

115TH CONGRESS
2D SESSION

S. 3085

AN ACT

To establish a Federal Acquisition Security Council and to provide executive agencies with authorities relating to mitigating supply chain risks in the procurement of information technology, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Federal Acquisition
3 Supply Chain Security Act of 2018”.

4 **SEC. 2. FEDERAL ACQUISITION SUPPLY CHAIN SECURITY.**

5 (a) IN GENERAL.—Chapter 13 of title 41, United
6 States Code, is amended by adding at the end the fol-
7 lowing new subchapter:

8 “SUBCHAPTER III—FEDERAL ACQUISITION
9 SUPPLY CHAIN SECURITY

10 **“§ 1321. Definitions**

11 “In this subchapter:

12 “(1) APPROPRIATE CONGRESSIONAL COMMIT-
13 TEES AND LEADERSHIP.—The term ‘appropriate
14 congressional committees and leadership’ means—

15 “(A) the Committee on Homeland Security
16 and Governmental Affairs, the Committee on
17 the Judiciary, the Committee on Appropria-
18 tions, the Committee on Armed Services, the
19 Committee on Commerce, Science, and Trans-
20 portation, the Select Committee on Intelligence,
21 and the majority and minority leader of the
22 Senate; and

23 “(B) the Committee on Oversight and Gov-
24 ernment Reform, the Committee on the Judici-
25 ary, the Committee on Appropriations, the
26 Committee on Homeland Security, the Com-

1 mittee on Armed Services, the Committee on
2 Energy and Commerce, the Permanent Select
3 Committee on Intelligence, and the Speaker and
4 minority leader of the House of Representa-
5 tives.

6 “(2) COUNCIL.—The term ‘Council’ means the
7 Federal Acquisition Security Council established
8 under section 1322(a) of this title.

9 “(3) COVERED ARTICLE.—The term ‘covered
10 article’ has the meaning given that term in section
11 4713 of this title.

12 “(4) COVERED PROCUREMENT ACTION.—The
13 term ‘covered procurement action’ has the meaning
14 given that term in section 4713 of this title.

15 “(5) INFORMATION AND COMMUNICATIONS
16 TECHNOLOGY.—The term ‘information and commu-
17 nications technology’ has the meaning given that
18 term in section 4713 of this title.

19 “(6) INTELLIGENCE COMMUNITY.—The term
20 ‘intelligence community’ has the meaning given that
21 term in section 3(4) of the National Security Act of
22 1947 (50 U.S.C. 3003(4)).

23 “(7) NATIONAL SECURITY SYSTEM.—The term
24 ‘national security system’ has the meaning given
25 that term in section 3552 of title 44.

1 “(8) SUPPLY CHAIN RISK.—The term ‘supply
2 chain risk’ has the meaning given that term in sec-
3 tion 4713 of this title.

4 **“§ 1322. Federal Acquisition Security Council estab-**
5 **lishment and membership**

6 “(a) ESTABLISHMENT.—There is established in the
7 executive branch a Federal Acquisition Security Council.

8 “(b) MEMBERSHIP.—

9 “(1) IN GENERAL.—The following agencies
10 shall be represented on the Council:

11 “(A) The Office of Management and
12 Budget.

13 “(B) The General Services Administration.

14 “(C) The Department of Homeland Secu-
15 rity, including the Cybersecurity and Infra-
16 structure Security Agency.

17 “(D) The Office of the Director of Na-
18 tional Intelligence, including the National Coun-
19 terintelligence and Security Center.

20 “(E) The Department of Justice, including
21 the Federal Bureau of Investigation.

22 “(F) The Department of Defense, includ-
23 ing the National Security Agency.

1 “(G) The Department of Commerce, in-
2 cluding the National Institute of Standards and
3 Technology.

4 “(H) Such other executive agencies as de-
5 termined by the Chairperson of the Council.

6 “(2) LEAD REPRESENTATIVES.—

7 “(A) DESIGNATION.—

8 “(i) IN GENERAL.—Not later than 45
9 days after the date of the enactment of the
10 Federal Acquisition Supply Chain Security
11 Act of 2018, the head of each agency rep-
12 resented on the Council shall designate a
13 representative of that agency as the lead
14 representative of the agency on the Coun-
15 cil.

16 “(ii) REQUIREMENTS.—The rep-
17 resentative of an agency designated under
18 clause (i) shall have expertise in supply
19 chain risk management, acquisitions, or in-
20 formation and communications technology.

21 “(B) FUNCTIONS.—The lead representa-
22 tive of an agency designated under subpara-
23 graph (A) shall ensure that appropriate per-
24 sonnel, including leadership and subject matter

1 experts of the agency, are aware of the business
2 of the Council.

3 “(c) CHAIRPERSON.—

4 “(1) DESIGNATION.—Not later than 45 days
5 after the date of the enactment of the Federal Ac-
6 quisition Supply Chain Security Act of 2018, the Di-
7 rector of the Office of Management and Budget
8 shall designate a senior-level official from the Office
9 of Management and Budget to serve as the Chair-
10 person of the Council.

11 “(2) FUNCTIONS.—The Chairperson shall per-
12 form functions that include—

13 “(A) subject to subsection (d), developing
14 a schedule for meetings of the Council;

15 “(B) designating executive agencies to be
16 represented on the Council under subsection
17 (b)(1)(H);

18 “(C) in consultation with the lead rep-
19 resentative of each agency represented on the
20 Council, developing a charter for the Council;
21 and

22 “(D) not later than 7 days after comple-
23 tion of the charter, submitting the charter to
24 the appropriate congressional committees and
25 leadership.

