

NOTICE OF PROPOSED RULEMAKING DOCKET NO. NSD-104
AG ORDER NO. 6067-2024; RIN 1124-AA01
89 FR 86116 (Oct. 29, 2024)

***DEPARTMENT OF JUSTICE: PROPOSED RULE ON PROVISIONS PERTAINING TO
PREVENTING ACCESS TO U.S. SENSITIVE PERSONAL DATA AND GOVERNMENT-
RELATED DATA BY COUNTRIES OF CONCERN OR COVERED PERSONS***

MEETING SUMMARY

RE: MEETING WITH WORLD PRIVACY FORUM (“WPF”) REGARDING THE
DEPARTMENT OF JUSTICE’S PROPOSED RULE ON PROVISIONS PERTAINING
TO PREVENTING ACCESS TO U.S. SENSITIVE PERSONAL DATA AND
GOVERNMENT-RELATED DATA BY COUNTRIES OF CONCERN OR COVERED
PERSONS

DATE/TIME OF MEETING: NOVEMBER 26, 2024 1:00 PM – 1:30 PM EST

PLACE OF MEETING: VIRTUAL

ATTENDEES:

FROM THE NATIONAL SECURITY DIVISION OF THE DEPARTMENT OF
JUSTICE

Allison Harrington, Attorney
Cory Jacobs, Attorney
Jailene Acevedo, Paralegal
Jennifer Roan, Program Analyst
Joe Bartels, Attorney
Kaveh Miremadi, Attorney
Lee Licata, Deputy Section Chief

FROM THE DEPARTMENT OF COMMERCE

Marvin Wiley, Policy Advisor, Global Data Policy and Privacy

FROM WORLD PRIVACY FORUM

Pam Dixon, Founder and Director

SUMMARY OF MEETING:

On November 26, 2024, representatives from the Department of Justice (“DOJ”) and the Commerce Department (“Commerce”) engaged with representatives from The World Privacy Forum (“WPF”) regarding WPF’s comments on DOJ’s October 29, 2024 Notice of Proposed Rulemaking (“NPRM”) entitled “Proposed Rule on Provisions Pertaining to Preventing Access to U.S. Sensitive Personal Data and Government-Related Data by Countries of Concern or

Covered Persons.” *See* 89 FR 86116. These notes are a summary of the engagement; they are not a transcript. The Department of Justice has not shared these notes with meeting participants to confirm their accuracy.

During the engagement, a representative from DOJ briefly discussed the NPRM’s proposed requirements, including exceptions to the proposed rule, changes from DOJ’s March 5, 2024 Advanced Notice of Proposed Rulemaking (“ANPRM”), and comments received on the ANPRM. *See* 89 FR 15780. DOJ also noted that the NPRM comment period is open until November 30, 2024, and encouraged participants to submit comments on the proposed rule. During the engagement, representatives from DOJ also invited meeting participants to ask questions about the NPRM from participants.

Commerce asked that WPF provide an overview of their role in industry and provide any feedback or concerns pertaining to DOJ’s NPRM. WPF explained that their work is on data brokerage, identity, and artificial intelligence as relates to governance and privacy across the world.

WPF started by stating that their comments on the ANPRM seemed very negative despite that not being WPF’s intention.

WPF expressed their concern with the original definition of health data. Specifically, that it was unworkable and would not be able to be sustained from the perspective of data brokers. They also expressed concern with only restricting countries of concern. Regarding the definition of health data, WPF stated that it included aspects of HIPAA but did not include the context that HIPAA does. Without such context, WPF does not believe that the definition can function as the protections do not flow with the data.

Additionally, WPF expressed their belief that their response to the ANPRM was not acknowledged. Specifically, they posed a question regarding why countries of concern could not have data but others across the world could. They believe this problematic and needs correction.

DOJ asked if WPF had a theory of how the government could utilize its national security authorities to address risk to data in foreign, non-countries of concern. WPF conceded that they do not have expertise in national security authorities and are only, really, focused on privacy.

WPF also replied indicating that they had internally discussed and researched possible solutions. They proposed a pathway following HIPAA, but instead looking at the entities with the data. Instead of regulating data, WPF suggested that the government look at telecommunications companies and regulate where the information they release can be sent for reasons of national security. WPF’s view is that it would be easier to start there, admitting that their suggestion is from the perspective is from not working in national security.

DOJ asked how their telecommunications suggestion would fit within the President’s authorities under the International Emergency Economic Powers Act (IEEPA), which is the underlying authority for EO 14117. WPF conceded that they are unfamiliar with how IEEPA

works and didn't have the time to do the legal analysis. And that ultimately, it's unclear if their proposal was deployed under IEEPA that it could pass legal scrutiny.

WPF replied that maybe the government should look at data as a dual-use technology and apply export controls as a starting point. Per WPF, evaluating data lifecycles would aid in determining where to place government controls.

DOJ explained that export controls still set out limits on locations rather than just on uses of data. Therefore, DOJ asked WPF if they seek to regulate more broadly, with a broader set of countries. WPF agreed to regulating more broadly. They added that it creates less problems, but that there needs to be a way by which do regulate in such a way in developing countries as well.

DOJ stated that they would like to see the underlying legal analysis of WPF's proposals, including whether such proposals could ever be effectuated using the President's national security authorities rather than through Congress having to pass new legislation. WPF replied that government regulation of the industry in this area is problematic. They believe that export control is a viable proposal.

DOJ asked if WPF had any additional concerns with the proposed rule.

WPF explained their concern with the DOJ's response to their ANPRM comments. They stated that prior to DOJ's response to their comments, they had failed to see a response in which an individual researcher was named multiple times. WPF believes that the entity responding to their comments merely agreed with said researcher. WPF does not believe their concerns were addressed, nor did the response read like a true analysis. DOJ stated that WPF's prior comments were mostly focused on the need for privacy legislation which is outside the scope of the proposal rule and therefore need not be addressed in the proposed or final rule.

WPF reiterated the point of the HIPAA definition without the HIPAA context. They added that providers are not regulated, nor is data that doesn't fall into exceptions. Thus, they believe that DOJ's response is incomprehensible. DOJ asked about HIPAA's deidentifying mechanisms. DOJ asked if the proposal is to say that protected data should also be unseen by certain parties. WPF stated that if data is to a covered entity, all of the relevant data is covered, which is why the definition is not workable. They also stated that the deidentification standard would need to apply to all data. DOJ suggested that WPF leave comment laying out the data that HIPAA normally protects that, in an outside context, they would not, for example, want a data broker to sell to a country of concern or covered person.

WPF had no further questions.