CYSE406 Cyber Law

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Cybersecurity background research memo

By

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MEMORANDUM FOR: Distribution

FROM: Alan Schneider, Director of Cybersecurity

TO: Representative Tito Canduit

SUBJECT: Background research of proposed cybersecurity regulation relevant to the protection of United States citizens from cybersecurity threats abroad.

I. PURPOSE

This memorandum provides information on proposed federal regulation designed to create a systematic framework for assessing and addressing technology-based threats to U.S. persons.

II. BACKGROUND

a. S.686 "Restricting the Emergence of Security Threats that Risk Information and Communications Technology Act" or "RESTRICT Act" has been introduced by Senator Warner, Mark R [D-VA] and 25 bi-partisan co-sponsors.
https://www.congress.gov/bill/118th-congress/senate-bill/686/text

b. The Restrict Act's purpose is to limit risk to national security by granting the Department of Commerce Secretary authority to review, block, and mitigate transactions involving foreign information and communications technology (ICT). Specifically, those that pose substantial risk to the national security of the United States. Essentially, the Act enables the U.S. government to ban the sale of certain countries specific software or equipment or force a change in ownership of those companies if deemed to pose a spying risk. The bill applies to technology connected to state entities deemed a "foreign adversary" of the U.S. Currently, only six countries fall under this designation: China (including Hong Kong and Macau), Cuba, Iran, North Korea, Russia, and Venezuela.

Section 3 of S.686 defines authorized actions the Commerce Secretary shall take to fulfill his duties prescribed under the proposed law.

(a) In General.—The Secretary, in consultation with the relevant executive department and agency heads, is authorized to and shall take action to identify, deter, disrupt, prevent, prohibit, investigate, or otherwise mitigate, including by negotiating, entering into, or imposing, and enforcing any mitigation measure to address any risk arising from any covered transaction by any person, or with respect to any property, subject to the jurisdiction of the United States that the Secretary determines— (S.686 - 118th Congress (2023-2024): Restrict Act)

(1) poses an undue or unacceptable risk of—

(A) sabotage or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of information and communications technology products and services in the United States; (S.686 - 118th Congress (2023-2024): Restrict Act)

(B) catastrophic effects on the security or resilience of the critical infrastructure or digital economy of the United States; (S.686 - 118th Congress (2023-2024): Restrict Act)

(C) interfering in, or altering the result or reported result of a federal election, as determined in coordination with the Attorney General, the Director of National Intelligence, the Secretary of Treasury, and the Federal Election Commission; or (S.686 - 118th Congress (2023-2024): Restrict Act)

(D) coercive or criminal activities by a foreign adversary that are designed to undermine democratic processes and institutions or steer policy and regulatory decisions in favor of the strategic objectives of a foreign adversary to the detriment of the national security of the United States, as determined in coordination with the Attorney General, the Director of National Intelligence, the Secretary of Treasury, and the Federal Election Commission; or (S.686 - 118th Congress (2023-2024): Restrict Act)

(2) otherwise poses an undue or unacceptable risk to the national security of the United States or the safety of United States persons. (S.686 - 118th Congress (2023-2024): Restrict Act)

c. HISTORICAL CONTEXT. ICT products – such as Kaspersky antivirus software, telecommunications equipment supplied by Huawei, and software products from firms based in the People's Republic of China (PRC) – have increased in popularity while the United States government has been slow to respond to potential threats posed by these products. Of notable interest is software from vendors in the PRC – such as Byte Dance's TikTok, Tencent's WeChat, and Alibaba's Alipay. These example frame a lack of consistent policies to identify threats posed by foreign ICT products and insufficient authority to assess said threat and decisively act. These are valid concerns as the top two apps downloaded in the United States from January 15, 2023, to February 13, 2023, were from PRC vendors Temu and ByteDance. The privacy risks in using foreign owned apps in the case of ByteDance owned Tik Tok are these: that the Chinese government could force TikTok to turn over private data it collects and stores in China on American users or use the platforms recommendation algorithm for misinformation or propaganda. The U.S. previous attempts to force TikTok to store its U.S. user data on domestic servers and force a sale of the TikTok platform both of which failed. Previously, President Trump's administration had banned approval of China's Huawei Technologies and ZTE because they pose "an unacceptable risk" to US national security. A ban that has continued through President Biden's administration. The Restrict Act is meant to give the government clear power to ban any app that could threaten Americans' security.

d. REGULATORY CONCERNS. The bill covers a broad range of technologies, while giving the government the power to intervene under broad circumstances, such as where they see "undue or unacceptable risk to the national security of the United States or the safety of United States persons." The language of the bill is overbroad and could give the

government too much leeway to control and censor information. Banning apps and services that allow people to communicate, such as TikTok, potentially limiting freedom of expression. There are additional concerns that VPN use could be interpreted as illegal based on the Act. This is based on sections describing services “designed or intended to evade or circumvent the application of this Act” as being covered under the Act.

e. ADDITIONAL COMMENTS. While the Secretary of Commerce may after Joint Presidential finding may ban technology connected to state entities deemed a “foreign adversary” That decision may be overturned by Joint resolution or two thirds majority. Additionally, as it relates to the Freedom of Information Act (FOIA) (The Freedom of Information Act, 5 U.S.C. § 552). SB.386 section 15 (2) states “Any information submitted to the Federal Government by a party to a covered transaction in accordance with this Act, as well as any information the Federal Government may create relating to review of the covered transaction, is exempt from disclosure under section 552 of title 5, United States Code (commonly referred to as the “Freedom of Information Act”).” (S.686 - 118th Congress (2023-2024): Restrict Act)

Works Cited

S.686 - 118th Congress (2023-2024): Restrict Act. https://www.congress.gov/bill/118th-congress/senate-bill/686.

"The Freedom of Information Act, 5 U.S.C. § 552." *The United States Department of Justice*, 21 Jan. 2022, www.justice.gov/oip/freedom-information-act-5-usc-552.