1 “(d) MEETINGS.—The Council shall meet not later
2 than 60 days after the date of the enactment of the Fed-
3 eral Acquisition Supply Chain Security Act of 2018 and
4 not less frequently than quarterly thereafter.

5 **“§ 1323. Functions and authorities**

6 “(a) IN GENERAL.—The Council shall perform func-
7 tions that include the following:

8 “(1) Identifying and recommending develop-
9 ment by the National Institute of Standards and
10 Technology of supply chain risk management stand-
11 ards, guidelines, and practices for executive agencies
12 to use when assessing and developing mitigation
13 strategies to address supply chain risks, particularly
14 in the acquisition and use of covered articles under
15 section 1326(a) of this title.

16 “(2) Identifying or developing criteria for shar-
17 ing information with executive agencies, other Fed-
18 eral entities, and non-Federal entities with respect to
19 supply chain risk, including information related to
20 the exercise of authorities provided under this sec-
21 tion and sections 1326 and 4713 of this title. At a
22 minimum, such criteria shall address—

23 “(A) the content to be shared;

24 “(B) the circumstances under which shar-
25 ing is mandated or voluntary; and

1 “(C) the circumstances under which it is
2 appropriate for an executive agency to rely on
3 information made available through such shar-
4 ing in exercising the responsibilities and au-
5 thorities provided under this section and section
6 4713 of this title.

7 “(3) Identifying an appropriate executive agen-
8 cy to—

9 “(A) accept information submitted by execu-
10 tive agencies based on the criteria established
11 under paragraph (2);

12 “(B) facilitate the sharing of information
13 received under subparagraph (A) to support
14 supply chain risk analyses under section 1326
15 of this title, recommendations under this sec-
16 tion, and covered procurement actions under
17 section 4713 of this title;

18 “(C) share with the Council information
19 regarding covered procurement actions by execu-
20 tive agencies taken under section 4713 of this
21 title; and

22 “(D) inform the Council of orders issued
23 under this section.

24 “(4) Identifying, as appropriate, executive agen-
25 cies to provide—

1 “(A) shared services, such as support for
2 making risk assessments, validation of products
3 that may be suitable for acquisition, and miti-
4 gation activities; and

5 “(B) common contract solutions to support
6 supply chain risk management activities, such
7 as subscription services or machine-learning-en-
8 hanced analysis applications to support in-
9 formed decisionmaking.

10 “(5) Identifying and issuing guidance on addi-
11 tional steps that may be necessary to address supply
12 chain risks arising in the course of executive agen-
13 cies providing shared services, common contract so-
14 lutions, acquisitions vehicles, or assisted acquisitions.

15 “(6) Engaging with the private sector and other
16 nongovernmental stakeholders in performing the
17 functions described in paragraphs (1) and (2) and
18 on issues relating to the management of supply
19 chain risks posed by the acquisition of covered arti-
20 cles.

21 “(7) Carrying out such other actions, as deter-
22 mined by the Council, that are necessary to reduce
23 the supply chain risks posed by acquisitions and use
24 of covered articles.

1 “(b) PROGRAM OFFICE AND COMMITTEES.—The
2 Council may establish a program office and any commit-
3 tees, working groups, or other constituent bodies the
4 Council deems appropriate, in its sole and unreviewable
5 discretion, to carry out its functions.

6 “(c) AUTHORITY FOR EXCLUSION OR REMOVAL OR-
7 DERS.—

8 “(1) CRITERIA.—To reduce supply chain risk,
9 the Council shall establish criteria and procedures
10 for—

11 “(A) recommending orders applicable to
12 executive agencies requiring the exclusion of
13 sources or covered articles from executive agen-
14 cy procurement actions (in this section referred
15 to as ‘exclusion orders’);

16 “(B) recommending orders applicable to
17 executive agencies requiring the removal of cov-
18 ered articles from executive agency information
19 systems (in this section referred to as ‘removal
20 orders’);

21 “(C) requesting and approving exceptions
22 to an issued exclusion or removal order when
23 warranted by circumstances, including alter-
24 native mitigation actions or other findings relat-
25 ing to the national interest, including national

1 security reviews, national security investiga-
2 tions, or national security agreements; and

3 “(D) ensuring that recommended orders do
4 not conflict with standards and guidelines
5 issued under section 11331 of title 40 and that
6 the Council consults with the Director of the
7 National Institute of Standards and Technology
8 regarding any recommended orders that would
9 implement standards and guidelines developed
10 by the National Institute of Standards and
11 Technology.

12 “(2) RECOMMENDATIONS.—The Council shall
13 use the criteria established under paragraph (1), in-
14 formation made available under subsection (a)(3),
15 and any other information the Council determines
16 appropriate to issue recommendations, for applica-
17 tion to executive agencies or any subset thereof, re-
18 garding the exclusion of sources or covered articles
19 from any executive agency procurement action, in-
20 cluding source selection and consent for a contractor
21 to subcontract, or the removal of covered articles
22 from executive agency information systems. Such
23 recommendations shall include—

1 “(A) information necessary to positively
2 identify the sources or covered articles rec-
3 ommended for exclusion or removal;

4 “(B) information regarding the scope and
5 applicability of the recommended exclusion or
6 removal order;

7 “(C) a summary of any risk assessment re-
8 viewed or conducted in support of the rec-
9 ommended exclusion or removal order;

10 “(D) a summary of the basis for the rec-
11 ommendation, including a discussion of less in-
12 trusive measures that were considered and why
13 such measures were not reasonably available to
14 reduce supply chain risk;

15 “(E) a description of the actions necessary
16 to implement the recommended exclusion or re-
17 moval order; and

18 “(F) where practicable, in the Council’s
19 sole and unreviewable discretion, a description
20 of mitigation steps that could be taken by the
21 source that may result in the Council rescinding
22 a recommendation.

