Testimony

of Jonathan Zuck
President
The Association for Competitive Technology

before the
Committee on Energy and Commerce
The Subcommittee on Commerce, Manufacturing, and Trade

on
Balancing Privacy and Innovation: Does the President's Proposal Tip the Scale?

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Chairman Bono Mack, Ranking Member Butterfield, and distinguished members of the Committee: My name is Jonathan Zuck, and I thank you for holding this important hearing examining the various proposals for government regulation of personal privacy.

I am the president of the Association for Competitive Technology (ACT). ACT is an international advocacy and education organization for people who write software programs--referred to as application developers. We represent over 4,000 small and mid-size IT firms throughout the world and advocate for public policies that help our members leverage their intellectual assets to raise capital, create jobs, and innovate.

My goal today is to explain the evolving nature of the mobile application industry and how the Administration's proposed new privacy framework and its multi-stakeholder process offers both promise and challenges to continued innovation in this marketplace.

Specifically, app developers have three key messages for the members of the Committee:

1. **The app marketplace is still in its earliest growth stage, rapidly continuing to evolve.**
2. **The best way to address consumer privacy concerns is through a multi-stakeholder process producing voluntary, but enforceable, codes of conduct. However, it should avoid regulating technology instead of**

behavior and promote conditions to encourage the free exchange of ideas.

3. **App developers and industry organizations are adopting measures to improve consumer privacy protections and increase awareness of the potential uses of personal information.**

Evolution of the App Marketplace

I am often invited to speak on the subject of mobile apps and each time I do it seems new figures emerge about the growth trajectory of our marketplace. Just two years ago, total industry revenues were $3.8 billion and expected to rise to $8.3 billion.[1] At the close of last year we had grown to $20 billion and are projected to reach $76 billion by 2015.[2] This is a meteoric rise for an app economy that didn't even exist four years ago.

This is also a small business phenomenon. Over 88 percent of the top 500 app makers are small businesses.[3] And as small business is the engine of economic growth in our country, app makers are contributing greatly to the job market with half a million jobs created in this new marketplace.[4] These jobs can be found anywhere. Thirty percent are in the state of California – but the rest are spread out all across the country.

As a brand new industry, we are experiencing rapid changes in the marketplace with new business models emerging every year. Recently freemium apps and in-

[1] http://www.eweek.com/c/a/Mobile-and-Wireless/Apple-Google-Lead-38B-Mobile-App-Charge-IHS-512817/
[2] http://www.slideshare.net/joelrubinson/an3-us-appeconomy20112015
[3] http://Republicans.EnergyCommerce.house.gov/Media/file/Hearings/CMT/100511/Reed.pdf
[4] http://www.technet.org/new-technet-sponsored-study-nearly-500000-app-economy-jobs-in-united-states-february-7-2012/

app purchasing have become the favored means to monetize new releases.[5] Not long ago, paid downloads ruled the day. Through it all, developers are still exploring whether the advertising model can generate enough income on its own.[6]

While business models continue to evolve, developers are also experimenting with different platforms. Currently Apple's iOS provides the most dependable platform, but RIM has been aggressively wooing developers to Blackberry as its userbase in Asia and the Middle East remains strong.[7] Android continues to gain marketshare, though the platform suffers from fragmentation; and with dramatic changes coming in the new Metro user interface of Windows Phone 8, many software developers are porting their programs to that new mobile platform.[8]

Some very successful developers who are creating innovative apps come from the states of Members on this Committee. Companies like Zco Corporation whose latest release is PolicePad, an iPad-based system that can replace PC and telemetry systems in police cruisers at a fraction of the cost. Zco Corporation employs 20 people in New Hampshire making custom applications for a wide-range of consumer devices as well as 3D animations. Or Interknowlogy in Carlsbad, California which makes custom applications for the healthcare industry, government and non-profits like the San Diego Zoo. Or Computer Ways, Inc., in

[5] http://www.nytimes.com/2012/03/19/technology/game-makers-give-away-freemium-products.html?_r=1&pagewanted=all
[6] http://tech.fortune.cnn.com/2011/11/21/piper-jaffray-android-app-revenue-is-7-of-iphones/
[7] http://www.engadget.com/2012/02/03/RIM-free-BlackBerry-Playbook-Android/
[8] http://www.reuters.com/article/2012/03/20/mobile-developers-idUSL1E8EJAGT20120320

Deerfield Beach, Florida, which developed an app bringing the beauty of Florida coast to the Windows 7 phone.

With such a dynamic mobile ecosystem it is difficult to predict where the market is headed next and what industry standards will be adopted. This makes it difficult to implement a regulatory regime for the app marketplace. The industry is far from mature and activities or practices that regulators seek to address may no longer exist in their current form by the time new rules can be implemented.

The Multi-stakeholder Process Offers Promise as Well as Concerns

While the app marketplace is experiencing dramatic growth and innovation, concerns for consumer privacy online have grown. While most of the headlines have been earned by big companies operating in traditional internet commerce, the app industry has not been immune from privacy missteps. Various federal agencies have considered proposals to protect consumers' personal information including apps among their areas of concern.

