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 CENTER FOR INFORMATION POLICY LEADERSHIP ("CIPL") 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 25, 2024 2:30 PM – 3:00 PM EST

PLACE OF MEETING: VIRTUAL

ATTENDEES:

FROM THE NATIONAL SECURITY DIVISION OF THE DEPARTMENT OF JUSTICE

Jailene Acevedo, Paralegal
Jennifer Roan, Program Analyst
Lee Licata, Deputy Chief for National Security Data Risk

FROM THE DEPARTMENT OF COMMERCE

Marvin Wiley, Policy Advisor

FROM THE CENTER FOR INFORMATION POLICY LEADERSHIP

Mark Smith, Manager of Privacy and Data Policy
Markus Heyder, Vice President and Senior Policy Counselor
Matthew Reisman, Director of Privacy and Data Policy

SUMMARY OF MEETING:

On November 26, 2024, representatives from the Department of Justice ("DOJ") and the Department of Commerce ("Commerce") engaged with representatives from the Center for Information Policy Leadership ("CIPL") regarding CIPL'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 CIPL describe their role in industry and raise their concerns, if any, on DOJ's NPRM. CIPL stated that they are a think tank with offices in Washington, D.C. and globally. With regard to the NPRM, CIPL explained that they have consulted with their member organizations and have received input from members in financial services, technology, and the pharmaceutical industry. CIPL will be submitting a comment with input prior to the deadline.

CIPL claimed that they have not seen research on economic impact, qualifying notes, or economic output. Nonetheless, they have long-existing literature on data flow and the cost to economic growth from the restrictions of the proposed rule. They added that they have done studies on quantifying economic impact of data flows more broadly, with broader literature emerging on economic trade fragmentation.

Commerce asked if CIPL's member companies have presented examples on non-economic impact. CIPL stated that the non-economic impacts would depend on, and vary as a result of, how some of the rule exemptions are interpreted.

CIPL's members in financial services found certain in clarifications in the NPRM helpful, but they believe that further clarification is needed—particularly on the exemptions covering essential cybersecurity services, product development, and the notion of responding to lawful requests from countries of concern.

Additionally, CIPL explained that their members in the pharmaceutical industry seek clarification regarding 4 items. The first is the ability to share data with local contractors with regulatory requirements in countries of concern. This includes companies in the U.S. working with local contractors in countries of concern. The second is the standard of deidentification being exempt from bulk sensitive data. The third is clarification in terminology. The fourth is their concern in ability to operate within the normal course of business while conducting clinical trials.

Furthermore, CIPL's telecommunications members seek clarity on the telecommunications exemption and whether the definition of a telecommunication services should be extended to related services, such as networking and broadband.

Regarding compliance, CIPL stated that there would be opportunity costs associated with the proposed rule. Given the restrictions in transfer, rules, and adequacy, these members state that compliance would undermine their ability to follow other compliance rules. Per these members, the associated costs would decrease if the compliance rules were simplified.

DOJ asked if CIPL members have examples of how they must operate differently under the proposed rule's requirements (for example maintaining different records or deploying different security requirements for restricted transactions) as opposed to how they operate in compliance with GDPR, for example. CIPL replied that they have not. Their general observation is that global data transfers and data flows have conflicting rules across jurisdictions.

CIPL stated that the NPRM preamble contains exemptions that expire, which could delay the development and effectiveness of gathering data for datasets. CIPL added that if the U.S. must withdraw from a given market, that would constitute a cost impact, especially since China is the second largest market for pharmaceuticals.

Further, CIPL stated that member companies would like clarification on the definition of personal health data. They believe that the "related" aspect of information related to underlying medical conditions is too broad. DOJ prompted CIPL to think about this definition in terms of risks identified, the aspect of linked or linkable to an individual rather than focusing on whether a type of PHI identifies a diagnosis.

DOJ asked CIPL if their members that are known covered persons under the rule's definitions have provided any input. CIPL has heard from one with operations in a country of concern. They did not disclose the entity, but they stated that their views are consistent with CIPL's aforementioned comments. CIPL noted that various of their members have operations in countries of concern, China in particular.

Commerce asked if CIPL's pharmaceutical members have proposed alternatives to the thresholds within the NPRM. CIPL responded that they have not, noting that that CIPL commented on DOJ's ANPRM that the thresholds should be higher.

DOJ asked CIPL if there are members who believe that the thresholds make for meaningful distinctions or whether the thresholds are all really de minimis as any entity who has regulated data will essentially comply with the rule. CIPL replied that, without asking their members, DOJ's direction in this regard feels fair. CIPL's members agree that they will comply irrespective of the thresholds. To that end, DOJ explained that the thresholds for genomic data, for example, were set to include most data sets as any commercially meaningful data set of genomic data would include more than 100 persons' data.

Commerce asked that CIPL provide any other member recommendations for compliance with thresholds. CIPL then raised the question of whether the thresholds are the most suitable approach. In the event that the Department decide not to use threshold operative, CIPL asked if there would be a different approach to focus on ensuring entities that conduct restricted transactions meet certain security requirements regardless of how much data they have.

DOJ asked CIPL when their comment would be posted to the NPRM docket. CIPL expects to publish their comment prior to November 28th.

CIPL had no further questions.