April 12, 2024

Dear Members of the Senate Committee on Finance and House Committee on Ways and Means:

For your review, the undersigned associations and organizations have prepared a memorandum describing our concerns with the U.S. Trade Representative's (USTR) 2024 National Trade Estimate Report. Unlike previous years, this year, USTR significantly scaled back its coverage of digital trade barriers despite their proliferation around the world. This decision is not aligned with USTR's statutory authority or Congressional intent. We urge Congress to press USTR to reverse course and carry out its mandate to protect U.S. interests in digital trade and the millions of American jobs that it supports.

The undersigned associations and organizations represent every facet of the U.S. economy. Digital trade underpins our global competitiveness and leadership in every sector, including agriculture, education, healthcare, financial services, and technology. As such, it is critical that USTR return the U.S. to its traditional role as the global leader in shaping the rules of the multilateral trading system in ways that benefit American workers and businesses, align with American priorities and values, and address regulatory overreach.

As the memorandum describes, digital trade is a long-standing, bipartisan priority of the United States Congress. USTR's neglect of digital trade barriers and global challenges facing U.S. businesses and workers amounts to policy malpractice that should be corrected by Congress immediately.

Thank you for your attention to our views.

Sincerely,

ACT | The App Association
Business Roundtable
BSA | The Software Alliance
Coalition of Services Industries
Computer & Communications Industry Association (CCIA)
Consumer Technology Association (CTA)
Engine
Global Data Alliance
Global Innovation Forum
Information Technology Industry Council (ITI)
National Foreign Trade Council
Software & Information Industry Association (SIIA)
TechNet
U.S. Chamber of Commerce
U.S. Council for International Business

MEMORANDUM

USTR's Flawed Approach to Digital Trade in the 2024 National Trade Estimate Report Will Hurt U.S. Exports and Job Creation and Allow Others to Shape Global Trade Rules

I. Introduction

The concerns prompting this memo surround the 2024 National Trade Estimate Report ("NTE Report"), which USTR is statutorily obligated to produce and publish annually. Under the 1974 Trade Act, USTR is required to identify and analyze "significant barriers to, or distortions of" U.S. goods and services exports globally and, when possible, estimate the distortive impact they have on U.S. commerce. The NTE Report serves as a key facet of USTR's mandate from Congress to protect U.S. businesses from unfair treatment abroad. By chronicling the obstacles to operations and the cross-border delivery of goods and services in key foreign markets, the report lays down a marker for foreign laws, regulations, and other policies that are of concern to the United States.

Through this process, USTR signals to the countries in question that these policies are being monitored by the United States government and may be seen as potentially problematic. Further, the report signals policies that may require further investigation or action, as appropriate. This is a vital aspect of USTR's role in evaluating the global trading environment for U.S. companies, identifying potentially unfair practices against U.S. goods and services exports, and addressing these barriers. Inclusion of a barrier in the NTE Report does not necessarily mean enforcement action is forthcoming from USTR, but it does indicate that a particular measure may be impeding, or has the potential to impede, international trade and puts that country on notice.

The problem at the heart of this year's NTE Report is that USTR has removed a sizable collection of barriers from the 2023 NTE Report in this year's edition, with a targeted and concerning deprioritizing of barriers to digital trade. For example, between 2023 and 2024, USTR reduced the number of country analyses of data localization mandates by over 70 percent (from 24 countries in 2023 to seven in 2024) and removed concerns with respect to at least 80 digital trade-related measures. This is in direct contravention of USTR's statutory obligation to "identify and analyze acts, policies, or practices of each foreign country which constitute significant barriers to, or distortions of…United States electronic commerce" through the NTE Report. Among the harmful digital trade barriers excluded from the 2024 NTE report were measures restricting cross-border data flows, requiring data localization, forcing disclosure of source code and/or algorithms, and discriminating against U.S. firms in favor of domestic competitors.

