

DOJ Notes on the May 21 Consultation with Global Data Alliance (“GDA”) and Business Software Alliance (“BSA”) Regarding Bulk Thresholds

Notes | 5/21/2024 2:00 PM – 2:30 PM EST

On May 21, 2024, representatives from the Department of Justice (“DOJ”) and the Commerce Department (“Commerce”) consulted with representatives from GDA and BSA regarding GDA and BSA’s comments on DOJ’s March 5, 2024 Advanced Notice of Proposed Rulemaking (“ANPRM”) entitled “Provisions Regarding Access to Americans’ Bulk Sensitive Personal Data and Government-Related Data by Countries of Concern.”

The consultation specifically focused on GDA and BSA’s comments on the proposed bulk thresholds set forth in the ANPRM. During the consultation, representatives from DOJ and Commerce asked GDA and BSA questions about the bulk thresholds proposed in the ANPRM and listened to GDA and BSA’s responses.

The notes that follow are DOJ’s brief summary of the input shared by GDA and BSA.*

- **Participants:** Representatives from the National Security Division of the Department of Justice, the International Trade Administration of Department of Commerce, GDA, and BSA.
- **GDA and BSA members’ concerns:**
 - **Microsoft:** Covered persons (software engineers that support US customers) do not have standing access to personal data, but it’s possible they would get this access to things like a user ID, name, etc. for HR purposes (e.g., de-bugging; providing customer service).
 - **IBM:** IBM provides no cloud service in China, but they still have a business in China for HR purposes. They also have one US-based call center that services people in Asia, and it is possible that a data transfer could take place here with a covered person. They also have Chinese nationals working in research labs abroad.
 - BSA was generally hesitant to provide numbers on the quantity of current covered data or the financial value of transactions – they did not understand the framework to require this data quantity to be provided to the government.
 - BSA is concerned about the coverage of encrypted, anonymized data and is concerned of having to decrypt this dat. Cloud companies often do not have insight on the type of data being stored because customers will encrypt their data and only they hold the encryption key. BSA is concerned about liability for their cloud customers.
 - BSA is concerned about covered identifiers – there is a very broad array of covered identifier types, and combinations of these would essentially result in a lower bulk threshold. This covered data is used for many industrial and software manufacturing (i.e. sensor-related data). BSA is unclear whether this data is “covered” or not.

*These notes are a summary of the consultation; they are not a transcript. The Department of Justice has not shared these notes with meeting participants to confirm their accuracy.

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- BSA is concerned about keeping track of this data, *i.e.*, how would a company design a data analytics process to categorize, count, and keep track of all this data? BSA notes that it is difficult to cumulate data over a year to figure out if a transaction is subject to thresholds.
- BSA is concerned that the definitions for “access,” “sensitive personal data,” and “biometric data,” are broader than many state laws and other national laws. BSA is concerned about inconsistency with the definitions. BSA suggested using an alternate scope for restricted transactions, such as “all publicly traded American companies” or “companies with a certain percentage of Chinese investment.”
- **Other suggestions and feedback:**
 - **Personal Health Data:** BSA and GDA expressed that they would like a carve-out for “normal” scientific or industrial transactions.
 - BSA and GDA expressed that because the Genomic data threshold is so low, it is essentially an embargo on transfer of genomic data.
 - BSA and GDA suggest that DOJ use the bulk thresholds as de-minimus exceptions with different scopes above those thresholds.

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