

ANNEX VII



U.S. Department of Justice

Criminal Division

Office of Assistant Attorney General

Washington, D.C. 20530

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Counselor
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Mr. Ted Dean
Deputy Assistant Secretary
International Trade Administration
1401 Constitution Ave., NW
Washington, DC 20230

Dear Mr. Antonipillai and Mr. Dean:

This letter provides a brief overview of the primary investigative tools used to obtain commercial data and other record information from corporations in the United States for criminal law enforcement or public interest (civil and regulatory) purposes, including the access limitations set forth in those authorities.¹ These legal processes are nondiscriminatory in that they are used to obtain information from corporations in the United States, including from companies that will self-certify through the US/EU Privacy Shield framework, without regard to the nationality of the data subject. Further, corporations that receive legal process in the United States may challenge it in court as discussed below.²

Of particular note with respect to the seizure of data by public authorities is the Fourth Amendment to the United States Constitution, which provides that "[t]he right of the people to

¹ This overview does not describe the national security investigative tools used by law enforcement in terrorism and other national security investigations, including National Security Letters (NSLs) for certain record information in credit reports, financial records, and electronic subscriber and transaction records, *see* 12 U.S.C. § 3414; 15 U.S.C. § 1681u; 15 U.S.C. § 1681v; 18 U.S.C. § 2709, and for electronic surveillance, search warrants, business records, and other collection of communications pursuant to the Foreign Intelligence Surveillance Act, *see* 50 U.S.C. § 1801 *et seq.*

² This paper discusses federal law enforcement and regulatory authorities; violations of state law are investigated by states and are tried in state courts. State law enforcement authorities use warrants and subpoenas issued under state law in essentially the same manner as described herein, but with the possibility that state legal process may be subject to protections provided by State constitutions that exceed those of the U.S. Constitution. State law protections must be at least equal to those of the U.S. Constitution, including but not limited to the Fourth Amendment.

be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. As the United States Supreme Court stated in *Berger v. State of New York*, “[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” 388 U.S. 41, 53 (1967) (citing *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967)). In domestic criminal investigations, the Fourth Amendment generally requires law enforcement officers to obtain a court-issued warrant before conducting a search. See *Katz v. United States*, 389 U.S. 347, 357 (1967). When the warrant requirement does not apply, government activity is subject to a “reasonableness” test under the Fourth Amendment. The Constitution itself, therefore, ensures that the U.S. government does not have limitless, or arbitrary, power to seize private information.

Criminal Law Enforcement Authorities:

Federal prosecutors, who are officials of the Department of Justice (DOJ), and federal investigative agents including agents of the Federal Bureau of Investigation (FBI), a law enforcement agency within DOJ, are able to compel production of documents and other record information from corporations in the United States for criminal investigative purposes through several types of compulsory legal processes, including grand jury subpoenas, administrative subpoenas, and search warrants, and may acquire other communications pursuant to federal criminal wiretap and pen register authorities.

Grand Jury or Trial Subpoenas: Criminal subpoenas are used to support targeted law enforcement investigations. A grand jury subpoena is an official request issued from a grand jury (usually at the request of a federal prosecutor) to support a grand jury investigation into a particular suspected violation of criminal law. Grand juries are an investigative arm of the court and are impaneled by a judge or magistrate. A subpoena may require someone to testify at a proceeding, or to produce or make available business records, electronically stored information, or other tangible items. The information must be relevant to the investigation and the subpoena cannot be unreasonable because it is overbroad, or because it is oppressive or burdensome. A recipient can file a motion to challenge a subpoena based on those grounds. See Fed. R. Crim. P. 17. In limited circumstances, trial subpoenas for documents may be used after the case has been indicted by the grand jury.

Administrative Subpoena Authority: Administrative subpoena authorities may be exercised in criminal or civil investigations. In the criminal law enforcement context, several federal statutes authorize the use of administrative subpoenas to produce or make available business records, electronically stored information, or other tangible items in investigations involving health care fraud, child abuse, Secret Service protection, controlled substance cases, and Inspector General investigations implicating government agencies. If the government seeks to enforce an administrative subpoena in court, the recipient of the administrative subpoena, like the recipient of a grand jury subpoena, can argue that the subpoena is unreasonable because it is overbroad, or because it is oppressive or burdensome.

Court Orders For Pen Register and Trap and Traces: Under criminal pen register and trap-and-trace provisions, law enforcement may obtain a court order to acquire real-time, non-content dialing, routing, addressing, and signaling information about a phone number or email upon certification that the information provided is relevant to a pending criminal investigation. *See* 18 U.S.C. §§ 3121-3127. The use or installation of such a device outside the law is a federal crime.

Electronic Communications Privacy Act (ECPA): Additional rules govern the government's access to subscriber information, traffic data, and stored content of communications held by ISPs, telephone companies, and other third-party service providers, pursuant to Title II of ECPA, also called the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712. The SCA sets forth a system of statutory privacy rights that limit law enforcement access to data beyond what is required under constitutional law from customers and subscribers of Internet service providers. The SCA provides for increasing levels of privacy protections depending on the intrusiveness of the collection. For subscriber registration information, IP addresses and associated time stamps, and billing information, criminal law enforcement authorities must obtain a subpoena. For most other stored, non-content information, such as email headers without the subject line, law enforcement must present specific facts to a judge demonstrating that the requested information is relevant and material to an ongoing criminal investigation. To obtain the stored content of electronic communications, generally, criminal law enforcement authorities obtain a warrant from a judge based on probable cause to believe the account in question contains evidence of a crime. The SCA also provides for civil liability and criminal penalties.

