

e-commerce law & policy

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Congress cracks down on 'internet restricting countries'

Legislation is currently under review that would create civil and criminal liabilities for US businesses and their employees who cooperate with 'internet restricting countries', such as the People's Republic of China, by storing or processing electronic communications, or 'personally identifiable information', using the internet. Michael Vatis, a partner in the New York office of Steptoe & Johnson LLP, explains that if the legislation is passed, it could raise conflict-of-laws issues for 'United States businesses' – a term which is broadly defined in the proposals.

HR 275, recently approved by the House Foreign Affairs Committee, would create significant liability and record keeping requirements for any 'United States business' that cooperates with certain 'internet-restricting countries,' including China. The bill would also restrict the ability of US businesses to store or process electronic communications in such countries. It would direct the secretaries of Commerce and State to study the feasibility of imposing licensing requirements on the export of items that could be used to restrict 'internet freedom' in such countries. The bill defines 'United States business' broadly, including not only companies that have their primary place of business in the United States, are incorporated under US law, or are traded on a US exchange, but also any foreign subsidiary of such a company that is 'control[ed]' or 'direct[ed]' by the US business. Even if only parts of the bill were enacted, internet and technology companies could face serious conflict-of-laws conundrums.

Under the bill, an 'internet-restricting country' is defined as any country that blocks or filters

'peaceful political or religious content' or punishes individuals or groups for 'posting or transmitting' such content. Initially, such countries would include Belarus, Cuba, Ethiopia, Iran, Laos, North Korea, the People's Republic of China, Tunisia, and Vietnam. But this list would be subject to amendment by the President, who would be assisted by a new Office of Global Internet Freedom (OGIF) to be established in the Department of State.

The bill would create up to \$4 million in combined civil and criminal liability for any US business that 'collects or obtains personally identifiable information' over the internet and then provides such information to authorities of an internet-restricting country. The bill would also create a private right of action against such businesses and combined civil and criminal liability of up to \$200,000 and up to five years imprisonment for '[a]ny officer, director, employee, or agent, or stockholder' who violates this provision while acting on behalf of such a business. Personally identifiable information is defined as any name, address or other information listed in 18 USC § 2703(c)(2), but does not include 'traffic data' such as IP addresses, or 'any record of aggregate data that does not identify particular persons.' Liability would not apply where the information is provided for 'legitimate foreign law enforcement purposes' - to be determined by the Justice Department, but not to include 'the control, suppression, or punishment of peaceful expression of political or religious opinion' - or where the President has waived the application of the law to a particular US business or internet-restricting country.

US businesses would also be barred from locating any servers or facilities for the storage or, in some

cases, processing of 'any electronic communication that contains any personally identifiable information' in an internet-restricting country. Any US business that 'creates, provides, or hosts an Internet search engine' would be required to provide the OGIF with a report describing 'all terms and parameters used to filter, limit, or otherwise affect' search results at the behest of internet-restricting countries. All US businesses that maintain an 'internet content hosting service,' including email and blog providers, would be required to provide the OGIF with the URLs of all 'data and content' that the service has 'removed' or 'blocked' due to a request or policy of an internet-restricting country. Finally, such services would be barred from blocking access to websites for Voice of America, Radio Free Asia, and other organizations that the US government pays to disseminate information. Violations of any one of these provisions could result in combined civil and criminal fines of up to \$20,000 for both the US business and associated individuals, who could also be imprisoned for up to one year.

The legislation is currently under review by subcommittees of the House Energy and Commerce Committee. If enacted, the bill could raise significant conflicts-of-laws issues, with foreign authorities threatening fines if US businesses fail to comply with a demand for information or a requirement to store or process communications locally, and the US government warning of legal action if the business complies with such foreign demands. Global businesses therefore will want to keep a close eye on this legislation.

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