

AMENDMENT TO RULES COMMITTEE PRINT 116-57

OFFERED BY MS. CLARKE OF NEW YORK

At the end of Subtitle G of Title XII, add the following:

SEC. []. PREVENTING FOREIGN CENSORSHIP IN AMERICA

(a) FINDINGS.

Congress finds the following:

(1) Foreign governments have increasingly sought to extraterritorially intimidate American and non-American companies into policing media content and the free speech rights of staff, employees, and other associated persons.

(2) Because the extraterritorial advocacy for human rights abroad is a core tenet of American foreign policy and central to American national security, the growing extraterritorial suppression of speech of persons and companies represents a long-term threat to American interests.

(3) Self-censorship by American companies and other nongovernmental entities in accordance with the stated or unstated wishes of foreign geopolitical rivals will only encourage more of the same.

(4) While China's economic weight affords it unique leverage to seek to compel corporate self-censorship or retaliation against staff expressing contrary views, including the manager of a basketball team expressing support for human rights, other countries such as North Korea have also sought to stifle free speech through malign measures, including conducting cyberattacks against a motion picture studio that distributed comedic content regarding its leadership.

(5) The United States Congress not only defends, but encourages, American persons and persons within the United States to be outspoken defenders of the rights of those around the world standing up against repression and persecution.

(b) PROTECTING FREE SPEECH OF AMERICAN WORKERS FROM FOREIGN CENSORSHIP.

(1) PROHIBITION ON RETALIATION.—

(A) IN GENERAL.—Except as provided in paragraph (C), a domestic entity may not discharge, suspend, cease contracting with, or fail to pursue future contracts with, any existing employee or contractor, or take any other adverse action against any such employee or contractor with respect to his or her compensation, terms, conditions, or privileges of employment or contract, on the basis of protected activity, in the case that such an adverse action was undertaken—

(i) because a designated foreign government or entity explicitly or implicitly requests that the domestic entity take such an adverse action, or the domestic entity presumes that a designated foreign authority would prefer such an adverse action;

(ii) because the protected activity resulted in, or has the potential to result in—

(I) financial, reputational, or other damage to the domestic entity's profitability or organizational prospects in a country governed by a designated foreign authority with which the protected activity relates; or

(II) economic retaliation by such country; or

(iii) in response to a protected activity which constitutes protected inaction.

(B) GOOD FAITH CLAIMS.—A domestic entity may not discharge, suspend, cease contracting with, or fail to pursue future contracts with, any existing employee or contractor, or take any other adverse action against any such employee or contractor with respect to his or her compensation, terms, conditions, or privileges of employment or contract, on the basis of such employee or contractor's actual or contemplated assertion of any protection under this Act, provided such protection was asserted in good faith.

(C) EXCEPTIONS.—The prohibition under paragraph (A) does not apply if—

(i) the protected activity of the employee or contractor was conducted in such employee or contractor’s official employment or contractual capacity;

(ii) a reasonable person, considering the context or content of the protected activity, would believe such activity was conducted in such employee or contractor’s official employment or contractual capacity, and such activity, if conducted in an official capacity, would have been contrary to an official policy or the financial or organizational interests of the domestic entity; or

(iii) the protected activity occurred—

(I) in the territory of a country governed by a designated foreign authority which seeks to restrict such activity; and

(II) during an overseas trip or assignment such employee or contractor undertook on behalf of the domestic entity.

(D) RULE OF CONSTRUCTION ON SOCIAL MEDIA.—For the purpose of determining whether protected activity was conducted in an employee or contractor’s official capacity, protected activity on a social media account or other analogous medium of communication which is used both in an official and unofficial capacity, shall be presumed to be used in an unofficial capacity, absent clear and convincing evidence to the contrary.

(2) PROHIBITION ON CONTRACTUAL LIMITATIONS.—A domestic entity may not require, as a condition of employment, contract, or any compensation, benefit, or privilege related to such employment or contract, a prospective, existing, or former employee or contractor to—

(A) limit a protected activity conducted in an unofficial capacity, provided such protected activity would reasonably be expected to trigger the prohibition on retaliation described in subsection (1); or

(B) waive or abridge any right or cause of action under this Act, including requiring an employee or contractor to pursue any claims under this Act in a nonpublic or otherwise confidential manner.

(3) NONPREEMPTION.—Nothing in this section shall preempt any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, or practice that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided to employees or contractors under this Act.