This memo explains why USTR's abdication of its responsibility to promote key principles of longstanding, bipartisan U.S. digital trade policy, especially through its removal of numerous important digital trade barriers from the 2024 NTE Report, are problematic. The memo demonstrates that USTR's approach to the 2024 NTE is inconsistent with the governing statute and contrary to the clear will of the U.S. Congress.

II. Legal Analysis of the 2024 NTE Report under Trade Act of 1974

The Trade Act of 1974, as amended, ("the Act") charges USTR with producing and publishing the annual NTE Report.[1] In particular, the Act requires that the NTE Report:

> "(A) identify and analyze acts, policies, or practices of each foreign country which constitute significant barriers to, or distortions of —
>
> > (i) United States exports of goods or services (including agricultural commodities; and property protected by trademarks, patents, and copyrights exported or licensed by United States persons),
> >
> > (ii) foreign direct investment by United States persons, especially if such investment has implications for trade in goods or services; and
> >
> > (iii) United States electronic commerce[.]"[2]

As the statutory text above makes clear, USTR is statutorily obliged to "identify and analyze" any "barriers to, or distortions of" U.S. electronic commerce. As a threshold matter, USTR disregarded this statutory instruction in the 2024 NTE Report. In particular, USTR claims that "[o]ver the years, the NTE Report expanded from its statutory purpose to include measures without regard to whether they may be valid exercises of sovereign policy authority."[3] Rather, according to USTR, "the purpose of the NTE Report is to identify barriers the U.S. Government seeks to remove."[4] However, the statute directs USTR to "identify and analyze" in the NTE Report *all* measures "which constitute significant barriers to" U.S. electronic commerce. This analysis may provide factual statements that a foreign government made attempting to justify the creation of a trade barrier on the basis of legitimate public policy grounds or other exceptions. However, USTR's statutory mandate does not extend to making final judgments as to the invocation of such exceptions.

In fact, the Act provides a list of considerations that USTR must account for in its analysis of foreign measures to include in the NTE Report. These factors include, for example, "the relative impact of the act, policy, or practice on United States commerce" and "the extent to which such act, policy, or practice is subject to international agreements to which the United States is a party[.]"[5] Had Congress intended that the purpose of the statute was to generate a report in which USTR was directed to make final judgments as to whether a given trade barrier was a "valid exercise of sovereign policy authority," and should therefore be excluded from the report, it would have included such a mandate in this statutory list. Consequently, USTR clearly strays from its statutory responsibilities by considering factors that are not included in the statute, while ignoring factors that under the statute it ***must*** consider,[6] as a means to exclude digital trade barriers from the NTE Report.

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[1] *See* 19 U.S.C. § 2241(b).
[2] 19 U.S.C. § 2241(a)(1)(A)-(B) (emphasis added).
[3] *Id*.
[4] 2024 NTE at p. 1.
[5] 19 U.S.C. 2241(2)(A), (C).
[6] The chapeau of this provision unambiguously states that "In making any analysis or estimate [in the NTE], the Trade representative shall take into account [the listed factors.]" *See id.* (emphasis added).

The statute makes clear that Congress viewed USTR's responsibility to catalogue all foreign trade barriers in the NTE Report as separate from the question of whether USTR can or should take action against a particular trade barrier. Specifically, the statute directs that, in the NTE Report, USTR must include "information with respect to any action taken (or the reasons for no action taken) to eliminate any act, policy, or practice identified" in the NTE Report. This provision demonstrates that (1) Congress recognized USTR would have to make choices about which trade barriers to act against during a given time period, *and* (2) that this question was separate from USTR's obligation to catalogue *all* foreign trade barriers, whether or not USTR would "seek to remove" them. Moreover, this provision was clearly intended to allow for Congressional oversight over how USTR exercised its inherent discretion to decide which barriers to act against, to protect against abuse of that discretion and ensure that Congressional prerogatives are being taken into account.

In sum, USTR's approach to the 2024 NTE Report is contrary to the unambiguous language and clear direction of the Act.

