ICLE tl;dr

State App Store Bills

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Background: While Congress is considering legislation that would dictate the terms that major app stores can offer to app developers, several states have similarly pursued legislation to regulate app stores. In particular, bills requiring app-store providers to permit the practice of "sideloading," or prohibiting them from requiring that specific payment mechanisms be used, have gained traction in several states. Some state bills also would create a private right of action against app stores.

But... A proliferation of state regulations threatens to create a patchwork of rules for mobile app stores, which operate globally. In this landscape, it is likely that one or two large states could set the regulatory baseline for the entire country. Smaller states that set burdensome rules could force app stores to cease distributing apps from developers domiciled in their jurisdictions.

Moreover... These bills are ill-advised on their own terms. Mandating that closed app-store platforms permit the use of alternative payment options could see large developers and rival payment processors free ride on an app store's own investments. Denying closed platforms the ability to prohibit "sideloading" could compromise cybersecurity. These state bills would substitute regulatory fiat for consumer choice, sacrificing the benefits currently enjoyed by many consumers.

KEY TAKEAWAYS

A PROLIFERATION OF BILLS

Bills requiring large app stores (generally defined either by revenue or number of downloads) to permit users to sideload apps are under consideration in Georgia, Hawaii, Illinois, Minnesota, New York, and North Carolina. These bills would require that users be able to install software on their mobile devices that has not been vetted or distributed by the platform provider.

Bills prohibiting app stores from requiring particular payment mechanisms have been introduced in Arizona, Florida, Georgia, Illinois, Massachusetts, Minnesota, New York, and North Carolina. The intent of these bills is to prevent companies like Apple from requiring that developers only accept in-app payments through Apple's system.

Both types of bills presuppose that large platforms harm consumers and developers when they preference their own distribution and payment services, despite the demonstrated benefits of closed ecosystems.

Arizona's bill is one of several whose terms could be enforced not just by the state attorney general, but through private right of action. Such rules threaten to open the door to massive rent-seeking behavior by developers and alternative payment systems.

THE BENEFITS OF CLOSED APP ECOSYSTEMS

App stores are multi-sided markets, and app developers benefit from access to the millions of users who access them. Some platforms currently allow sideloaded apps, while others restrict such access. A platform's decision to be more or less closed to outside software is a point of competitive differentiation.

Forcing a closed app store to allow alternative payment methods decouples the platform from its primary means to finance its own development. App stores also may limit sideloading and alternative payment options in an attempt to reduce users' privacy and security risks. Sideloaded apps do not receive the same security review that curated apps receive. Thus, users may be exposed to fraud and other cyberthreats in the form of malicious or negligently coded sideloaded apps.

For users, the value of closed platforms lies in the particular combination of curation, security, and privacy that their products offer relative to more open platforms.

A PATCHWORK OF RULES

Regulating app stores at the state level is especially challenging, given the global nature of app-store markets. Enforcement could also be daunting, due to the inherent difficulty of distinguishing in-state and out-of-state users.

While a platform provider could theoretically respond to this fragmented regulatory environment by creating bespoke versions of their app store for each jurisdiction, this seems unlikely. The costs of maintaining such a system would be exceedingly high.

More likely, the platform would tailor its operation to comport with those requirements set by the largest states. This is largely the approach many of these same platforms have taken with respect to state privacy regulations.

Smaller states that adopt conflicting or especially onerous regulations could see app stores exclude developers domiciled in those states from participating on the platform. This would, indeed, undermine the ostensible purpose of such laws: to protect local app developers.

When considered in concert with the increased security and consumer privacy risks that these mandates would create, it is clear that state-level app-store laws are ill-advised.

For more on the benefits of self-preferencing and closed platforms, see Geoffrey A. Manne's "Against the Vertical Discrimination Presumption." For more on prior legal disputes over app store policies, see Dirk Auer's "The Epic Flaws of Epic's Antitrust Gambit." For more on the data security risks of sideloading, see Mikołaj Barczentewicz's "Privacy and Security Implications of Regulation of Digital Services in the EU and in the US."

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