The Administration recently published its proposed privacy framework, *Consumer Data Privacy in a Networked World*,[9] featuring several principles that ACT emphasizes in its recommendations for developers. Specifically, the Administration has identified seven areas of focus around which it has crafted a Consumer Privacy Bill of Rights. ACT advised the Administration during the drafting of this document

[9] http://www.whitehouse.gov/sites/default/files/privacy-final.pdf

and has been invited to participate in the multi-stakeholder process that is intended to produce a consensus agreement on a voluntary industry code of conduct.

ACT strongly supports the concept outlined by the multi-stakeholder process proposed by the Administration. Bringing together representatives from industry, government, academia, and advocacy to collaborate in the development of voluntary codes of conduct provides the best opportunity to reach an agreement that works for everyone.

While we believe strongly in the industry's ability to implement self-regulatory measures, it is clear that bad actors deserve swift enforcement response. When reckless companies get attention for violating consumers' privacy rights it's bad for everyone's business. Developers only enjoy success in the marketplace when consumers have confidence in the safety of their personal information online.

For this reason ACT applauded the FTC when it exercised its existing enforcement authority to punish app makers violating the Children's Online Privacy Protection Act (COPPA). Just this week the FTC took action against app maker RockYou for misleading customers about their privacy and failing to maintain adequate data protection practices.[10] The FTC has also taken enforcement action against Playdom – now a Disney subsidiary – for violating COPPA, fining them $3 million,[11] and against a small app company, W3 Innovations, fining them $50,000 for similar

[10] http://news.cnet.com/8301-1009_3-57405308-83/rockyou-settles-with-ftc-over-charges-of-exposing-user-info/
[11] http://news.cnet.com/8301-13506_3-20062566-17.html

infractions.[12] These actions showed that the FTC is prepared to go after companies both large and small if they violate children's privacy.

These enforcement measures also showed that the Commission has sufficient authority in consumer privacy cases under COPPA and Section Five of the FTC Act. In testimony before the Senate Commerce Committee last year,[13] and again in Chairman Liebowitz's press conference earlier this week,[14] the FTC has confirmed it needs no new regulations as it already possesses sufficient authority. Voluntary adoption of codes of conduct will provide the Commission with additional opportunities to exercise that authority should the need arise.

While we are thankful to be part of the multi-stakeholder proceedings and believe it is critical that app developers have a role in these discussions, we have a few concerns about the process initiated by the National Telecommunications and Information Administration (NTIA). First, a comprehensive approach is the only way to address the issue of consumer privacy and it appears the NTIA has deviated from this path. Secondly, it is crucial for participants in this process to feel unfettered in their participation, free to engage in wide-ranging discussion and propose bold solutions. We believe the free exchange of ideas is likely be sharply curtailed by the format of the discussions.

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[12] http://9to5mac.com/2011/08/15/w3-innovations-pays-the-ftc-50000-for-collecting-childrens-info-in-ios-apps/
[13] http://www.c-spanvideo.org/program/MobileTechn
[14] http://htc-01.media.globix.net/COMP008760MOD1/ftc_web/FTCindex.html#March_26_12

Consumers have raised privacy concerns across the broad spectrum of online properties so it makes little sense to target one technology sector. In fact, to do so is the cardinal sin of regulation. Anyone who works in the technology regulatory or legislative fields has heard the admonition, "regulate bad behavior not technology." Sadly, we are concerned this is the sort of step NTIA appears to be taking. Through its Request for Comment, the NTIA suggests it's necessary to convene an "initial multi-stakeholder process to facilitate the implementation of the Transparency principle in the privacy notices for mobile device applications."[15] This is intended to occur outside the broader industry framework and to precede any efforts to address the issue of privacy in a comprehensive fashion.

Singling out the work of an industry of small business developers is unnecessary and counterproductive. It sends a chilling message to entrepreneurs and startups and will have a devastating impact on innovation. Moreover, it is difficult to fathom why regulators want to devote all their attention to a technology overwhelmingly comprised of small businesses while big companies are in the headlines every month stoking the privacy fears of Internet users across the globe. NTIA needs to return its focus to the big picture of online privacy and leave behind ill-advised efforts to target specific technologies.

It is also necessary to sound a note of caution on the suggestion of a fully transparent multi-stakeholder process. It is important to remember that industry

[15] http://www.ntia.doc.gov/files/ntia/publications/fr_privacy_rfc_notice_03052012_0.pdf

participants will be searching for a resolution that involves compromise – compromise that could negatively affect their companies' bottom lines and attract criticism. In order for the best solutions to emerge in a consensus fashion, stakeholders must have confidence that the dialogue provides wide latitude to offer a range of alternatives.

If this process takes the form of a public discussion, industry participants will be looking over their shoulders or sitting on their hands instead of offering bold ideas for workable solutions. Fully transparent proceeding will not produce the free exchange of ideas and consensus agreement that is the stated aim of the stakeholder process. For NTIA to get the best results from these efforts, they need to value positive outcomes more than an open process.