(c) ENFORCEMENT.

(1) PRIVATE RIGHT OF ACTION.—

(A) IN GENERAL.—A person who is injured by an actual or threatened violation of this Section may bring an action for injunctive relief and monetary damages, including compensatory and punitive damages.

(B) COSTS.—The court shall award a prevailing plaintiff costs and fees, including reasonable attorney's fees and expert witness fees.

(C) LIMITATION ON MONETARY DAMAGES.—An employee or contractor bringing an action under this subsection to recover monetary damages pursuant to a profit-sharing, revenue-sharing, or analogous arrangement with a domestic entity may not recover the portion of the proceeds of such arrangement which would likely have been derived from activities or sales within the country governed by the designated foreign authority with which such employee or contractor's protected activity relates.

(D) STATUTE OF LIMITATIONS.—

(i) IN GENERAL.—No action may be commenced pursuant to this subsection more than the later of—

(I) 5 years after the date on which the violation occurs; or

(II) 3 years after the date on which the violation is discovered or should have been discovered through exercise of reasonable diligence.

(ii) TOLLING.—If an employee or contractor, or immediate family member thereof, of a domestic entity is detained or otherwise subject to coercion by a designated foreign authority prior to the expiration of the statute of limitations, such statute of limitation may be tolled at the discretion of the court, until the date that is one year after such detention or coercion concluded.

(E) SUMMARY JUDGMENT.—In an action under this subsection, a court may not grant a motion for summary judgment made by a domestic entity solely based on a document or other evidence produced solely by the domestic entity that describes the entity’s alleged reason for taking adverse action against an employee or contractor.

(F) RULE OF CONSTRUCTION.—The private right of action under this subsection is in addition to any other right or remedy under Federal or State law.

(2) FEDERAL AND STATE ENFORCEMENT.—

(A) FEDERAL ENFORCEMENT.—

(i) JUDICIAL ENFORCEMENT.—The Secretary of Labor or the Equal Employment Opportunity Commission may petition any appropriate district court of the United States for temporary or permanent injunctive relief if the Secretary or Commission determines that subsections (a) or (b) of section 3 of this Act has been violated.

(ii) CIVIL PENALTY.—

(I) IN GENERAL.—Any domestic entity who commits a violation of this Act may be assessed a civil money penalty by either the Secretary of Labor or the Equal Employment Opportunity Commission, but not both, of not more than the greater of—

(aa) \$100,000 for each violation constituting other adverse action against any employee or contractor with respect to his or her compensation, terms, conditions, or privileges of employment or contract;

(bb) \$250,000 for each violation involving the discharge, suspension, cessation of contract with, or failure to pursue future contracts with any employee or contractor; or

(cc) \$1,000,000 for each willful violation involving the discharge or termination of a United States person who is an employee or contractor, undertaken—

(aaa) at the explicit direction of a political, diplomatic, or intelligence official or element of a designated foreign authority;

(bbb) with actual knowledge of the prohibitions under this Act; and

(ccc) in connection with peaceful protected activity which could be reasonably understood to align with the foreign policy or national security interests of the United States.

(II) FACTORS TO CONSIDER.—In determining the amount of any penalty to be assessed, the Secretary or Commission shall take into account—

(aa) the previous record of the domestic entity in terms of compliance with this Act, or any other Federal, State, or local statutes or regulations which seek to combat foreign influence over domestic activities;

(bb) whether the violation was willful;

(cc) the gravity of the violation;

(dd) the size of the domestic entity, and any secondary implications of a large penalty on its workforce;

(ee) the nature of the protected activity, including the diplomatic relationship between the United States and the country governed by a designated foreign authority with which the protected activity relates.

(III) HEARING, APPEAL, AND ADDITIONAL MATTERS.—

(aa) AGENCY OR COMMISSION HEARING.—The domestic entity assessed shall be afforded an opportunity for agency or commission hearing, upon request made within thirty days after the date of issuance of the notice of assessment. If a hearing is requested, the initial decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary or Commission modifies or vacates the decision. Notice of intent to modify or vacate the decision of the administrative law judge shall be issued to the parties within thirty days after the decision of the administrative law judge.

