

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 BUSINESS SOFTWARE ALLIANCE (“BSA”) 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 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
Joe Bartels, Attorney
Kaveh Miremadi, Attorney
Lee Licata, Deputy Chief for National Data Risk
Michelle Bazu, Attorney

FROM THE DEPARTMENT OF COMMERCE

Marvin Wiley, Policy Advisor, Global Data Policy and Privacy
Isabella Carlton, Policy Advisor, Global Data Policy and Privacy

FROM BSA, THE SOFTWARE ALLIANCE

Joseph Whitlock, Director of Policy

SUMMARY OF MEETING:

On November 26, 2024, representatives from the Department of Justice (“DOJ”) and the Commerce Department (“Commerce”) engaged with representatives from The Business Software Alliance (“BSA”) regarding BSA’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 Joseph Whitlock (“Whitlock”), present on behalf of two companies, BSA and GDA, give an overview of the companies’ role in industry and any concerns regarding DOJ’s NPRM. Whitlock stated that BSA represents many major B2B companies, such as Oracle, but does not include large consumer facing technology firms like Facebook (Meta), Google, and Amazon. GDA represents approximately 75 companies in every sector of the economy focused on transferring data, research and development, medical and pharmaceutical, etc. Whitlock stated that he only advocates on cross border data transfers and would be present in such a capacity today (hereafter, “BSA”).

In response to Commerce, BSA stated they would post their comment to the NPRM docket on Friday, November 29th.

BSA stated that they have numerous outstanding issues with DOJ’s NPRM. Their primary concern is with the amount of time allotted to comment on the NPRM. In that regard, they are concerned with the comment period being significantly shorter than for DOJ’s ANPRM. This is of particular concern to BSA as they claimed that the record keeping, auditing, and decryption requirements differ greatly from the ANPRM.

Regarding decryption, BSA’s members stated that they were unable to decrypt and will operate under the assumption that they have restricted transactions, thus adopting the necessary requirements. However, they were no longer able to undertake this approach when they looked at the new recordkeeping requirements of the NPRM.

Per BSA, the notion that an entity can capture a start and end date, who the relevant parties are, amongst other factors, constitutes a fundamental misunderstanding of how data transfers operate. They added that this is tremendously expensive.

If the measures laid out in the NPRM were applicable only to China, BSA believes compliance would be more manageable. However, because it is also pertaining to certain China’s citizens and other related entities that are considered covered persons, BSA believes business would be hindered significantly. They cited increased difficult to do meet the rule’s requirements with potential criminal charges “hanging over their heads” as punishments to the companies that conduct business without complying with the rule. BSA believes that there is no way to know which entity will be a covered person under the many ways corporate persons are supposed to be captured.

BSA stated that the proposed rule is not ready for final publication at this time, and they are strictly opposed to publication given the nature of the changes from the ANPRM and 30-day comment period.

BSA stated that if the government is to proceed with final publication of the rule, they should do so with a rule pertaining only to prohibited transactions. BSA agrees that bulk data should not be sold to adversarial parties. BSA does not believe the restricted category, however, is fully finalized and requires revisions as it is “misguided” and “suspect”.

DOJ asked BSA about the difficulty levels present in identifying covered persons in the BSA and GDA-represented businesses, using the definition of “covered person” in the NPRM.

BSA stated that millions of individuals and entities would ultimately be categorized as covered persons globally. BSA explained that they have 40 million registered firms in China. Approximately 2 million have partial state ownership. Considering that any company 50% or more owned globally, any entity more than 25% owned by state enterprises, and a full U.S. entity registered in a country of concern would be covered persons, BSA reiterates their previous points. To that end, BSA provided an example from section 202.211(a), where there are examples of companies with owners in China, making all subsidiaries and employees covered persons.

DOJ asked BSA, given their aforementioned points, how they manage and are in compliance with the Office of Foreign Assets Control (“OFAC”) sanctions regime which is often deployed in a similar manner to the proposed rule. DOJ noted that the 50% rule applies within OFAC for those designated to one or more sanctioned programs.

BSA replied stating they do not recommend replicating OFAC. DOJ stated, as an example, that Cuban nationals are designated irrespective of whether they are included on list. Other provisions of the list apply without designations.

BSA responded saying that Cuba has a more isolated economy than China, making the two incomparable. They also claimed that OFAC deals with economic sanctions for listed persons in the context of national security whereas the matter at hand is concerning restricted transactions. Given that the restricted transactions would apply to many aspects of ordinary business, such as employment and investment agreements, BSA believes that the magnitude of regulation is not comparable to OFAC.

BSA suggested that DOJ start with the brokerage of a U.S. persons sensitive data for U.S. government employees. According to BSA, the entire digital economy to China is inherently suspect. DOJ stated that they do not agree with BSA on the claim that the entire economy would have an inherent suspicious nature.

BSA replied that NPRM contains number of examples showing the contrary, with fines and imprisonment being potential criminal charges for what BSA would consider ordinary commercial activity. DOJ stated that there are certain elements that must be shown for criminal prosecution, for example “willfulness” in violations of the rule’s requirements. It is a more complex process and, in that regard, the NPRM also contains a knowledge standard.

DOJ added that OFAC sanctions are also broader with a strict liability regime whereas the NPRM includes a knowingly standard.

To BSA's claim that the NPRM would regulate billions of data transmissions, DOJ stated that OFAC's regulations do as well. BSA stated that they did not believe this about OFAC. DOJ added that an annual report is sent to OFAC yearly, not necessarily of solely payment transactions with listed persons. DOJ reiterated that OFAC has a strict liability regime whereas DOJ has a knowingly standard.

In response, BSA reaffirmed their position that this section of the NPRM is incomparable to OFAC, considering millions of data transmissions that are not listable. BSA asked if DOJ could focus on prohibited transactions and take additional time to revise the remainder of the NPRM. Otherwise, BSA claims that the rule will not work, and that the U.S. economy will be put in an unreasonable position.

DOJ replied that it will be publishing the final rule as mandated by the President in signing the Executive Order and consistent with direction from the Attorney General. DOJ understands BSA's points on the comment period, the complexity, etc., but the decision ultimately rests with the President and the Attorney General.

DOJ explained that throughout the entirety of this rulemaking process, DOJ has engaged and acknowledged stakeholders such as BSA. DOJ is continuing to work through implementation, nonetheless.

BSA restated their belief that they do not understand how the NPRM requirements will be workable. In response to DOJ, they have challenges regarding record keeping. They also asked about alternatives on the regulations for data brokerage, which are partially nonsensical to BSA.

DOJ stated that they welcome any comments from BSA, including those that include how DOJ can adjust for how companies store their data. DOJ acknowledged BSA's point on data brokerage regulations as well. BSA stated that their comment will include information on the above points, and that they would continue to work on their analysis of the rule after the comment period closed.

BSA had no further questions.