Court Orders for Surveillance Pursuant to Federal Wiretap Law: Additionally, law enforcement may intercept in real time wire, oral, or electronic communications for criminal investigative purposes pursuant to the federal wiretap law. *See* 18 U.S.C. §§ 2510-2522. This authority is available only pursuant to a court order in which a judge finds, *inter alia*, that there is probable cause to believe that the wiretap or electronic interception will produce evidence of a federal crime, or the whereabouts of a fugitive fleeing from prosecution. The statute provides for civil liability and criminal penalties for violations of the wiretapping provisions.

Search Warrant – Rule 41: Law enforcement can physically search premises in the United States when authorized to do so by a judge. Law enforcement must demonstrate to the judge based on a showing of “probable cause” that a crime was committed or is about to be committed and that items connected to the crime are likely to be found in the place specified by the warrant. This authority is often used when a physical search by police of a premise is needed due to the danger that evidence may be destroyed if a subpoena or other production order is served on the corporation. *See* U.S. Const. amend. IV (discussed in further detail above); Fed. R. Crim. P. 41. The subject of a search warrant may move to quash the warrant as overbroad, vexatious, or otherwise improperly obtained, and aggrieved parties with standing may move to suppress any evidence obtained in an unlawful search. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

DOJ Guidelines and Policies: In addition to these Constitutional, statutory, and rule-based limitations on government access to data, the Attorney General has issued guidelines that place further limits on law enforcement access to data, and that also contain privacy and civil

liberty protections. For instance, the Attorney General's Guidelines for Domestic Federal Bureau of Investigation (FBI) Operations (September 2008) (hereinafter AG FBI Guidelines), available at <http://www.justice.gov/archive/opa/docs/guidelines.pdf>, set limits on use of investigative means to seek information related to investigations that involve federal crimes. These guidelines require that the FBI use the least intrusive investigative methods feasible, taking into account the effect on privacy and civil liberties and the potential damage to reputation. Further, they note that "it is axiomatic that the FBI must conduct its investigations and other activities in a lawful and reasonable manner that respects liberty and privacy and avoids unnecessary intrusions into the lives of law-abiding people." See AG FBI Guidelines at 5. The FBI has implemented these guidelines through the FBI Domestic Investigations and Operations Guide (DIOG), available at [https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20\(DIOG\)](https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20(DIOG)), a comprehensive manual that includes detailed limits on use of investigative tools and guidance to assure that civil liberties and privacy are protected in every investigation. Additional rules and policies that prescribe limitations on the investigative activities of federal prosecutors are set out in the *United States Attorneys' Manual* (USAM), also available online at <http://www.justice.gov/usam/united-states-attorneys-manual>.

Civil and Regulatory Authorities (Public Interest):

There are also significant limits on civil or regulatory (*i.e.*, "public interest") access to data held by corporations in the United States. Agencies with civil and regulatory responsibilities may issue subpoenas to corporations for business records, electronically stored information, or other tangible items. These agencies are limited in their exercise of administrative or civil subpoena authority not only by their organic statutes, but also by independent judicial review of subpoenas prior to potential judicial enforcement. See, *e.g.*, Fed. R. Civ. P. 45. Agencies may seek access only to data that is relevant to matters within their scope of authority to regulate. Further, a recipient of an administrative subpoena may challenge the enforcement of that subpoena in court by presenting evidence that the agency has not acted in accordance with basic standards of reasonableness, as discussed earlier.

There are other legal bases for companies to challenge data requests from administrative agencies based on their specific industries and the types of data they possess. For example, financial institutions can challenge administrative subpoenas seeking certain types of information as violations of the Bank Secrecy Act and its implementing regulations. See 31 U.S.C. § 5318; 31 C.F.R. Part X. Other businesses can rely on the Fair Credit Reporting Act, see 15 U.S.C. § 1681b, or a host of other sector specific laws. Misuse of an agency's subpoena authority can result in agency liability, or personal liability for agency officers. See, *e.g.*, Right to Financial Privacy Act, 12 U.S.C. §§ 3401–3422. Courts in the United States thus stand as the guardians against improper regulatory requests and provide independent oversight of federal agency actions.

Finally, any statutory power that administrative authorities have to physically seize records from a company in the United States pursuant to an administrative search must meet the requirements of the Fourth Amendment. See *See v. City of Seattle*, 387 U.S. 541 (1967).

Conclusion:

All law enforcement and regulatory activities in the United States must conform to applicable law, including the U.S. Constitution, statutes, rules, and regulations. Such activities must also comply with applicable policies, including any Attorney General Guidelines governing federal law enforcement activities. The legal framework described above limits the ability of U.S. law enforcement and regulatory agencies to acquire information from corporations in the United States -- whether the information concerns U.S. persons or citizens of foreign countries -- and in addition permits judicial review of any government requests for data pursuant to these authorities.

Sincerely,



Bruce C. Swartz
Deputy Assistant Attorney General and
Counselor for International Affairs