(bb) APPEAL.—Any domestic entity against whom an order imposing a civil money penalty has been entered after a hearing under this section may obtain review by the United States district court for any district in which it is located or the United States district court for the District of Columbia by filing a notice of appeal in such court within 30 days from the date of such order, and simultaneously sending a copy of such notice by registered mail to the Secretary or Commission. The Secretary or Commission shall promptly certify and file in such court the record upon which the penalty was imposed. If any domestic entity fails to pay an assessment after it has become a final and unappealable order, or after the court has entered final judgment in favor of the agency or commission, the Secretary or Commission shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United States district court.

(cc) PAYMENT OF PENALTY.—All penalties collected under authority of this section shall be paid into the Treasury of the United States.

(B) FEDERAL ENFORCEMENT ACCOUNTABILITY.—On an annual basis, the President shall make publicly-available a report, which may contain a classified annex, containing a list of all Federal enforcement actions undertaken pursuant to this Act in the prior year by—

(i) the Department of Labor;

(ii) the Equal Employment Opportunity Commission; and

(iii) such other bodies which the President determines appropriate for enforcing the provisions of this Act.

(C) STATE ENFORCEMENT.—If the attorney general of a State has reason to believe that an interest of the residents of the State has been or is being threatened or adversely affected by a practice or action that violates section 3, the attorney general of the State may, as *parens patriae*, bring a civil action on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

(3) VENUE.—An action under this section may be brought in—

(1) the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code; or

(2) another court of competent jurisdiction.

(d) DEFINITIONS.

In this Act:

(1) PROTECTED ACTIVITY GENERALLY.—The term “protected activity” means protected action, protected inaction, or enhanced China-related protected activity, except that such term does not include any activity that—

(A)(i) in the case of an activity that takes place in the United States, violates a Federal law or regulation (or advocates for any such activity which constitutes a Federal felony offense);

(ii) in the case of an activity that takes place outside of the United States, would violate such a Federal law or regulation had the activity been conducted in the United States (or advocates for any such activity that constitutes a Federal felony offense);

(iii) in the case of an activity that takes place in a State, territory, or unit of local government and involves an act that constitutes a felony offense, violates a State law, territorial law, or local ordinance that prohibits such an act or advocates for such activity;

(B) undermines or inherently conflicts with an outcome or objective that such employee or contractor ordinarily aims to achieve in their official employment or contractual capacity, and achieving such an outcome or objective is a reasonably central component of such employee or contractor's typical responsibilities;

(C) is undertaken by an employee or contractor who routinely conducts work on behalf of a domestic entity whose principal and overriding purpose is advocating for or otherwise furthering outcomes or objectives of a designated foreign government or entity (including a domestic entity registered under the Foreign Agents Registration Act of 1938), which are fundamentally opposed to a principal desired outcome or objective of the activity;

(D) is undertaken with the intent to, or the reasonably foreseeable effect of, denigrating a person or class of persons on the basis of any protected characteristic which is subject to any employment protections enforceable by the Equal Employment Opportunity Commission or an analogous state or territorial agency of any state or territory in the United States; or

(E) the average person applying contemporary community standards of the United States would determine to be, taken as a whole, patently obscene and lacking in serious political, literary, artistic, or scientific value.

(2) **PROTECTED ACTION.**—The term “protected action” means—

(A) any speech, conduct, or other advocacy related to a designated foreign government or entity's actual, historic, or potential current or future gross violation of internationally recognized human rights (as such term is defined in section 502B(d) of the Foreign Assistance Act of 1961 (22 U.S.C. 2304(d))), or such government or entity's facilitation or support of, or activities related to, such a violation;

(B) any speech, conduct, or other advocacy related to political, social, or similarly sensitive matters, provided such matters generally relate to conditions or practices within a country governed by a designated foreign authority, or domestic or international policies of a designated foreign government or entity, on which such designated foreign authority censors or imposes official or unofficial publishing or advocacy restrictions (including but not limited to religious activities, cultural activities, territorial claims, sovereignty status, political leaders, internal party dynamics, alleged abuses of power, and corruption), if such censorship or restriction would be unconstitutional or otherwise unlawful if implemented in the United States by the United States Government;

(C) any speech, conduct, or other advocacy related to the international activities of a designated foreign authority, or any designated foreign authority-affiliated entity or designated agent of influence acting on its behalf, which may result in imprisonment or other official or unofficial sanction if undertaken in such country (including but not limited to licit or illicit transfers of technology, overt, covert, or clandestine action, or overseas influence or disinformation campaigns);

(D) any speech, conduct, or other advocacy contesting, purposefully or incidentally, a preferred governmental narrative of a designated foreign authority with respect to historical or current events (including but not limited to the creation or use of maps or other geographic identifiers which depict disputed territories or describe disputed territorial classifications);

(E) any speech, conduct, or other advocacy regarding senior officials of a designated foreign authority on the basis of decisions or actions undertaken in such official's official or personal capacity;
or

(F) the provision by an employee or contractor of financial or in-kind support, using exclusively resources other than resources of an employing or contracting domestic entity which has not provided consent for such use, to any person engaging in an activity which would constitute protected activity if the employee or contractor personally engaged in such activity.