III. USTR's Approach is Contrary to a Longstanding, Bipartisan Consensus on U.S. Digital Trade Policy

For decades, U.S. digital trade policy has consistently generated bipartisan support for its role in bolstering American leadership, encouraging American innovation, and leveling the playing field for U.S.-based companies and workers competing against foreign businesses, while also serving as a tool to spread democratic values abroad. America's global economic leadership over decades has been pivotal in supporting a level playing field for U.S. digital products and services, technology providers, and digitally-enabled small businesses around the world. During the mid-1990's, for example, the United States was a leader in securing a ban on customs duties on electronic transmissions at the World Trade Organization. Successive U.S. Administrations have promoted the development of new trade rules to ensure America's trading partners do not discriminate against American companies. Facilitating digital trade has also become increasingly important as a means of promoting American values as U.S. adversaries continually push for more restrictive digital trade rules. This has heightened concerns about the protection of human rights, particularly relating to freedom of expression, access to information, and privacy.

There remains a bipartisan consensus in the U.S. Congress supporting the promotion of digital trade and the removal of foreign barriers to digital trade. Congress has consistently weighed in with clear advice and ambitious negotiating objectives to guide the Administration in facilitating digital trade, enabling cross-border data flows, and protecting U.S. businesses from discrimination and violation of their intellectual property rights.

In 2015, Congress authorized President Obama to negotiate new trade agreements and directed trade negotiators to secure strong protections for American technology and intellectual property rights and fair treatment of electronically delivered goods and services under existing trade rules. It also directed USTR "to ensure that governments refrain from implementing trade-related measures that impede digital trade in goods and services, restrict cross-border data flows, or require local storage or processing of data."[7] During the Trump Administration, these principles were codified in U.S. law through the U.S.-Mexico-Canada Agreement ("USMCA") Implementation Act in 2020. The USMCA's digital trade chapter was lauded at the time as the model for future trade agreements. The agreement protected data flows, improved privacy and consumer protections, prohibited technology transfers and source code disclosures, and underscored the need for cooperation on cybersecurity and competition issues. Congress clearly reaffirmed its strong support for these principles in its vote to pass the USMCA, with 90 percent of the House and Senate voting in favor of the agreement.

It is clear that USTR's approach to digital trade is contrary to the express will of Congress. USTR should keep in mind that, ultimately, it is Congress, not the executive branch, that the U.S. Constitution vests with authority over international trade policy and regulation.[8] And as Chairman of the Senate Finance Committee Ron Wyden (D-WA) has noted, "USTR's unilateral decision to abandon any leverage against China's digital expansionism, and to oppose policies championed by allies like Australia, Japan, the U.K. and Korea, directly contradicts its mission as delegated by Congress."[9] The USTR is walking away from these important policies at a critical time, and the President should direct the agency to reverse course. If USTR does not intend to pursue its stated goal to "[d]efend U.S. interests in digital trade and digitally delivered services" that the agency outlined in its FY2025 budget request,[10] then Congress could consider whether funding and its delegation of responsibility to USTR to represent the U.S. on digital economy matters is appropriate.

IV. USTR's Justifications for Its Approach to Digital Trade Barriers in the 2024 NTE Report Are Conceptually Flawed

USTR has sought to justify its retreat from advancing U.S. commercial interests and values in promoting digital free trade principles, including in the 2024 NTE Report, by claiming that the United States needs "policy space" for new laws on privacy and other issues before it can negotiate on digital trade. But trade rules have never prevented Congress from passing new laws, nor have they prevented agencies and departments from promulgating regulations to fulfill legitimate policy objectives, including those that could be needed in the future to address emerging technologies like artificial intelligence ("AI"). Trade rules have also not hamstrung states in passing laws on these matters; for example, seventeen states have enacted privacy laws to date. U.S. trade agreements, including the USMCA, include exceptions for parties to advance such objectives, such as health, safety, environment, and national security priorities, to allow for otherwise conflicting regulatory, supervisory, and judicial measures, including in the digital trade context.[11] Yet, USTR has not explained why