23 “(3) NOTICE OF RECOMMENDATION AND RE-
24 VIEW.—A notice of the Council’s recommendation

1 under paragraph (2) shall be issued to any source
2 named in the recommendation advising—

3 “(A) that a recommendation has been
4 made;

5 “(B) of the criteria the Council relied upon
6 under paragraph (1) and, to the extent con-
7 sistent with national security and law enforce-
8 ment interests, of information that forms the
9 basis for the recommendation;

10 “(C) that, within 30 days after receipt of
11 notice, the source may submit information and
12 argument in opposition to the recommendation;

13 “(D) of the procedures governing the re-
14 view and possible issuance of an exclusion or re-
15 moval order pursuant to paragraph (5); and

16 “(E) where practicable, in the Council’s
17 sole and unreviewable discretion, a description
18 of mitigation steps that could be taken by the
19 source that may result in the Council rescinding
20 the recommendation.

21 “(4) CONFIDENTIALITY.—Any notice issued to
22 a source under paragraph (3) shall be kept confiden-
23 tial until—

24 “(A) an exclusion or removal order is
25 issued pursuant to paragraph (5); and

1 “(B) the source has been notified pursuant
2 to paragraph (6).

3 “(5) EXCLUSION AND REMOVAL ORDERS.—

4 “(A) ORDER ISSUANCE.—Recommendations
5 of the Council under paragraph (2), together
6 with any information submitted by a
7 source under paragraph (3) related to such a
8 recommendation, shall be reviewed by the following
9 officials, who may issue exclusion and
10 removal orders based upon such recommendations:
11

12 “(i) The Secretary of Homeland Security,
13 for exclusion and removal orders applicable
14 to civilian agencies, to the extent
15 not covered by clause (ii) or (iii).

16 “(ii) The Secretary of Defense, for exclusion
17 and removal orders applicable to
18 the Department of Defense and national
19 security systems other than sensitive compartmented
20 information systems.

21 “(iii) The Director of National Intelligence,
22 for exclusion and removal orders
23 applicable to the intelligence community
24 and sensitive compartmented information

1 systems, to the extent not covered by
2 clause (ii).

3 “(B) DELEGATION.—The officials identi-
4 fied in subparagraph (A) may not delegate any
5 authority under this subparagraph to an official
6 below the level one level below the Deputy Sec-
7 retary or Principal Deputy Director, except that
8 the Secretary of Defense may delegate author-
9 ity for removal orders to the Commander of the
10 United States Cyber Command, who may not
11 redelegate such authority to an official below
12 the level one level below the Deputy Com-
13 mander.

14 “(C) FACILITATION OF EXCLUSION OR-
15 DERS.—If officials identified under this para-
16 graph from the Department of Homeland Secu-
17 rity, the Department of Defense, and the Office
18 of the Director of National Intelligence issue or-
19 ders collectively resulting in a governmentwide
20 exclusion, the Administrator for General Serv-
21 ices and officials at other executive agencies re-
22 sponsible for management of the Federal Sup-
23 ply Schedules, governmentwide acquisition con-
24 tracts, and multi-agency contracts shall help fa-
25 cilitate implementation of such orders by re-

1 moving the covered articles or sources identified
2 in the orders from such contracts.

3 “(D) REVIEW OF EXCLUSION AND RE-
4 MOVAL ORDERS.—The officials identified under
5 this paragraph shall review all exclusion and re-
6 moval orders issued under subparagraph (A)
7 not less frequently than annually pursuant to
8 procedures established by the Council.

9 “(E) RESCISSION.—Orders issued pursu-
10 ant to subparagraph (A) may be rescinded by
11 an authorized official from the relevant issuing
12 agency.

13 “(6) NOTIFICATIONS.—Upon issuance of an ex-
14 clusion or removal order pursuant to paragraph
15 (5)(A), the official identified under that paragraph
16 who issued the order shall—

17 “(A) notify any source named in the order
18 of—

19 “(i) the exclusion or removal order;
20 and

21 “(ii) to the extent consistent with na-
22 tional security and law enforcement inter-
23 ests, information that forms the basis for
24 the order;

1 “(B) provide classified or unclassified no-
2 tice of the exclusion or removal order to the ap-
3 propriate congressional committees and leader-
4 ship; and

5 “(C) provide the exclusion or removal
6 order to the agency identified in subsection
7 (a)(3).

8 “(7) COMPLIANCE.—Executive agencies shall
9 comply with exclusion and removal orders issued
10 pursuant to paragraph (5).

11 “(d) AUTHORITY TO REQUEST INFORMATION.—The
12 Council may request such information from executive
13 agencies as is necessary for the Council to carry out its
14 functions.

15 “(e) RELATIONSHIP TO OTHER COUNCILS.—The
16 Council shall consult and coordinate, as appropriate, with
17 other relevant councils and interagency committees, in-
18 cluding the Chief Information Officers Council, the Chief
19 Acquisition Officers Council, the Federal Acquisition Reg-
20 ulatory Council, and the Committee on Foreign Invest-
21 ment in the United States, with respect to supply chain
22 risks posed by the acquisition and use of covered articles.