(3) **PROTECTED INACTION.**—The term “protected inaction” means refraining from or refusing to undertake activity, including nonexcepted activity conducted in an employee or contractor’s official capacity, on the basis of sincerely-held philosophical, ethical, or patriotic objections, that—

(A) counters or otherwise inhibits protected action or enhanced China-related protected activity, even if such activity occurs abroad;

(B) facilitates or supports a human rights violation of a designated foreign government or entity; or

(C) facilitates or supports an overseas propaganda or disinformation effort of a designated foreign authority or designated agent of influence, provided that the activity which the employee or contractor refrained from or refused to undertake has the direct and foreseeable impact of meaningfully, or the intent of reasonably directly, contributing to a matter described in subparagraph (A), (B), or (C).

(4) **ENHANCED CHINA-RELATED PROTECTED ACTIVITY.**—The term “enhanced China-related protected activity” means any speech, conduct, or other advocacy, which is not protected action or protected inaction, and which relates to—

(A) actions of the government or ruling party of the People’s Republic of China, or any special administrative region or equivalent region, to restrict, limit, or otherwise inhibit freedom of speech or assembly, freedom of religion, or other fundamental human rights or freedoms, including through arbitrary detention, pervasive surveillance, or censorship;

(B) any aspect of a public policy debate within the United States which can reasonably be understood to predominantly pertain to China, or the relationship between the United States and any country or countries in the Indo-Pacific region, with respect to which the government or ruling party of the People’s Republic of China has lobbied or otherwise sought to encourage or discourage elected or appointed officials of the United States from pursuing or implementing a particular policy; or

(C) revealing or otherwise discussing malign international activities (including cyberattacks, unfair trade practices, intellectual property violations, influence or disinformation campaigns, illicit data collection efforts, and global surveillance or censorship efforts) of the government, ruling party, or any affiliated commercial enterprise of the People’s Republic of China.

(5) COUNTRY OF CONCERN.—The term “country of concern” means—

(A) China, including any special administrative regions or equivalent regions, but excluding, Taiwan for so long as such remains governed in a distinct and separate manner; or

(B) any other country, provided such country is not a member of the North Atlantic Treaty Organization (NATO), a major non-NATO ally designated under section 517 of the Foreign Assistance Act of 1961 (22 U.S.C. 2321k), a strategic partner of the United States, or a member, as of the date of enactment of this Act, of the Organisation for Economic Co-operation and Development, which the President publicly certifies to Congress on an annual basis—

(i) seeks, or consistently sought within the prior 10 years, to restrict protected activities of employees or contractors or otherwise meaningfully inhibit or alter the domestic speech of domestic entities on topics subject to the protections of this Act;

(ii) poses a legitimate risk of undermining official United States foreign policy objectives, furthering gross violations of international recognized human rights (as such term is defined in section 502B(d) of the Foreign Assistance Act of 1961 (22 U.S.C. 2304(d)), or interfering with the open debate and discussion of topics related to such country, by virtue of the actual or attempted actions described in clause (i); and

(iii) is—

(I) designated as a country of particular concern for religious freedom pursuant to section 402(b)(1) of the International Religious Freedom Act of 1998 (22 U.S.C. 6442(b)(1));

(II) a country sanctioned under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (22 U.S.C. 5601 et seq.), or which was sanctioned under such Act at any point of time prior to the date of enactment of this Act; or

(III) a country the government of which the Secretary of State determines has repeatedly provided support for acts of international terrorism for purposes of section 1754(c) of the Export Control Reform Act of 2018 (50 U.S.C. 4813(c)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), or section 40 of the Arms Export Control Act (22 U.S.C. 2780).

(6) DESIGNATED FOREIGN GOVERNMENTS AND ENTITIES.—The term “designated foreign government or entity” means any designated foreign authority, designated foreign authority-affiliated entity, or designated agent of influence.