[7] *See* 19 U.S.C. 4201(b)(6).
[8] United States Constitution, Article 1, Section 8, Clause 3 ("The Congress shall have the power…[t]o regulate commerce with foreign nations[.]").
[9] Press Release, "Wyden Statement on Ambassador Tai's Decision to Abandon Digital Trade Leadership to China at WTO", United States Senate Committee on Finance (Oct. 25, 2023). The full statement is available at: https://www.finance.senate.gov/chairmans-news/wyden-statement-on-ambassador-tais-decision-to-abandon-digital-trade-leadership-to-china-at-wto.
[10] *See* Office of the United States Trade Representative, "Fiscal Year 2025 Budget" (March 2024) at p. 23, 59.
[11] *See e.g.,* United States-Mexico-Canada Agreement, arts. 17.18(1) ("The Parties recognize that immediate, direct, complete, and ongoing access by a Party's financial regulatory authorities to information of covered persons . . . is critical to financial regulation and supervision"); 19.11(2) ("The Article does not prevent a Party from

(Continued…)

these provisions are insufficient to provide the policy space it currently seeks. Furthermore, U.S. policy in any number of areas – e.g., environmental and labor policy – is constantly in flux, but that has not stopped this USTR or other Administration officials from engaging to try to shape global policy on related issues.

As such, the core issue with the 2024 NTE Report is that the measures USTR has excluded are problematic in a number of ways, such as through their discriminatory nature, possible infringement of intellectual property rights, and potential violation of trade agreements. USTR can support our trading partners' right to regulate and still stand up for the interests of U.S. businesses and workers by pushing foreign governments to implement widely-recognized good regulatory practices in crafting such regulations. This includes ensuring that regulations are narrowly-tailored to address their intended objectives, do not discriminate against U.S. goods and services, provide adequate time for compliance, are based on the best available evidence, and are developed through a transparent process in which comments are taken into account.

V. Policy Considerations for U.S. Engagement

As the United States is the global digital economy leader, the stakes involved in standing up against digital trade barriers around the world are enormous. In 2021, the U.S. digital economy accounted for $3.7 trillion of gross output, $2.41 trillion of value added (equating to 10.3 percent of U.S. gross domestic product or GDP), $1.24 trillion of compensation, and 8 million jobs.[12] In 2022, digital trade played an even greater part in U.S. economic growth, with the U.S. government estimating that the digital economy brought in $2.6 trillion in value added, again representing roughly 10 percent of U.S. GDP, and supported 8.9 million jobs that generated $1.3 trillion in annual compensation.[13]

Digital products and services are also a key component of U.S. exports. In 2022, exports of digitally-enabled services brought in $626 billion to the United States, making up 70 percent of all U.S. services exports by value, with a $256 billion trade surplus for the sector.[14] This represented an increase of 5.5 percent from the $599 billion in exports of the same services in 2021.[15] Digitally-enabled services exports

adopting or maintaining a measure inconsistent with paragraph 1 that is necessary to achieve a legitimate public policy objective, provided that the measure: (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (b) does not impose restrictions on transfers of information greater than are necessary to achieve the objective."); and 19.16(2) ("This Article does not preclude a regulatory body or judicial authority of a Party from requiring a person of another Party to preserve and make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination, enforcement action, or judicial proceeding, subject to safeguards against unauthorized disclosure.")

[12] *See* Tina Highfill and Christopher Surfield, "New and Revised Statistics of the U.S. Digital Economy, 2005–2021", U.S. Department of Commerce Bureau of Economic Analysis (November 2022). Full report available at: https://www.bea.gov/system/files/2022-11/new-and-revised-statistics-of-the-us-digital-economy-2005-2021.pdf.

[13] *See* "How Big is the Digital Economy?", U.S. Department of Commerce Bureau of Economic Analysis. Available at: https://www.bea.gov/sites/default/files/2023-12/digital-economy-infographic-2022.pdf.