23 “(f) RULES OF CONSTRUCTION.—Nothing in this
24 section shall be construed—

1 “(1) to limit the authority of the Office of Fed-
2 eral Procurement Policy to carry out the responsibil-
3 ities of that Office under any other provision of law;
4 or

5 “(2) to authorize the issuance of an exclusion
6 or removal order based solely on the fact of foreign
7 ownership of a potential procurement source that is
8 otherwise qualified to enter into procurement con-
9 tracts with the Federal Government.

10 **“§ 1324. Strategic plan**

11 “(a) IN GENERAL.—Not later than 180 days after
12 the date of the enactment of the Federal Acquisition Sup-
13 ply Chain Security Act of 2018, the Council shall develop
14 a strategic plan for addressing supply chain risks posed
15 by the acquisition of covered articles and for managing
16 such risks, that includes—

17 “(1) the criteria and processes required under
18 section 1323(a) of this title, including a threshold
19 and requirements for sharing relevant information
20 about such risks with all executive agencies and, as
21 appropriate, with other Federal entities and non-
22 Federal entities;

23 “(2) an identification of existing authorities for
24 addressing such risks;

1 “(3) an identification and promulgation of best
2 practices and procedures and available resources for
3 executive agencies to assess and mitigate such risks;

4 “(4) recommendations for any legislative, regu-
5 latory, or other policy changes to improve efforts to
6 address such risks;

7 “(5) recommendations for any legislative, regu-
8 latory, or other policy changes to incentivize the
9 adoption of best practices for supply chain risk man-
10 agement by the private sector;

11 “(6) an evaluation of the effect of implementing
12 new policies or procedures on existing contracts and
13 the procurement process;

14 “(7) a plan for engaging with executive agen-
15 cies, the private sector, and other nongovernmental
16 stakeholders to address such risks;

17 “(8) a plan for identification, assessment, miti-
18 gation, and vetting of supply chain risks from exist-
19 ing and prospective information and communications
20 technology made available by executive agencies to
21 other executive agencies through common contract
22 solutions, shared services, acquisition vehicles, or
23 other assisted acquisition services; and

24 “(9) plans to strengthen the capacity of all ex-
25 ecutive agencies to conduct assessments of—

1 “(A) the supply chain risk posed by the ac-
2 quisition of covered articles; and

3 “(B) compliance with the requirements of
4 this subchapter.

5 “(b) SUBMISSION TO CONGRESS.—Not later than 7
6 calendar days after completion of the strategic plan re-
7 quired by subsection (a), the Chairperson of the Council
8 shall submit the plan to the appropriate congressional
9 committees and leadership.

10 **“§ 1325. Annual report**

11 “Not later than December 31 of each year, the Chair-
12 person of the Council shall submit to the appropriate con-
13 gressional committees and leadership a report on the ac-
14 tivities of the Council during the preceding 12-month pe-
15 riod.

16 **“§ 1326. Requirements for executive agencies**

17 “(a) IN GENERAL.—The head of each executive agen-
18 cy shall be responsible for—

19 “(1) assessing the supply chain risk posed by
20 the acquisition and use of covered articles and avoid-
21 ing, mitigating, accepting, or transferring that risk,
22 as appropriate and consistent with the standards,
23 guidelines, and practices identified by the Council
24 under section 1323(a)(1); and

1 “(2) prioritizing supply chain risk assessments
2 conducted under paragraph (1) based on the criti-
3 cality of the mission, system, component, service, or
4 asset.

5 “(b) INCLUSIONS.—The responsibility for assessing
6 supply chain risk described in subsection (a) includes—

7 “(1) developing an overall supply chain risk
8 management strategy and implementation plan and
9 policies and processes to guide and govern supply
10 chain risk management activities;

11 “(2) integrating supply chain risk management
12 practices throughout the lifecycle of the system,
13 component, service, or asset;

14 “(3) limiting, avoiding, mitigating, accepting, or
15 transferring any identified risk;

16 “(4) sharing relevant information with other ex-
17 ecutive agencies, as determined appropriate by the
18 Council in a manner consistent with section 1323(a)
19 of this title;

20 “(5) reporting on progress and effectiveness of
21 the agency’s supply chain risk management con-
22 sistent with guidance issued by the Office of Man-
23 agement and Budget and the Council; and

24 “(6) ensuring that all relevant information, in-
25 cluding classified information, with respect to acqui-

1 sitions of covered articles that may pose a supply
2 chain risk, consistent with section 1323(a) of this
3 title, is incorporated into existing processes of the
4 agency for conducting assessments described in sub-
5 section (a) and ongoing management of acquisition
6 programs, including any identification, investigation,
7 mitigation, or remediation needs.

8 “(c) INTERAGENCY ACQUISITIONS.—

9 “(1) IN GENERAL.—Except as provided in para-
10 graph (2), in the case of an interagency acquisition,
11 subsection (a) shall be carried out by the head of the
12 executive agency whose funds are being used to pro-
13 cure the covered article.

14 “(2) ASSISTED ACQUISITIONS.—In an assisted
15 acquisition, the parties to the acquisition shall deter-
16 mine, as part of the interagency agreement gov-
17 erning the acquisition, which agency is responsible
18 for carrying out subsection (a).

19 “(3) DEFINITIONS.—In this subsection, the
20 terms ‘assisted acquisition’ and ‘interagency acquisi-
21 tion’ have the meanings given those terms in section
22 2.101 of title 48, Code of Federal Regulations (or
23 any corresponding similar regulation or ruling).

