



April 17, 2018

Ms. Ajarin Pattanapanchai
The Permanent Secretary
Ministry of Digital Economy and Society
120 Moo 3, 6-9 floor
The Government Complex Commemorating His Majesty
Chaeng Watthana Road,
Thung Song Hong, Khet Laksi Bangkok 10210

Re: Joint Industry Comments on the Cybersecurity Bill

Dear Ms. Pattanapanchai

1. Introduction and statement of interest

BSA | The Software Alliance (“**BSA**”)¹ and the US-ASEAN Business Council (**US-ABC**)² represent the leading US technology companies operating in Thailand. Our members are at the forefront of data-driven innovation, developing and offering essential software, security tools, communications devices, servers, and computers that drive the global information economy and improve our daily lives. Our members earn users’ confidence by providing essential security technologies to protect them from cyber threats. These threats may be posed by a broad range of malicious actors, including those who would steal our identities, harm our loved ones, steal commercially valuable secrets, or pose immediate danger to our nation’s security.

Our members thus have a significant interest in the Thai government’s plans to introduce the draft Cybersecurity Bill (the “**2018 Draft Bill**”).

BSA and US-ABC have worked closely with governments around the world in relation to the development of national cybersecurity policies and legislation. In doing so, we have witnessed first-hand the potential for such policy and legislation to effectively deter and manage cybersecurity threats whilst still protecting privacy and civil liberties of citizens.

¹ BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. BSA’s members include: Adobe, Amazon Web Services, ANSYS, Apple, Autodesk, AVEVA, Bentley Systems, Box, CA Technologies, Cisco, CNC/Mastercam, DataStax, DocuSign, IBM, Informatca, Intel, Microsoft, Okta, Oracle, salesforce.com, SAS Institute, Siemens PLM Software, Splunk, Symantec, The MathWorks, Trend Micro, Trimble Solutions Corporation, and Workday.

² For over 30 years, the US-ASEAN Business Council has been the premier advocacy organization for US corporations operating within the dynamic Association of Southeast Asian Nations (ASEAN). Worldwide, the Council’s 150+ membership generates over \$6 trillion in revenue and employ more than 13 million people. Members include the largest US companies conducting business in ASEAN, and range from newcomers to the region to companies that have been working in Southeast Asia for over 100 years. The Council has offices in: Washington, DC; New York, NY; Bangkok, Thailand; Hanoi, Vietnam; Jakarta, Indonesia; Kuala Lumpur, Malaysia; Manila, Philippines; and Singapore.

As a result of this experience, BSA has developed the International Cybersecurity Policy Framework (“**International Framework**”), which sets out a recommended model for a comprehensive national cybersecurity policy. US-ABC strongly supports this framework. We have included a copy of the International Framework with this letter.

In summary, the Framework recommends six overarching principles that should guide the development of a successful national cybersecurity policy, namely that policies should:

1. be aligned with internationally recognized standards;
2. be risk-based, outcome-focused, and technology neutral;
3. rely on market-driven mechanisms where possible;
4. be flexible and encourage innovation;
5. be rooted in public-private collaboration; and
6. be oriented to protect privacy.

2. Joint Industry Comments

BSA commented on an earlier draft of the Cybersecurity Bill in 2015 issued by Thailand's Electronic Transactions Development Agency (“**2015 Draft Bill**”). A copy of BSA's original response is set out in the Annex to this letter.

BSA, with US-ABC, wishes to once again commend the Ministry of Digital Economy and Society (“**MDES**”) for undertaking this important effort to ensure Thailand is prepared to deter and manage cybersecurity threats. As cybersecurity threats grow more sophisticated and dangerous, the risk of an insufficient or poorly calibrated national policy for countering cyber threats is potentially catastrophic.

Cybersecurity threats are global in nature, and so must be the response. BSA and US-ABC commend MDES and the Government of Thailand for soliciting input from the private sector and other interested stakeholders in the development of this law. We encourage continued open communication and consultation with the private sector, including global companies. As such, we suggest that the Cybersecurity Law make clear that references to cooperation with the private sector (e.g. Sections 5(4), 7(5), etc.) explicitly allow for and encourage cooperation with international companies.

