Big Tech's "Digital Trade" Agenda Threatens Virginia's Tech Policy Goals

Nationwide, state legislators have introduced bills to protect people from biased artificial intelligence (AI) models, online privacy violations, abuses of children and teens' data, and anti-competitive practices by tech companies—and to guarantee our right to repair our phones, cars, and other equipment.

The surge in statehouse tech legislation shows that the American people—and their elected officials at every level—want action now. But few people realize that the very firms whose conduct led to this bipartisan response have a strategy to undermine tech regulation through a stealthy form of international preemption. They want to add rules to international trade deals that limit how state and federal governments can regulate tech.

The most extreme of what these Big Tech interests misleadingly call "digital trade" rules would:

- limit governments' powers to require impact assessments, bias audits, or pre-deployment testing of even high-risk AI and other programs if this involves government regulators or independent reviewers having access to detailed descriptions of algorithms or to source code;
- forbid right to repair polices that require manufacturers to share repair tools that depend on access to code or algorithms;
- ban regulation of international data transfers, guaranteeing rights for firms to choose where our personal data moves and is stored; and
- prohibit requirements to keep certain data locally stored, for instance to keep sensitive data within the state for privacy or any other reason.

Virginia lawmakers' initiatives to regulate the tech industry must not be thwarted by "digital trade" rules being pushed by Big Tech firms. We must ensure that tech bills in Virginia are not undermined by this plot for international preemption.

The rest of this explainer details how "digital trade" provisions conflict with specific legislation proposed in Virginia relating to AI regulation.

For a detailed analysis of these "digital trade" rules, see https://rethinktrade.org/reports/international-preemption-by-trade-agreement/

AI REGULATION

To try to avoid civil rights and liberties violations and other harms from AI systems being rushed into use, legislators are introducing bills in statehouses nationwide that require impact assessments, bias audits, or pre-deployment testing to ensure that AI models are fair and accurate. The Big Tech-demanded "digital trade" rule that bans access to source code and algorithms would forbid such reviews from being conducted by or made available to government regulators or independent bodies, as many bills require.

In 2024, Virginia's state legislature considered the Artificial Intelligence Developer Act. If passed, this bill would have imposed requirements on the creators and users of AI systems to develop impact assessments that are meant to protect Virginians from risks to their health, safety, and rights:

> "§ 59.1-604. (...) B. Each developer that offers, sells, leases, gives, or otherwise makes available to a deployer a high-risk artificial intelligence system shall make available to the deployer information and documentation in the developer's possession, custody, or control that is reasonably required to complete an impact assessment. (...)
> § 59.1-606. (...) C. Except as provided in this subsection, no deployer shall deploy or use a high-risk artificial intelligence system to make a consequential decision unless the deployer has completed an impact assessment for such high-risk artificial intelligence system. (...) Each impact assessment completed pursuant to this subsection shall include, at a minimum: (...)
> 3. A description of (i) the data the high-risk artificial intelligence system processes as inputs and (ii) the outputs such high-risk artificial intelligence system produces; (...)
> F. The Attorney General may require that a developer disclose to the Attorney General any statement or documentation described in this chapter if such statement or documentation is relevant to an investigation conducted by the Attorney General. The Attorney General may also require that a deployer disclose to the Attorney General any risk management policy designed and implemented, impact assessment completed, or record maintained pursuant to this chapter if such risk management policy, impact assessment, or record is relevant to an investigation conducted by the Attorney General."

This bill requires developers to share information with deployers, requires deployers to carry out impact assessments, and allows the attorney general to require disclosure of impact assessments. Impact assessments must include a description of the data processed by a high-risk AI system and the outputs such a high-risk AI system produces. As a result, this policy could be at risk of legal challenges from deployers or developers based on algorithmic secrecy guarantees in "digital trade" provisions.

The good news is that very few of the hundreds of trade agreements in effect worldwide include Big Tech's "digital trade" rules. The bad news is that Big Tech lobbyists are using their power and money to try to rig numerous trade deals that are being negotiated right now to derail the wave of tech regulation underway nationwide. To learn more, please visit: www.rethinktrade.org