24 “(d) ASSISTANCE.—The Secretary of Homeland Se-
25 curity may—

1 “(1) assist executive agencies in conducting risk
2 assessments described in subsection (a) and imple-
3 menting mitigation requirements for information
4 and communications technology; and

5 “(2) provide such additional guidance or tools
6 as are necessary to support actions taken by execu-
7 tive agencies.

8 **“§ 1327. Judicial review procedures**

9 “(a) IN GENERAL.—Except as provided in subsection
10 (b) and chapter 71 of this title, and notwithstanding any
11 other provision of law, an action taken under section 1323
12 or 4713 of this title, or any action taken by an executive
13 agency to implement such an action, shall not be subject
14 to administrative review or judicial review, including bid
15 protests before the Government Accountability Office or
16 in any Federal court.

17 “(b) PETITIONS.—

18 “(1) IN GENERAL.—Not later than 60 days
19 after a party is notified of an exclusion or removal
20 order under section 1323(c)(6) of this title or a cov-
21 ered procurement action under section 4713 of this
22 title, the party may file a petition for judicial review
23 in the United States Court of Appeals for the Dis-
24 trict of Columbia Circuit claiming that the issuance

1 of the exclusion or removal order or covered procure-
2 ment action is unlawful.

3 “(2) STANDARD OF REVIEW.—The Court shall
4 hold unlawful a covered action taken under sections
5 1323 or 4713 of this title, in response to a petition
6 that the court finds to be—

7 “(A) arbitrary, capricious, an abuse of dis-
8 cretion, or otherwise not in accordance with
9 law;

10 “(B) contrary to constitutional right,
11 power, privilege, or immunity;

12 “(C) in excess of statutory jurisdiction, au-
13 thority, or limitation, or short of statutory
14 right;

15 “(D) lacking substantial support in the ad-
16 ministrative record taken as a whole or in clas-
17 sified information submitted to the court under
18 paragraph (3); or

19 “(E) not in accord with procedures re-
20 quired by law.

21 “(3) EXCLUSIVE JURISDICTION.—The United
22 States Court of Appeals for the District of Columbia
23 Circuit shall have exclusive jurisdiction over claims
24 arising under sections 1323(c)(5) or 4713 of this
25 title against the United States, any United States

1 department or agency, or any component or official
2 of any such department or agency, subject to review
3 by the Supreme Court of the United States under
4 section 1254 of title 28.

5 “(4) ADMINISTRATIVE RECORD AND PROCE-
6 DURES.—

7 “(A) IN GENERAL.—The procedures de-
8 scribed in this paragraph shall apply to the re-
9 view of a petition under this section.

10 “(B) ADMINISTRATIVE RECORD.—

11 “(i) FILING OF RECORD.—The United
12 States shall file with the court an adminis-
13 trative record, which shall consist of the
14 information that the appropriate official
15 relied upon in issuing an exclusion or re-
16 moval order under section 1323(c)(5) or a
17 covered procurement action under section
18 4713 of this title.

19 “(ii) UNCLASSIFIED, NONPRIVILEGED
20 INFORMATION.—All unclassified informa-
21 tion contained in the administrative record
22 that is not otherwise privileged or subject
23 to statutory protections shall be provided
24 to the petitioner with appropriate protec-
25 tions for any privileged or confidential

1 trade secrets and commercial or financial
2 information.

3 “(iii) IN CAMERA AND EX PARTE.—
4 The following information may be included
5 in the administrative record and shall be
6 submitted only to the court ex parte and in
7 camera:

8 “(I) Classified information.

9 “(II) Sensitive security informa-
10 tion, as defined by section 1520.5 of
11 title 49, Code of Federal Regulations.

12 “(III) Privileged law enforcement
13 information.

14 “(IV) Information obtained or
15 derived from any activity authorized
16 under the Foreign Intelligence Sur-
17 veillance Act of 1978 (50 U.S.C. 1801
18 et seq.), except that, with respect to
19 such information, subsections (e), (e),
20 (f), (g), and (h) of section 106 (50
21 U.S.C. 1806), subsections (d), (f), (g),
22 (h), and (i) of section 305 (50 U.S.C.
23 1825), subsections (e), (e), (f), (g),
24 and (h) of section 405 (50 U.S.C.

1 1845), and section 706 (50 U.S.C.
2 1881e) of that Act shall not apply.

3 “(V) Information subject to privi-
4 lege or protections under any other
5 provision of law.

6 “(iv) UNDER SEAL.—Any information
7 that is part of the administrative record
8 filed ex parte and in camera under clause
9 (iii), or cited by the court in any decision,
10 shall be treated by the court consistent
11 with the provisions of this subparagraph
12 and shall remain under seal and preserved
13 in the records of the court to be made
14 available consistent with the above provi-
15 sions in the event of further proceedings.
16 In no event shall such information be re-
17 leased to the petitioner or as part of the
18 public record.

19 “(v) RETURN.—After the expiration
20 of the time to seek further review, or the
21 conclusion of further proceedings, the
22 court shall return the administrative
23 record, including any and all copies, to the
24 United States.

1 “(C) EXCLUSIVE REMEDY.—A determina-
2 tion by the court under this subsection shall be
3 the exclusive judicial remedy for any claim de-
4 scribed in this section against the United
5 States, any United States department or agen-
6 cy, or any component or official of any such de-
7 partment or agency.

8 “(D) RULE OF CONSTRUCTION.—Nothing
9 in this section shall be construed as limiting,
10 superseding, or preventing the invocation of,
11 any privileges or defenses that are otherwise
12 available at law or in equity to protect against
13 the disclosure of information.