BSA and US-ABC acknowledge and appreciate the efforts that have been made to address concerns raised in relation to the 2015 Draft Bill. However, most of our comments to the 2015 Draft Bill continue to apply to the 2018 Draft Bill. BSA therefore offers the following comments that are intended to help achieve the Bill's laudable objective of ensuring “prompt and unified action” in response to cybersecurity threats, while avoiding any unintended consequences.

A. Composition of the National Cybersecurity Committee

In BSA's previous comments to the 2015 Draft Bill, BSA highlighted that the proposed National Cybersecurity Committee (“**NCSC**”) should be expanded to include the National Human Rights Commission and the Office of the Ombudsman among its members to complement the perspectives of the existing security- and defense-centered members of the NCSC. This suggestion is aimed to ensure that concerns regarding personal privacy and civil liberties of individuals will be fully considered by the NCSC in any cybersecurity strategy or response it develops.

BSA and US-ABC acknowledge that Section 6 of the 2018 Draft Bill has expanded the composition of the NCSC, with the addition of representatives from several ministries including transport, education, and public health. The inclusion of these members to the NCSC will undoubtedly increase the diversity of views and provide for a well-rounded national cybersecurity policy proposal to the Cabinet. Nevertheless, the NCSC still does not include members that represent the interests of personal privacy and civil liberties of individuals. As

such, there continues to be a heavy emphasis on law enforcement and defense within the NCSC, with the Minister of Defense being appointed as the Vice-Chairman of the NCSC.

We recommend cybersecurity efforts are not led solely by the Ministry of Defense, but are co- led by the Ministry of Digital Economy and Society. Due to the broad ramifications of cybersecurity incidents for Thailand’s national and international economic interests, civilian interests should be well represented on the NCSC.

B. Broad powers of the NCSC

Under Section 14 of the 2018 Draft Bill, the NCSC is empowered to act as a centralized coordinator for any inter-agency response to a cyber attack and cyber incident. BSA and US-ABC continue to support this approach. Tasking a single national body with lead responsibility for cybersecurity ensures clarity, coherence, and coordination in the government’s preparedness for and response to cybersecurity threats and challenges.

As part of its role as centralized coordinator, the NCSC is afforded broad authority to respond to actionable threats. For example, under Sections 36 and 37 of the 2018 Draft Bill, the NCSC has the power to direct private agencies³ to take actions in the event of a “cyber incident” and “cyber attack”. We acknowledge that an effort has been made, in line with our comments on the 2015 Draft Bill, to clarify that some of these powers are triggered only where “the services of computer networks, Internet, telecommunication networks, satellites, utilities, important public service” are affected. However, we remain concerned about the absence of clear parameters and trigger events relating to NCSC’s rights under these Sections.

- **The NCSC’s powers should only apply where “critical infrastructure” is affected.** The concept of “critical infrastructure” is used in cybersecurity regulations in many jurisdictions internationally and is an accepted qualifier for broad regulatory enforcement powers of the type seen in the 2018 Draft Bill. Consistent with international practice, we suggest defining:
 - critical infrastructure as **“those assets, services, and systems, whether physical or virtual, which, if destroyed, degraded, or rendered unavailable for an extended period, would have a large-scale, debilitating impact on national security, public health, public safety, national economic security, or core local or national government functions.”**

Specific critical infrastructure should be identified by the NCSC based on an analysis of criticality, interdependency, and risk.

- **The broad powers in Sections 36 and 37 should only be triggered by “significant cyber incidents”.** This would require two new definitions of “cyber incident” and “significant cyber incident”. Consistent with the International Framework, we recommend defining:
 - a “cyber incident” as **“a single, or series of, identified occurrence(s) of a system, service, or network indicating a possible breach of information security policy or failure of security controls, or a previously unknown situation that may be relevant to the security of the system, service, or network.”**
 - A “significant cyber incident” as **“a cyber incident resulting in: (i) the unauthorized or denial of access to or damage, deletion, alteration, or suppression of data that is essential to the operation of critical infrastructure; or (ii) the defeat of an operational control or technical**

³ “Private agencies” is a newly defined term in Section 3 meaning “organizations established by an assembly of individuals or a body of persons to run business either for profits or not for profits and either registered or not registered”.

control that is essential to the security or operation of critical infrastructure.”