(7) DESIGNATED FOREIGN AUTHORITY.—The term “designated foreign authority” means any government or governmental element, or political party or party element exercising substantial control or influence over government functions or decision-making, or government or party official of a country of concern.

(8) DESIGNATED FOREIGN AUTHORITY-AFFILIATED ENTITY.—The term “designated foreign authority-affiliated entity” means any state-owned, private, or otherwise non-governmental entity domiciled within, based within, or having its principal place of business or operations within a country of concern, unless such entity is specifically exempted by order of the President or his or her designee. Such term shall include variable interest entities and international subsidiaries affiliated with such designated foreign authority-affiliated entities.

(9) DESIGNATED AGENT OF INFLUENCE.—The term “designated agent of influence” means any domestic or international entity or person—

(A) registered under the Foreign Agents Registration Act of 1938 on behalf of a designated foreign authority or designated foreign authority-affiliated entity;

(B) the President determines and publicly certifies is otherwise acting as an overt, covert, or clandestine agent of a designated foreign authority; or

(C) understood or reasonably suspected by the domestic entity undertaking an adverse action or seeking to impose a contractual limitation which is prohibited under this Act to be an overt, covert, or clandestine agent of a designated foreign authority.

(10) DOMESTIC ENTITY.—

(A) IN GENERAL.—For the purposes of the Act, the term “domestic entity” means—

(i) any entity, without regard to the country where such entity is domiciled or incorporated, that—

(I) conducts business or organizational activities in the United States (or outside of the United States at a facility that is officially or unofficially affiliated with the United States Government); or

(II) pays salary, wages, or other compensation for work performed in the United States or that has control over employment or contracting opportunities in the United States; and

(ii) the Federal Government.

(B) LIMITED FEDERAL EXCLUSION AUTHORITY.—The President may, upon 90 days prior notice to Congress, exclude a component of a Federal agency or the Armed Forces, or a corporate contractor thereof, from the definition under this paragraph, to the extent such exclusion is in the interests of United States foreign policy or national security.

(11) EMPLOYEE.—The term “employee” means any person, including supervisors, employed in a covered context by a domestic entity.

(12) CONTRACTOR.—The term “contractor” means an individual who provides work in a covered context for a domestic entity under the terms of an independent contract with such domestic entity or an individual who uses a loan-out corporation or similar corporate structure to facilitate such work.

(13) COVERED CONTEXTS.—The term “covered context” means employment or contractual activities which—

(A) occur within the United States (including any overseas federal facilities thereof), regardless of the nationality, citizenship, domicile, or place of incorporation of the employee, contractor, or domestic entity; or

(B) are conducted by an employee or contractor of a domestic entity who typically performs work within the United States, regardless of whether such employee or contractor handles matters of an international nature or is temporarily assigned to a foreign jurisdiction for a period of 6 months or less (except to the extent such activity relates to official overseas travel to a country of concern exempted from the prohibition on retaliation pursuant to section 3 of this Act).

(e) ANNUAL REPORTING ON CENSORSHIP OF FREE SPEECH WITH RESPECT TO INTERNATIONAL ABUSES OF HUMAN RIGHTS.

Section 116(d) of the Foreign Assistance Act (22 U.S.C. 2151n(d)) is amended—

(1) in paragraph (11)(C), by striking “and” at the end;

(2) in paragraph (12)(C)(ii), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following:

“(13) wherever applicable, each instance in which each country has attempted to extraterritorially intimidate or pressure a company or entity to censor or self-censor the speech of its employees, contractors, customers, or associated staff with regards to the abuse of human rights in such country, or sought retaliation against such employees or contractors for the same, including any instance in which the government of China has sought to extraterritorially censor or punish speech that is otherwise legal in the United States on the topics of—

“(A) repression and violation of fundamental freedoms in Hong Kong;

“(B) repression and persecution of religious and ethnic minorities in China, including in the Xinjiang Uyghur Autonomous Region and the Tibet Autonomous Region;

“(C) efforts to proliferate and use surveillance technologies to surveil activists, journalists, opposition politicians, or to profile persons of different ethnicities; and

“(D) other gross violations of human rights; and

“(14) wherever applicable, each instance in which a company or entity located in or based in a third country has censored or self-censored the speech of its employees, contractors, customers, or associated staff on the topic of abuse of human rights in each country or sought to retaliate against such employees for the same, due to intimidation or pressure from or the fear of intimidation by the foreign government.”.