

Morrison & Foerster Client Alert.

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California AG Makes Good on Promise to Pursue Apps that Don't Comply with the State's Privacy Policy Law

By Julie O'Neill and Matthew Galeotti

On October 30, 2012, California Attorney General Kamala Harris announced that her office would begin notifying the developers of as many as 100 mobile apps that their apps do not comply with the state's Online Privacy Protection Act¹ ("OPPA") and that they have 30 days to bring them into compliance.²

The announcement does not come as a surprise. Earlier this year, the Attorney General published a Joint Statement of Principles with the major platforms that distribute and sell mobile apps, providing that they will distribute only apps that have privacy policies that consumers are able to review prior to download. At that time, her office told app developers that they had six months to come into compliance or to be notified of violations. Shortly thereafter, Attorney General Harris formed a Privacy Enforcement and Protection Unit, intended specifically to enforce OPPA and other privacy laws.³

In light of the Attorney General's announcement and her continued focus on privacy, companies that collect personal information online from California residents – whether through a website, online service, or app – should take steps to ensure that they are in compliance. The Attorney General has asserted that a failure to comply could subject a company to a fine of up to \$2,500 *each time a noncompliant app is downloaded*.⁴

¹ Cal. Bus. & Prof. Code §§ 22575-22579.

² Cal. Bus. & Prof. Code § 22575 ("An operator shall be in violation of [OPPA] only if the operator fails to post its policy within 30 days after being notified of noncompliance.") The Attorney General's press release is available at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-notifies-mobile-app-developers-non-compliance>.

³ See "California Attorney General Creates Privacy Enforcement and Protection Unit; Increased Enforcement Likely," at <http://www.mofo.com/files/Uploads/Images/120723-California-Privacy-Enforcement.pdf>.

⁴ See the sample non-compliance letter attached to the Attorney General's press release at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-notifies-mobile-app-developers-non-compliance>. While OPPA does not provide for civil penalties, violations of OPPA may be enforced under California's unfair competition law. See Cal. Bus. & Prof. Code § 17206(a).

Beijing

Jingxiao Fang 86 10 5909 3382
Paul D. McKenzie 86 10 5909 3366

Brussels

Joanna Kopatowska 32 2 340 7365
Olivier Proust 32 2 340 7360
Karin Retzer 32 2 340 7364

Hong Kong

Eric Dickinson 852 2585 0812
Gordon A. Milner 852 2585 0808

London

Ann Bevirt 44 20 7920 4041
Deirdre Moynihan 44 20 7920 4164
Anthony Nagle 44 20 7920 4029

Los Angeles

Michael C. Cohen (213) 892-5404
David F. McDowell (213) 892-5383
Purvi G. Patel (213) 892-5296
Russell G. Weiss (213) 892-5640

New York

Madhavi T. Batliboi (212) 336-5181
John F. Delaney (212) 468-8040
Matthew R. Galeotti (212) 336-4044
Sherman W. Kahn (212) 468-8023
Mark P. Ladner (212) 468-8035
Michael B. Miller (212) 468-8009
Suhna N. Pierce (212) 336-4150
Marian A. Waldmann (212) 336-4230
Miriam H. Wugmeister (212) 506-7213

Northern Virginia

Daniel P. Westman (703) 760-7795

Palo Alto

Christine E. Lyon (650) 813-5770
Bryan Wilson (650) 813-5603

San Francisco

Roland E. Brandel (415) 268-7093
Anna Ferrari (415) 268-6728
Jim McCabe (415) 268-7011
James R. McGuire (415) 268-7013
William L. Stern (415) 268-7637

Tokyo

Daniel P. Levison 81 3 3214 6717
Gabriel E. Meister 81 3 3214 6748
Jay Ponazacki 81 3 3214 6562
Toshihiro So 81 3 3214 6568
Yukihiro Terazawa 81 3 3214 6585

Washington, D.C.

Nicholas A. Datlowe (202) 887-1590
Richard Fischer (202) 887-1566
D. Reed Freeman, Jr. (202) 887-6948
Julie O'Neill (202) 887-8764
Obrea O. Poindexter (202) 887-8741
Cynthia J. Rich (202) 778-1652
Robert A. Salerno (202) 887-6930
Andrew M. Smith (202) 887-1558
Nathan David Taylor (202) 778-1644

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THE LAW'S REQUIREMENTS

OPPA requires a commercial website operator or online service provider, including a mobile app developer, that collects personally identifiable information ("PII") from consumers residing in California to post a conspicuous privacy policy.⁵ Because OPPA applies to any company that collects data online about California residents, companies both within and outside of California may be subject to enforcement activity.

Under OPPA, the privacy policy must include:

- The categories of PII that the website, online service, or app collects from its users;
- The third parties with whom such PII may be shared;
- The process by which the consumer can review and request changes to his or her PII, if the website operator, online service provider, or app developer maintains such a process;
- The process by which the operator, provider, or developer notifies consumers of material changes to its privacy policy; and
- Its effective date.

ADDITIONAL CONSIDERATIONS

Compliance with OPPA does not necessarily ensure compliance with all applicable laws. In particular, the Federal Trade Commission (the "FTC") has long taken the position that privacy policies should describe, in a way that consumers can easily understand, all material collection, use, and disclosure practices.⁶ This means that, in addition to the information required by OPPA, a privacy policy should include other disclosures, such as:

- Its scope;
- How PII may be used;
- How "other information" – information that may not be considered PII but the collection of which may be material to users – is collected, used, and disclosed. This may include, for instance, users' clickstream information or other information derived from their interaction with the website, service, or app and collected for purposes of personalizing content or displaying targeted ads;
- How PII is secured and for how long it may be retained;
- How the user may exercise various rights, such as to opt out of receiving direct marketing or to opt out of the sharing of his or her PII with third parties;
- How the user may access the PII collected from him or her and the control that he or she has with respect to it; and

⁵ OPPA appears to have been drafted for business-to-consumer websites, online services, and apps, as it defines a "consumer" as "any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes." Websites, services, and apps that are solely business-to-business may therefore not be subject to the law's requirements, although there is not yet any clear authority on this point.

⁶ The FTC recently issued a guide to assist app developers in complying with privacy and other consumer protection principles. See "FTC Issues Guidance for Mobile App Privacy and Advertising; Signals More Enforcement Coming," at <http://www.mofo.com/files/Uploads/Images/120910-Mobile-App-Privacy.pdf>.

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- How the user can contact the operator or developer.⁷

Drafting a compliant privacy policy is only the first step. A company must also implement measures to ensure that it complies with the representations it makes in its privacy policy, to avoid claims that its privacy policy is deceptive or misleading.

In light of the increased enforcement activity by the California Attorney General and FTC, mobile app developers will want to ensure their mobile apps include a privacy policy, that the privacy policy is conspicuously posted on the mobile apps, and that the privacy policy is followed in practice.

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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.

⁷ Additional information may be necessary for websites, services, and apps made available to users outside of the United States.