As President of ACT, I have spent a considerable portion of my time in hotel conference centers around the world working on one of the biggest multi-stakeholder efforts of all time, ICANN. Additionally I've done my multi-stakeholder time at W3C, the EU Data Directive Safe Harbor provisions for US eCommerce Companies, WIPO on Discussions on Patent Law Harmonization and the EC working group on European Software Strategies. If there's one lesson I've learned, it's that multi-stakeholder processes move slowly; while industry moves to respond to customers within hours.

App Developers and Industry Groups Taking the Lead on Privacy

While federal regulatory bodies and multi-stakeholder groups have been considering measures to address consumer privacy, app makers have been learning about the issue and developing their own self-regulatory responses. App makers are particularly concerned with consumer confidence in the safety of private information because in the absence of this assurance they face reluctant customers.

The biggest hurdle to implementing industry-wide privacy standards is developer education. There are over 200,000 app developers in the United States. App makers want to do the right thing on privacy, but often don't know whether their app creates privacy concerns or what they need to do to be rules compliant. As most small business app developers are making customer-facing software for the first time, they are also addressing privacy issues for the first time. Matters typically handled by a legal department or chief privacy officer in a larger company are now most often handled by a small business owner.

Recognizing the need to boost developer education, ACT has been particularly active on this issue during the past twelve months. In addition to frequent meetings with lawmakers and regulators here in Washington, we have traveled around the country to speak at developer conferences to raise awareness about consumer privacy.[16]

[16] http://vimeo.com/34560160

While warning developers about possible new regulations, we have also helped to map out proactive steps they can take.

First and foremost, we advise app developers to be open with consumers about the information they collect and how it is used. We strongly advocate the use of privacy policies – even if an app maker believes no information is being collected. It is also important that this information is presented to users in a meaningful way so that they may easily comprehend it. On mobile devices this means that the information provided must be simple and clear enough to fit on a small screen.

ACT also advises app developers to be mindful of the relationships they have with third parties such as ad networks. App makers must be aware that the SDKs (software development kits) supplied by platform providers or ad networks may contain code that uses consumer information in ways they hadn't considered. Even if the developer never sees the data which passes straight through to an advertiser, the responsibility still lies with the app maker to inform the user what information is shared and how it is being used. Additionally, developers should ensure that they collect only as much information as is needed. When this information is no longer required, it should be de-identified.

ACT is committed to identifying self-regulatory methods to address this problem and we work with developer groups dedicated to finding their own solutions. One such affiliate group is Moms with Apps, comprised of more than one thousand

children's app makers. These developers are parents who decided to make apps to educate their children. They are conscious of privacy concerns and the collection of data because the last thing any of them want is to expose their own children's private information.

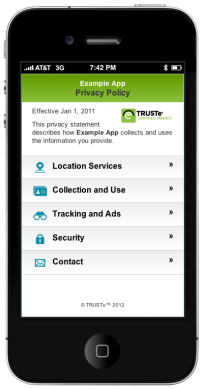
Moms With Apps Privacy Icon

Because of this concern, independent developers in Moms with Apps took the initiative to design a parental notification system that identifies the privacy settings of an app in a simple, easy to identify graphical display. While this isn't a final solution, it's a great step initiated from within the industry to safeguard user privacy.

In addition to the initiative shown by these app-making parents, other efforts have also been undertaken by industry to provide improved consumer access to privacy information. To address the accessibility of privacy policies, groups like TRUSTe[17] and PrivacyChoice.org[18] have begun offering privacy policy generators. Developers simply fill out a survey explaining the functions of their app and a privacy policy is automatically generated. This is a useful option for startups that can't afford legal staff. The resulting privacy policy is generated in both the long form that we are

[17] http://www.truste.com/products-and-services/small_medium_business_privacy/privacy_policy_generator.php
[18] http://www.privacychoice.org/resources/policymaker

accustomed to seeing (and seldom reading) as well as a more easily digestible version composed of simplified language. The other benefit of these services is that they customize the end product to appear on a small screen.



Tip the Balance?

The question posed for this hearing is whether the Administration's consumer privacy efforts tip the balance at the expense of innovation. At this time, we are hopeful that the concerns we have expressed don't tip the balance against innovation. ACT is committed to the multi-stakeholder process as an effort to improve industry efforts to protect consumer privacy. We recognize that consumer confidence in the safety of their privacy is necessary for app makers to effectively market their products. We will continue to work through this process, and with the members of this Committee, to improve these efforts.

ACT does, however, find serious shortcomings in the process outlined by the Administration for the multi-stakeholder proceedings. Targeting apps – a single technology – outside the general framework of the process is troubling and a cardinal sin of technology regulation. Isolating the industry sector composed primarily of small businesses disproportionately favors the larger companies that have repeatedly given consumers the most reason to be worried about their privacy. Additionally, suggesting that negotiators conduct proceedings without any privacy

will discourage industry participants from fully engaging in the process making consensus an elusive goal.

We will continue to convey our position on these matters during the multi-stakeholder process and encourage the Administration to make the necessary adjustments to fix these provisions.

Thank you for the opportunity to appear before the Committee today and I look forward to addressing any questions you may have.