14 “(c) DEFINITION.—In this section, the term ‘classi-
15 fied information’—

16 “(1) has the meaning given that term in section
17 1(a) of the Classified Information Procedures Act
18 (18 U.S.C. App.); and

19 “(2) includes—

20 “(A) any information or material that has
21 been determined by the United States Govern-
22 ment pursuant to an Executive order, statute,
23 or regulation to require protection against un-
24 authorized disclosure for reasons of national se-
25 curity; and

1 “(B) any restricted data, as defined in sec-
2 tion 11 of the Atomic Energy Act of 1954 (42
3 U.S.C. 2014).

4 **“§ 1328. Termination**

5 “‘This subchapter shall terminate on the date that is
6 5 years after the date of the enactment of the Federal
7 Acquisition Supply Chain Security Act of 2018.’”.

8 (b) CLERICAL AMENDMENT.—The table of sections
9 at the beginning of chapter 13 of such title is amended
10 by adding at the end the following new items:

 “SUBCHAPTER III—FEDERAL ACQUISITION SUPPLY CHAIN SECURITY

“Sec.

“1321. Definitions.

“1322. Federal Acquisition Security Council establishment and membership.

“1323. Functions and authorities.

“1324. Strategic plan.

“1325. Annual report.

“1326. Requirements for executive agencies.

“1327. Judicial review procedures.

“1328. Termination.”.

11 (c) EFFECTIVE DATE.—The amendments made by
12 this section shall take effect on the date that is 90 days
13 after the date of the enactment of this Act and shall apply
14 to contracts that are awarded before, on, or after that
15 date.

16 (d) IMPLEMENTATION.—

17 (1) INTERIM FINAL RULE.—Not later than one
18 year after the date of the enactment of this Act, the
19 Federal Acquisition Security Council shall prescribe
20 an interim final rule to implement subchapter III of

1 chapter 13 of title 41, United States Code, as added
2 by subsection (a).

3 (2) FINAL RULE.—Not later than one year
4 after prescribing the interim final rule under para-
5 graph (1) and considering public comments with re-
6 spect to such interim final rule, the Council shall
7 prescribe a final rule to implement subchapter III of
8 chapter 13 of title 41, United States Code, as added
9 by subsection (a).

10 (3) FAILURE TO ACT.—

11 (A) IN GENERAL.—If the Council does not
12 issue a final rule in accordance with paragraph
13 (2) on or before the last day of the 1-year pe-
14 riod referred to in that paragraph, the Council
15 shall submit to the appropriate congressional
16 committees and leadership, not later than 10
17 days after such last day and every 90 days
18 thereafter until the final rule is issued, a report
19 explaining why the final rule was not timely
20 issued and providing an estimate of the earliest
21 date on which the final rule will be issued.

22 (B) APPROPRIATE CONGRESSIONAL COM-
23 MITTEES AND LEADERSHIP DEFINED.—In this
24 paragraph, the term “appropriate congressional
25 committees and leadership” has the meaning

1 given that term in section 1321 of title 41,
2 United States Code, as added by subsection (a).

3 **SEC. 3. AUTHORITIES OF EXECUTIVE AGENCIES RELATING**
4 **TO MITIGATING SUPPLY CHAIN RISKS IN THE**
5 **PROCUREMENT OF COVERED ARTICLES.**

6 (a) IN GENERAL.—Chapter 47 of title 41, United
7 States Code, is amended by adding at the end the fol-
8 lowing new section:

9 **“§ 4713. Authorities relating to mitigating supply**
10 **chain risks in the procurement of cov-**
11 **ered articles**

12 “(a) AUTHORITY.—Subject to subsection (b), the
13 head of an executive agency may carry out a covered pro-
14 curement action.

15 “(b) DETERMINATION AND NOTIFICATION.—Except
16 as authorized by subsection (c) to address an urgent na-
17 tional security interest, the head of an executive agency
18 may exercise the authority provided in subsection (a) only
19 after—

20 “(1) obtaining a joint recommendation, in un-
21 classified or classified form, from the chief acquisi-
22 tion officer and the chief information officer of the
23 agency, or officials performing similar functions in
24 the case of executive agencies that do not have such
25 officials, which includes a review of any risk assess-

1 ment made available by the executive agency identi-
2 fied under section 1323(a)(3) of this title, that there
3 is a significant supply chain risk in a covered pro-
4 curement;

5 “(2) providing notice of the joint recommenda-
6 tion described in paragraph (1) to any source named
7 in the joint recommendation advising—

8 “(A) that a recommendation is being con-
9 sidered or has been obtained;

10 “(B) to the extent consistent with the na-
11 tional security and law enforcement interests, of
12 information that forms the basis for the rec-
13 ommendation;

14 “(C) that, within 30 days after receipt of
15 the notice, the source may submit information
16 and argument in opposition to the recommenda-
17 tion; and

18 “(D) of the procedures governing the con-
19 sideration of the submission and the possible
20 exercise of the authority provided in subsection
21 (a);

22 “(3) making a determination in writing, in un-
23 classified or classified form, after considering any in-
24 formation submitted by a source under paragraph

1 (2) and in consultation with the chief information
2 security officer of the agency, that—

3 “(A) use of the authority under subsection
4 (a) is necessary to protect national security by
5 reducing supply chain risk;

6 “(B) less intrusive measures are not rea-
7 sonably available to reduce such supply chain
8 risk; and

9 “(C) the use of such authorities will apply
10 to a single covered procurement or a class of
11 covered procurements, and otherwise specifies
12 the scope of the determination; and

13 “(4) providing a classified or unclassified notice
14 of the determination made under paragraph (3) to
15 the appropriate congressional committees and lead-
16 ership that includes—

17 “(A) the joint recommendation described
18 in paragraph (1);

19 “(B) a summary of any risk assessment re-
20 viewed in support of the joint recommendation
21 required by paragraph (1); and

22 “(C) a summary of the basis for the deter-
23 mination, including a discussion of less intru-
24 sive measures that were considered and why

1 such measures were not reasonably available to
2 reduce supply chain risk.

