

Public Safety / Privacy Act EO¹

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TL;DR

The [Public Safety Executive Order](#), signed by President Trump on January 25, 2017, likely doesn't have any impact on substantive US privacy law, either for the private sector or for government agencies. However, by signaling a shift in the new administration's stance toward the privacy rights of EU citizens, it may put the newly minted [US-EU Privacy Shield](#) at risk (if EU regulators or EU courts read this order as a substantive shift).

THE ORDER

This order is primarily concerned with strong enforcement of immigration laws and calls for maximal use of available resources to do so, directing DHS to remove aliens that fit certain statutory criteria (e.g., charged with criminal offenses). It is also critical of [sanctuary jurisdictions](#).

It does address the handling of personally identifiable information for non-citizens. Relevant language from the Order:

Sec. 14. Privacy Act. Agencies shall, to *the extent consistent with applicable law*, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information. [emphasis added]

Note that the language of the order merely directs agencies to amend their policies, rather than explicitly exempting non-citizens from the protections of the Privacy Act. This is likely because any more than that would require an act of Congress.

¹ Note this is not the challenged and reissued [Border Security and Immigration Order](#) signed the same day.

WHY THIS ORDER LIKELY HAS NO EFFECT ON EXISTING US PRIVACY LAW

Because an EO cannot override an act of Congress and because of the “extent consistent” language, a reasonable interpretation is that it has no substantive effect on existing law.

However, we are watching EU regulators closely to see how they react to this order.

Note that the FTC chairwoman [recently said](#) that this Order will have no impact on their enforcement of the Privacy Shield. On the other hand, the ACLU and HRW [recently urged](#) EU regulators to reexamine the Privacy Shield in light of this January EO.

Background

- The **Privacy Act** of 1974 governs the PII practices of federal agencies.
- The **EU-US Privacy Shield** is the transatlantic framework for the exchange of personal data (for commercial purposes) between the EU and the US. It replaced the EU-US Safe Harbor, which was invalidated by Europe’s top court in 2015.
- The Privacy Shield already faces its first legal challenge in Europe, although [it will be at least a year before the court rules on the merits](#).
- US privacy law, as applied to US corporations, is still primarily a matter of state law (although the FTC has some enforcement power with respect to unfair business practices, etc.).
- Congress passed the **Judicial Redress Act** in 2016, which expressly extends the protections of the Privacy Act to Europeans.² Obama issued a related [executive order](#) immediately following passage, in order to help get the Privacy Shield ratified.

Further Reading

1. U.S. Tech Industry Wants Trump to Calm EU Data Fears — [Fortune](#), Feb 2
2. Trump order strips privacy rights from non-U.S. citizens, could nix EU-US data flows - [TechCrunch](#), Jan 26
3. Concerns Loom Over a Data-Sharing Pact to Protect Privacy of Europeans, [WSJ](#), Feb 8 [paywall]

² List of covered countries [here](#).