C. Notification regime for cyber attacks

BSA and US-ABC are concerned that the new requirement for private agencies to notify the Secretary-General of any actual or anticipated cyber attacks in Section 35 is too broad. Overbroad thresholds for reporting can unintentionally inhibit cybersecurity by causing companies to over notify for any incident on their systems, leading to notification fatigue, increased costs, operational distractions, and difficulties identifying and addressing the most important incidents. We suggest limiting this notification regime to "significant cyber incidents" that impact "critical infrastructure", as described above.

D. Surveillance authority

BSA and US-ABC acknowledge that BSA's previous suggestions regarding the Secretary-General's surveillance authority in the 2015 Draft Bill have been incorporated to some extent in the 2018 Draft Bill. In particular, Section 47 of the 2018 Draft Bill provides that the Secretary-General may only access a private agency's communications information where it has first obtained a court order allowing it to do so. This court order requirement is excepted "in case of urgency where serious damages will be incurred if no immediate action is taken", allowing the Secretary-General to access the communications information first and file a report with the court later under urgent circumstances. Such a broad exception may introduce uncertainty in its application, possibly undermining consumer trust that businesses can generally guarantee that their users' personal data or confidential information will be protected from unauthorized access. To address these concerns, we recommend:

- **The court order issued should only be valid for a limited period of time.** We recommend that the court order's validity not be open-ended since this would create greater uncertainty for private agencies.
- **Any exception to obtaining a court order should be precisely-worded.** We recommend that the "urgency" exception should be clarified to situations where there is a probable cause of harm to national security.
- **An independent body should have oversight over the NCSC's powers in Section 47.** We again recommend that an independent body, such as the Personal Data Protection Committee that is proposed by the Personal Data Protection Act, be given the authority to monitor the NCSC's exercise of its powers under Section 47 of the 2018 Draft Bill to ensure privacy interests are adequately balanced with the need for surveillance.

E. Criminal liability

BSA and US-ABC observe that Sections 53 to 56 of the 2018 Draft Bill now impose criminal liability for several breaches under the 2018 Draft Bill. We recommend that criminal prosecution should only be imposed on those that, with criminal intent, seek to disrupt, degrade, or destabilize cyberspace.

We consider that imposing criminal liability on private agencies that do not comply with the NCSC's requests under Section 47 is excessive. This position could deter international companies from establishing a presence in Thailand if there is a risk their personnel are exposed to criminal liability for inadvertent or minor breaches.

F. Other aspects of a national cybersecurity policy

BSA and US-ABC also recommend that Thailand's national cybersecurity policy address other

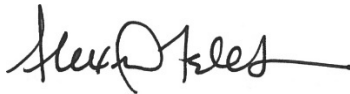
important issues including the implementation of guidelines for government procurement of technology and software, strong government support for cybersecurity technology research and development, educational campaigns to increase cybersecurity awareness and training, and the integration of cybersecurity cooperation into foreign policy. We encourage the Thai government to address these important issues as part of the implementing regulations to the 2018 Draft Bill and offer the International Framework and our international experience in these areas as a resource for developing the relevant policies.

3. Conclusion and Next Steps

BSA and US-ABC again applaud the Government of Thailand's efforts to protect infrastructure from cyber attacks and cyber criminals. However, we humbly request that MDES thoroughly consider the suggestions above. By doing so, we believe that MDES has an opportunity to deliver a robust, risk-based national cybersecurity policy that aligns with international best practices, fosters greater trust between the public and private sectors and enhances the security of data and infrastructure.

We remain open to further discussion with you at any time. Please feel free to contact us directly at afeldman@usasean.org or 202-375-4393, or jaredr@bsa.org or +65 9825 2151, or contact **Ms. Varunee Ratchatapattanukul, BSA's Thailand Country Manager, at varunee@bsa.org or +668-1840-0591, or Ms. Ella Duangkaew, US-ABC's Manager for Thailand, at eduangkaew@usasean.org or 202-440-3642** with any questions or comments which you might have. Thank you for your time and consideration.