3 “(c) PROCEDURES TO ADDRESS URGENT NATIONAL
4 SECURITY INTERESTS.—In any case in which the head of
5 an executive agency determines that an urgent national
6 security interest requires the immediate exercise of the au-
7 thority provided in subsection (a), the head of the agen-
8 cy—

9 “(1) may, to the extent necessary to address
10 such national security interest, and subject to the
11 conditions in paragraph (2)—

12 “(A) temporarily delay the notice required
13 by subsection (b)(2);

14 “(B) make the determination required by
15 subsection (b)(3), regardless of whether the no-
16 tice required by subsection (b)(2) has been pro-
17 vided or whether the notified source has sub-
18 mitted any information in response to such no-
19 tice;

20 “(C) temporarily delay the notice required
21 by subsection (b)(4); and

22 “(D) exercise the authority provided in
23 subsection (a) in accordance with such deter-
24 mination within 60 calendar days after the day
25 the determination is made; and

1 “(2) shall take actions necessary to comply with
2 all requirements of subsection (b) as soon as prac-
3 ticable after addressing the urgent national security
4 interest, including—

5 “(A) providing the notice required by sub-
6 section (b)(2);

7 “(B) promptly considering any information
8 submitted by the source in response to such no-
9 tice, and making any appropriate modifications
10 to the determination based on such information;

11 “(C) providing the notice required by sub-
12 section (b)(4), including a description of the ur-
13 gent national security interest, and any modi-
14 fications to the determination made in accord-
15 ance with subparagraph (B); and

16 “(D) providing notice to the appropriate
17 congressional committees and leadership within
18 7 calendar days of the covered procurement ac-
19 tions taken under this section.

20 “(d) CONFIDENTIALITY.—The notice required by
21 subsection (b)(2) shall be kept confidential until a deter-
22 mination with respect to a covered procurement action has
23 been made pursuant to subsection (b)(3).

24 “(e) DELEGATION.—The head of an executive agency
25 may not delegate the authority provided in subsection (a)

1 or the responsibility identified in subsection (g) to an offi-
2 cial below the level one level below the Deputy Secretary
3 or Principal Deputy Director.

4 “(f) ANNUAL REVIEW OF DETERMINATIONS.—The
5 head of an executive agency shall conduct an annual re-
6 view of all determinations made by such head under sub-
7 section (b) and promptly amend any covered procurement
8 action as appropriate.

9 “(g) REGULATIONS.—The Federal Acquisition Regu-
10 latory Council shall prescribe such regulations as may be
11 necessary to carry out this section.

12 “(h) REPORTS REQUIRED.—Not less frequently than
13 annually, the head of each executive agency that exercised
14 the authority provided in subsection (a) or (c) during the
15 preceding 12-month period shall submit to the appropriate
16 congressional committees and leadership a report summa-
17 rizing the actions taken by the agency under this section
18 during that 12-month period.

19 “(i) RULE OF CONSTRUCTION.—Nothing in this sec-
20 tion shall be construed to authorize the head of an execu-
21 tive agency to carry out a covered procurement action
22 based solely on the fact of foreign ownership of a potential
23 procurement source that is otherwise qualified to enter
24 into procurement contracts with the Federal Government.

1 “(j) TERMINATION.—The authority provided under
2 subsection (a) shall terminate on the date that is 5 years
3 after the date of the enactment of the Federal Acquisition
4 Supply Chain Security Act of 2018.

5 “(k) DEFINITIONS.—In this section:

6 “(1) APPROPRIATE CONGRESSIONAL COMMIT-
7 TEES AND LEADERSHIP.—The term ‘appropriate
8 congressional committees and leadership’ means—

9 “(A) the Committee on Homeland Security
10 and Governmental Affairs, the Committee on
11 the Judiciary, the Committee on Appropria-
12 tions, the Committee on Armed Services, the
13 Committee on Commerce, Science, and Trans-
14 portation, the Select Committee on Intelligence,
15 and the majority and minority leader of the
16 Senate; and

17 “(B) the Committee on Oversight and Gov-
18 ernment Reform, the Committee on the Judici-
19 ary, the Committee on Appropriations, the
20 Committee on Homeland Security, the Com-
21 mittee on Armed Services, the Committee on
22 Energy and Commerce, the Permanent Select
23 Committee on Intelligence, and the Speaker and
24 minority leader of the House of Representa-
25 tives.

1 “(2) COVERED ARTICLE.—The term ‘covered
2 article’ means—

3 “(A) information technology, as defined in
4 section 11101 of title 40, including cloud com-
5 puting services of all types;

6 “(B) telecommunications equipment or
7 telecommunications service, as those terms are
8 defined in section 3 of the Communications Act
9 of 1934 (47 U.S.C. 153);

10 “(C) the processing of information on a
11 Federal or non-Federal information system,
12 subject to the requirements of the Controlled
13 Unclassified Information program; or

14 “(D) hardware, systems, devices, software,
15 or services that include embedded or incidental
16 information technology.

