. These changes will better preserve the robust user experiences that have made mobile games such a vibrant and successful part of the mobile ecosystem. We are concerned that the approach currently described in the consensus draft will result in short-form notices that few, if any, consumers will find useful.

Any Consensus Document Should be Flexible about How to Implement Short-Form Notices

In general, ESA supports a flexible transparency approach that gives developers the ability to create effective short form disclosures. Any acceptable consensus document must allow a variety of short notice formats—e.g., formats developed by ESRB, ACT, TRUSTe, etc.—to potentially satisfy its requirements. Stakeholders should avoid endorsing any particular or overly-specific style of short-form notice screen to the exclusion of alternatives.

The current standards in Section III are not sufficiently flexible about how and where compliant short-form notices incorporate the mandatory disclosure language from Section II. For example, any consensus document should be open to the possibility of moving any required text—whatever the "required" text should eventually be—into other layers or pop-ups, rather than requiring such text to appear in the primary screen of the short-form notice. Developers should use their expertise in user experience to choose the most effective disclosure model, and the consensus document should give them that flexibility. A one-size-fits-all approach could actually harm effective disclosure by limiting creative and effective solutions by app developers.

While the current consensus draft is silent on this point, a "discoverable" short-form notice is the best way to ensure a good consumer experience. A requirement for app developers to design the short form notices to force a user to click "accept" or otherwise move through multiple screens of a short-form privacy notice before reaching the app itself would have a profoundly negative impact on user experience without concomitant user transparency.

[1] *See* **Forbes**, Top 25 Developers Receive Half of App Store Revenue, available at http://www.forbes.com/sites/chuckjones/2012/12/06/top-25-developers-receive-half-of-app-store-revenue/ (also noting that those top 25 developers account for half of all app store revenue)

Any Consensus Document Should Not Mandate Text-Based Notices

A requirement that the user notices be primarily text-based does not make sense. In the February 4 consensus draft, the drafters "clarified" that *all* of the category text and parentheticals from Sections II.A and II.B *must* appear in the short-form notice, which forces developers to create a "wall of text" that will confuse and frustrate consumers, undermining the core purpose of short-form disclosures—to deliver the information consumers are looking for in a format that they can easily and quickly understand. Prescribing that an app must list all of the categories in Section II—parentheticals included—is neither short nor notice.

Any consensus document should offer a more flexible framework than the current Section III: namely, a framework that would permit the data items to be provided in any effective format (including a form with icons, or mixed text and icons) that conveys the appropriate disclosures. Subsequent user testing may illuminate which alternative forms, in fact, convey the information in Section II, but, right now, the better approach is a commitment to format neutrality. This approach will let developers offer clear disclosures that users will understand and appreciate, using a creative mix of text or icons. The types of disclosures also may vary based on the types of users; allowing such discretion would facilitate the creation of notices that best reach the audience using the application.

Any Consensus Document Should Not Require Data Elements if the Activity Does Not Occur

The current consensus draft suggests that all of the individual Section II data elements must be listed in the notice, regardless of whether the activity will take place within the application. This type of disclosure is over-inclusive, and does not allow for differentiation based on business practices. A useful alternative would be to require the short form notice to only list or display the *applicable* data elements described in Section II.

If all seven data elements have to be displayed, consumers likely will not click through to see if all seven activity categories are taking place; from a transparency perspective, this may be a worse user experience since the user will not be able to easily discern the data activities. Even presenting a "grayed-out" version of the elements will add to the already looming problem of clutter and notice fatigue. To maximize effectiveness and presentation, any consensus document should give experience-minded developers the option of displaying all of the data elements while only requiring the applicable ones.

Additional Specific Suggestions

In addition to the overarching concerns noted above regarding the current draft's overly prescriptive requirements, ESA also has concerns about other specific elements of the current consensus draft:

- Much of the preamble does not belong in an operational document like this, even with caveats. At the very least, the preamble should not state that these short form notices "reflect[] the state of industry best practices."

- Section II.A should clarify whether "collection" also encompasses "access" (which would occur when an app does *not* pull the data off the device to transmit or store it, but merely accesses that data for the app to use on the phone itself. An example would be an app that accesses and processes contacts on the phone to send invitations but that does not actually collect or store the contact information.)
- Section II.B should clarify that the disclosures only apply when the app shares data that can be used to identify or contact the user or device.

ESA thanks the NTIA for its leadership on these issues.

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