Yours sincerely,



Alexander C. Feldman
President & CEO
US-ASEAN Business Council



Jared Ragland
Senior Director, Policy – APAC
BSA | The Software Alliance

CC:

1. Dr. Pichet Durongkaveroj, the Minister of the Ministry of Digital Economy and Society
2. Mrs. Surangkana Wayuparb, the Executive Director and Chief Executive of the Ministry of Digital Economy and Society's Electronic Transactions Development Agency (ETDA)

Annex
BSA's response to 2015 Draft Bill



6 May 2015

PRIVILEGED & CONFIDENTIAL

The Secretary-General
Office of the Council of State
Phra Arthit Road, Phra Nakorn,
Bangkok 10200

Re: BSA Comments on the Cybersecurity Bill

Dear The Secretary-General

BSA | The Software Alliance (BSA)¹ appreciates the opportunity to submit its comments to the Council of State with respect to the Cybersecurity Bill (the "**Bill**"). The Government of Thailand should be commended for undertaking this important, forward looking effort to ensure the country is prepared to deter and to manage cybersecurity threats. An effective cybersecurity strategy must be built on a solid legal foundation that facilitates coordination between law enforcement, government agencies and the private sector. Of course, such coordination requires a culture of trust that is possible only when the appropriate safeguards and incentives are put into place. Security requirements must, for instance, be duly balanced with the need for protection of privacy and civil liberties. With these principles in mind, we are concerned that the Bill's surveillance provisions (Article 35) may result in unintended consequence, including the undermining of consumer confidence in Thailand's IT systems. BSA therefore offers the following comments that are intended to help achieve the Draft Cybersecurity Act's laudable objective of ensuring "prompt and unified action" in response to cybersecurity threats.

Section 6: The members of the National Cybersecurity Committee

The membership of the proposed National Cybersecurity Committee (the "**NCSC**") is comprised primarily of government entities involved in security and defense, e.g. the Ministry of Digital Economy, the Ministry of Defense, and the Technology Crime Suppression Division of the Royal Thai Police. To balance out the perspectives of the NCSC and ensure that concerns regarding

¹ BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 60 countries around the world, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy. BSA's members include: Adobe, Altium, ANSYS, Apple, ARM, Autodesk, AVEVA, Bentley Systems, CA Technologies, Cisco, CNC/Mastercam, Dell, IBM, Intel, Intuit, Microsoft, Minitab, Oracle, salesforce.com, Siemens PLM Software, Symantec, Tekla, The MathWorks, and Trend Micro.

personal privacy and civil liberties are considered, the NCSC should also include members from the National Human Rights Commission and the Office of the Ombudsman. Having members with various backgrounds will ensure that the rights of individuals are not be inappropriately impacted.

Section 7-34: The broad power of the NCSC under the Bill

BSA supports the idea of the NCSC serving as the centralized facilitator in order to coordinate between all relevant government entities in case a cyber attack occurs. Pursuant to Section 7, the NCSC must, among other things, “prepare an operation plan for national cybersecurity.” The Office of the NCSC is charged by Sections 27-28 to develop guidelines, measures, operation plans, and projects relating to cybersecurity. Because the NCSC is afforded broad authority to take action in connection with the cybersecurity plan and related guidelines, it is important that the Act provide clear guidance regarding what constitutes an actionable threat. For instance, upon the occurrence of the cyber attack, Section 33 states that the NCSC can order all government agencies to take any action in order to prevent or mitigate the damage that arises. Likewise, Section 34 extends the NCSC's power to be able to order a private agency to act or not do any act, and notify the NCSC of the results of such operation, on the basis that the threat may affect the financial and commercial stability or national security.

Despite the broad power of the NCSC under these Sections, there is no clear definition of the term “cyber attacks” nor is there a threshold for determining the level of risk necessary to justify NCSC actions. Similarly, the Bill lacks guidance for determining when a risk to “financial and commercial stability or national security” is severe enough to warrant the NCSC to compel action from private entities. Therefore, clear definitions of these broad terms should be incorporated into the Bill so that all affected entities under the Bill clearly understand the position and that there is no more ambiguity.

Section 35 (1) and (2): Government Requests for Information, Action

Section 35 (1) of the Bill empowers the officials assigned in writing by the secretary-general of the Office of the NCSC to be able to send letters to demand clarification, or call in any government agency or person to give a statement, send a written explanation, or send any account, document, or evidence, for inspection or for information, in order to comply with the Bill.

Section 35 (2) further empowers officials to send letters requesting that a government agency or private entity take “action to facilitate the actions and duties of the NCSC”.