17 “(3) COVERED PROCUREMENT.—The term ‘cov-
18 ered procurement’ means—

19 “(A) a source selection for a covered arti-
20 cle involving either a performance specification,
21 as provided in subsection (a)(3)(B) of section
22 3306 of this title, or an evaluation factor, as
23 provided in subsection (b)(1)(A) of such section,
24 relating to a supply chain risk, or where supply
25 chain risk considerations are included in the

1 agency’s determination of whether a source is a
2 responsible source as defined in section 113 of
3 this title;

4 “(B) the consideration of proposals for and
5 issuance of a task or delivery order for a cov-
6 ered article, as provided in section 4106(d)(3)
7 of this title, where the task or delivery order
8 contract includes a contract clause establishing
9 a requirement relating to a supply chain risk;

10 “(C) any contract action involving a con-
11 tract for a covered article where the contract in-
12 cludes a clause establishing requirements relat-
13 ing to a supply chain risk; or

14 “(D) any other procurement in a category
15 of procurements determined appropriate by the
16 Federal Acquisition Regulatory Council, with
17 the advice of the Federal Acquisition Security
18 Council.

19 “(4) COVERED PROCUREMENT ACTION.—The
20 term ‘covered procurement action’ means any of the
21 following actions, if the action takes place in the
22 course of conducting a covered procurement:

23 “(A) The exclusion of a source that fails to
24 meet qualification requirements established
25 under section 3311 of this title for the purpose

1 of reducing supply chain risk in the acquisition
2 or use of covered articles.

3 “(B) The exclusion of a source that fails to
4 achieve an acceptable rating with regard to an
5 evaluation factor providing for the consideration
6 of supply chain risk in the evaluation of pro-
7 posals for the award of a contract or the
8 issuance of a task or delivery order.

9 “(C) The determination that a source is
10 not a responsible source as defined in section
11 113 of this title based on considerations of sup-
12 ply chain risk.

13 “(D) The decision to withhold consent for
14 a contractor to subcontract with a particular
15 source or to direct a contractor to exclude a
16 particular source from consideration for a sub-
17 contract under the contract.

18 “(5) INFORMATION AND COMMUNICATIONS
19 TECHNOLOGY.—The term ‘information and commu-
20 nications technology’ means—

21 “(A) information technology, as defined in
22 section 11101 of title 40;

23 “(B) information systems, as defined in
24 section 3502 of title 44; and

1 “(C) telecommunications equipment and
2 telecommunications services, as those terms are
3 defined in section 3 of the Communications Act
4 of 1934 (47 U.S.C. 153).

5 “(6) SUPPLY CHAIN RISK.—The term ‘supply
6 chain risk’ means the risk that any person may sab-
7 otage, maliciously introduce unwanted function, ex-
8 tract data, or otherwise manipulate the design, in-
9 tegrity, manufacturing, production, distribution, in-
10 stallation, operation, maintenance, disposition, or re-
11 tirement of covered articles so as to surveil, deny,
12 disrupt, or otherwise manipulate the function, use,
13 or operation of the covered articles or information
14 stored or transmitted on the covered articles.

15 “(7) EXECUTIVE AGENCY.—Notwithstanding
16 section 3101(c)(1), this section applies to the De-
17 partment of Defense, the Coast Guard, and the Na-
18 tional Aeronautics and Space Administration.”.

19 (b) CLERICAL AMENDMENT.—The table of sections
20 at the beginning of chapter 47 of such title is amended
21 by adding at the end the following new item:

 “Sec. 4713. Authorities relating to mitigating supply chain risks in the procure-
 ment of covered articles.”.

22 (c) EFFECTIVE DATE.—The amendments made by
23 this section shall take effect on the date that is 90 days
24 after the date of the enactment of this Act and shall apply

1 to contracts that are awarded before, on, or after that
2 date.

3 **SEC. 4. FEDERAL INFORMATION SECURITY MODERNIZA-**
4 **TION ACT.**

5 (a) IN GENERAL.—Title 44, United States Code, is
6 amended—

7 (1) in section 3553(a)(5), by inserting “and
8 section 1326 of title 41” after “compliance with the
9 requirements of this subchapter”; and

10 (2) in section 3554(a)(1)(B)—

11 (A) by inserting “, subchapter III of chap-
12 ter 13 of title 41,” after “complying with the
13 requirements of this subchapter”;

14 (B) in clause (iv), by striking “; and” and
15 inserting a semicolon; and

16 (C) by adding at the end the following new
17 clause:

18 “(vi) responsibilities relating to as-
19 sessing and avoiding, mitigating, transfer-
20 ring, or accepting supply chain risks under
21 section 1326 of title 41, and complying
22 with exclusion and removal orders issued
23 under section 1323 of such title; and”.

24 (b) RULE OF CONSTRUCTION.—Nothing in this Act
25 shall be construed to alter or impede any authority or re-

1 sponsibility under section 3553 of title 44, United States
2 Code.

3 **SEC. 5. EFFECTIVE DATE.**

4 This Act shall take effect on the date that is 90 days
5 after the date of the enactment of this Act.

 Passed the Senate December 18, 2018.

Attest:

Secretary.

115TH CONGRESS
2^D SESSION

S. 3085

AN ACT

To establish a Federal Acquisition Security Council and to provide executive agencies with authorities relating to mitigating supply chain risks in the procurement of information technology, and for other purposes.