

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 THE ELECTRONIC PRIVACY INFORMATION CENTER (“EPIC”) 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 4:00 PM – 4:30 PM EST

PLACE OF MEETING: VIRTUAL

ATTENDEES:

FROM THE NATIONAL SECURITY DIVISION OF THE DEPARTMENT OF JUSTICE

Allison Harrington, Attorney
Jailene Acevedo, Paralegal
Jennifer Roan, Program Analyst
Joseph Lullo, Attorney
Kaveh Miremadi, Attorney
Lee Licata, Deputy Chief for National Data Risk

FROM THE DEPARTMENT OF COMMERCE

Marvin Wiley, Policy Advisor

FROM THE ELECTRONIC PRIVACY INFORMATION CENTER (“EPIC”)

Alan Butler, Executive Director & President
Maria Villegas Bravo, Law Fellow

SUMMARY OF MEETING:

On November 25, 2024, representatives from the Department of Justice (“DOJ”) and the Department of Commerce (“Commerce”) engaged with representatives from the Electronic Privacy Information Center (“EPIC”) regarding EPIC’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.

Commerce asked that the EPIC representatives give a description of their role in the industry and to share their top priority concerns with DOJ’s NPRM. EPIC shared that as a non-profit entity focused on protection and government regulations, their main concerns did not revolve around compliance with or the economic impact of the NPRM. Rather, they sought clarification regarding certain parts of the NPRM.

EPIC stated that they have a concern with the NPRM’s definition of covered transactions. EPIC’s understanding of the NPRM is that the regime’s intent is to limit transactions in which bulk sensitive data is obtained by countries of concern. However, they note that the current definition of data brokerage may be too broad as it could be interpreted to also work in the opposite direction (a US person seeking bulk sensitive personal data or USG related data from a country of concern). Epic raised a particular example of a journalist or researcher could be prohibited from obtaining information for an investigation from a data broker that is in a country of concern or is a covered person.

DOJ explained that if EPIC’s example contemplates a U.S. person acquiring U.S. government related data, with no threshold attached from a data broker that is a covered person, it would be data brokerage. Data brokerage would apply to data marketed about being about certain individuals that are current or former recent government employees or precise geolocation data from a location identified in the list contained in the rule.

Additionally, EPIC why a list of social security numbers without other information is not considered bulk sensitive personal data but when paired with the names of the corresponding individuals would be. DOJ confirmed, explaining that for personal identifiers to be regulated they must be linked or linkable to an individual. To exemplify, DOJ stated that a piece of paper with a list of just social security number there is no way to identify the individuals who have those numbers without some other context. However, in combination with a home address, it would be because now we can identify who the numbers belong to.

Further, EPIC asked DOJ about the telecommunications versus non-telecommunications exemptions, particularly the carve out for providers that doesn’t apply to internet service providers. EPIC believes this could cause issues as relates to routing information. EPIC is considering the functional effects on infrastructure transactions. They noted that it is connected to the FCC’s definition of “provider.” EPIC explained that in the process of connectivity, users send IP and other identifiers, and large servers could hit thresholds in restricted and prohibited

transactions in the process of providing basic connectivity in countries of concern. EPIC is concerned that these would be considered covered transactions.

DOJ acknowledged that the FCC definition is sensible when considering its context in the FCC's open internet order but should that order be pulled back by the FCC, a new definition would be needed. DOJ is considering definitions that encompasses networking services.

EPIC's final concern was surrounding encryption and whether companies that encrypt their data would not meet the requisite knowledge standard to be regulated by the rule without decrypting their data. EPIC doesn't believe that companies would need to decrypt their data to know if they're regulated by the rule and comply.

DOJ encouraged EPIC to leave a comment with additional concerns on the NPRM docket. EPIC replied that they will comment by end of day on Wednesday, November 27th.

EPIC had no further questions.