

# Global Regulatory Enforcement Alert

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## MOBILE APPLICATION DEVELOPERS

### California AG Settlement with Amazon, Google, Apple and Other Mobile Appication Platform Providers Sends Privacy Compliance Obligations Your Way

On February 22, California Attorney General Kamala Harris announced that her office and the six leading mobile application platform providers – Amazon, Apple, Google, Hewlett-Packard, Microsoft, and RIM – have agreed to a statement of principles to foster innovation in privacy protection, promote transparency in privacy practices, and facilitate compliance with privacy laws in the mobile arena. In a press conference, Harris made it clear that failure to comply with the agreed-to principles by mobile app developers using these mobile platforms could lead to lawsuits being filed by the Attorney General's office against developers.

The statement-of-principles agreement (Agreement) will technically only be valid in California. However, the virtual nature of app marketplaces means the Agreement will have a practical effect on app marketplaces as a whole, regardless of where the app is downloaded or where the developer creates it.

#### **Existing California Privacy Laws Extend to Mobile App Developers**

Harris noted that there was a lack of understanding among developers as to whether existing California laws reached mobile apps. The Agreement clarifies this ambiguity: mobile apps are subject to the same California privacy laws as websites and other online services. Harris also emphasized that this is not a new law being enacted, but simply an interpretation of existing law in view of the “updating and upgrading of technology.”

#### **Privacy Policies Must Be Provided Upfront**

Under the Agreement, the six platforms will provide developers with an opportunity to include a hyperlink to their privacy policy when submitting apps to each marketplace. The hyperlinks will be made accessible to consumers via the app's page on the storefront. Harris stated that the Agreement seeks to provide consumers with notice of the privacy practices of each app **prior to the user's purchase or download of the app**. That is, because certain personally identifiable information may be transmitted to the developer upon a consumer's purchase/download of an app, the developer's obligation to inform consumers about privacy issues begins prior to download/purchase, and continues forward. Providing the consumer with data-handling practices at the time of purchase is also consistent with guidance released out of the Federal Trade Commission last week on children's mobile privacy.

Making reference to the recent news that certain developers had been accessing consumer address book information, Harris noted, for example, that it is not illegal to access a consumer's address book. However, failure to provide a consumer with advance notice that such information would be accessed by the app would, indeed, constitute a violation of California law.

The Agreement further requires that an app's privacy practices be provided in a “clear and complete” manner. “Clear and complete” is certainly subjective; however, Harris stressed that failure to provide privacy practices in a manner that consumers could readily understand may also qualify as a violation of the California law. This announcement reflects the view of the Attorney General that every app that collects personal information must have a privacy policy.

#### **What the Agreement Means Today**

The Agreement appears to be the first step between state government and industry to require developers to disclose their privacy practices upfront to consumers. Note, however, that for now, the Agreement only affects developers who are submitting new or updated versions of their apps to a marketplace. This limitation gives developers an opportunity to “catch up,” i.e., assess their data collection practices and draft policies that accurately reflect their use of user data.

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We encourage developers to inventory what data is collected by their apps and assess whether existing privacy disclosures could bear some revisiting.

As a caveat to the above, developers should be aware that the Agreement indicates that the six platforms have implemented, or will very shortly implement, reporting tools for consumers. These reporting tools will enable consumers to notify platform providers that a particular app is in violation with applicable terms of service and/or laws. To the extent that a current version of a developer's app is in non-compliance and reported (or possibly not "clear" enough in disclosing its practices), the platform providers are required to take action. Although precise measures have not been specified, they may include removal of the app from the marketplace or revocation of developer licenses/memberships. Also note, any action taken by a platform provider does not foreclose the possibility of a subsequent suit filed by the AG's office against the developer.

In rolling out this agreement, the AG's office made it a point to say that California law enforcement agencies may prosecute developers who violate their privacy policies under the False Advertising Law and/or the Unfair Competition Law. App developers, of course, should review their privacy practices and develop policies around how they collect and share information. Companies that hire or are hiring app developers to work with them should be sure to review the privacy policies and ensure their agreements effectively cover data privacy concerns. As noted by Harris during the press conference, "Everyone should assume and know that suits [enforcing these laws] could be started immediately."

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