To ensure that these broad powers are not potentially abused, it is essential for the Thai government to set out specific rules that define the type and scope of information the officials can request, and the circumstances under which the Office of the NCSC can compel a private sector actor to perform a specific action. Such rules should define who within the Office of the NCSC may make requests for information and impose handling restrictions to ensure that private information obtained by the NCSC is appropriately safeguarded. Moreover, exercise of these broad authorities should be strictly limited to circumstances where there is a specific and credible cybersecurity risk.

Section 35 (3): Surveillance Authority

Section 35 (3) empowers NCSC officials to access information communicated by post,

telegraph, telephone, facsimile, computer, or electronic tool or equipment, or any information technology media, for the benefit of operations to secure cybersecurity. This broad delegation of surveillance authority provides NCSC with virtually unfettered access to communications networks, and thus raises significant privacy concerns. Section 35 (3) lacks the necessary balance between national security and data privacy as the government may exercise its discretion without judicial review, e.g. there is no clause which requires that a warrant be obtained from the court prior to accessing private communications. The statute simply provides that the officials may access such information if there is a written permission letter from the secretary-general of the Office of the NCSC.

From a commercial perspective, Section 35 (3) of the Bill is likely to hinder IT investment in Thailand. Any business with an IT system could be subject to Section 35 (3) of the Bill, from banking and financial to retail businesses. As such, providers cannot guarantee that their users' personal data, trade secrets, or stock purchase history can be kept confidential. As a result, IT businesses may refuse to use or invest in IT systems in Thailand, which will undermine the effort to turn Thailand into an IT hub for the ASEAN Economic Community.

The lack of checks and balances within Section 35(3) stands in contrast with Thailand's approach to data privacy in existing law and in the proposed Computer-Related Crimes Act. For instance, Section 25 of the Special Case Investigation Act B.E. 2547 (the "**Special Case Act**") contains similar authority to access private information if there is a reasonable ground to believe that any media has been used to commit a Special Case offence. Importantly, Section 25 of the Special Case Act requires the Special Case Inquiry Official to submit an ex parte application to obtain a criminal court order in order to access such information. Also, the court may grant permission for a period of no more than 90 days per each permission. Likewise, under the proposed Computer-Related Crimes Act, law enforcement officials must obtain a court order in order to compel intermediaries to disclose the content of user communications.

Leading from this, it is suggested that Section 35 (3) of the Bill requires a court order to access private information and also that such order be valid only for a limited period of time. There should also be a probable cause of harm to national security before officials under the Bill could resort to Section 35. Finally, we recommend that an independent body, such as the Personal Data Protection Committee that is proposed by the Personal Data Protection Act, be given the authority to monitor the NCSC's usage of its powers under Section 35 (3) to ensure privacy interests are adequately balanced with the need for surveillance.

Conclusion

BSA appreciates the Thai government's attempt to protect any infrastructure from cyber attack and cyber terrorists, however, the official authority under the Bill should provide transparency and not undermine user privacy, which may adversely impact digital economy plans. Moreover, cooperation of the private sector in notifying the government when there is any security breach of their systems should be highlighted in order to prevent cyber attacks for the sake of national cybersecurity. Unfortunately, wide authority of the NCSC and/or the officials under the Bill may create fraud, mistrust and reduce cooperation of the private sector in notifying cybersecurity breaches. While the existence of Sections 5(4), 7(8), 17 (2), 17(3), and 18(3) seems to promote cooperation between the public and private sectors in preventing cyber attacks, the private sector may be reluctant to share information with the government for fear of the government requesting irrelevant information or intercepting their private communications via IT media. Therefore, BSA humbly requests the Council of State to thoroughly consider the above for reasons of transparency and to create trust between the public and private sectors, while preserving national cybersecurity.

We remain open to further discussion with you at any time. Please feel free to contact **Ms. Varunee Ratchatapattanakul, BSA's Thailand Representative**, at varunee@bsa.org or **+668-1840-0591** with any questions or comments which you might have.

Thank you for your time and consideration.

Yours sincerely,



Boon Poh Mok
Director, Policy, APAC
BSA | The Software Alliance

Cc:

1. H.E. Dr. Vishnu Krue-ngam, Deputy Prime Minister
2. Mrs. Surangkana Wayuparb, CEO, the Office of Electronic Transactions Development Agency (Public Organization)