[14] *See* U.S. Department of Commerce Bureau of Economic Analysis, U.S. Trade in Potentially-ICT Services. Available at: https://apps.bea.gov/iTable/?reqid=62&step=9&isuri=1&product=4#eyJhcHBpZCI6NjIsInN0ZXBzIjpbMSw5LDZdLCJkYXRhIjpbWyJwcm9kdWN0IiwiNCJdLFsiVGFibGVMaXN0IiwiMzU5Il1dfQ==.

[15] *See* Amir Nasr, "New Data Showcase the Strength of Digital Services Exports to Overall U.S. Economy", Disruptive Competition Project (July 26, 2023). Available at: https://www.project-disco.org/uncategorized/strength-of-digital-services-exports-to-u-s-economy/.

made up 2.5 percent of U.S. GDP in 2022[16] and, in the last five years, digitally-enabled services exports increased by 27.8 percent from the $489.7 billion generated in 2017.[17] Furthermore, digital trade exports, coming from every U.S. state, supported more than 3 million direct and indirect U.S. jobs in 2022.[18]

It is also important to recognize that a diverse range of sectors not traditionally seen as actors in the digital economy are producing and benefiting from digital goods and services, including transportation and warehousing, arts and entertainment, and agriculture and mining. Moreover, the digital economy is expanding nearly three times as rapidly as the economy writ large. And digital economy jobs are proliferating across the U.S. Jobs tied to the digital economy can be found in nearly every sector, and their number has grown at a faster rate than that of overall job growth over the last decade. These jobs pay well, and compensation growth for digital jobs exceeds that for all jobs generally.[19] In short, digitally-enabled products and services are not confined to a handful of "big" companies, let alone the "tech" sector.

Digital market access barriers also harm the ability of many U.S. service providers to reach consumers abroad. Any services supplier operating in a foreign market relies on the ability to transfer data to and from that jurisdiction, and would benefit from the free and open flow of data powered by any digital trade agreements. The data localization requirements and other restrictions on data flows that have proliferated globally harm U.S. strength in the cloud services industry and often give preferential treatment to local players or those from rival markets.

The effects of digital trade barriers also extend into production of physical goods. Companies that produce physical goods would also be negatively impacted by digital trade barriers. For instance, automotive and pharmaceutical companies depend on data flows both to operate abroad as well as to conduct testing to ensure safety standards are met. So not only is incorporation of digital technologies into product offerings a key driver of competitiveness, but it is also crucial to supporting objectives such as consumer safety.

A strong digital trade landscape that supports inclusive trade is also vital to the success of small businesses in the international marketplace. Small businesses rely on digital tools from U.S. companies for all aspects of their operations. U.S. micro, small, and medium-sized enterprises ("SMEs") in every sector, from medical professionals and services providers to farmers and manufacturers, rely on data flows and digital services to reach customers, conduct research and development, maintain supply chains, and otherwise facilitate daily operations. Digital trade enables companies to reach customers in the global marketplace, and it provides access to technologies that facilitate trade and enhance productivity, such as the digitalization of business operations and customs procedures, that benefit all exporters.

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[16] *Id*.
[17] *Id.*
[18] *See* "The Digital Trade Revolution: How U.S. Workers and Companies Benefit from Digital Trade", U.S. Chamber of Commerce (2024). Full report available at: https://www.uschamber.com/assets/documents/USCC_Digital-Trade-Report.pdf.
[19] *See* "The Digital Trade Revolution: How U.S. Workers and Companies Benefit from Digital Trade", U.S. Chamber of Commerce (2024). Full report available at: https://www.uschamber.com/assets/documents/USCC_Digital-Trade-Report.pdf.

Moreover, U.S. SMEs can benefit greatly from USTR's strong enforcement of digital trade rules. Small firms have fewer products, service lines, and resources than large ones, so it is more difficult for them to carry increased costs of data localization, forced tech transfers, and arbitrary application of regulations. Consequently, digital trade restrictions that undermine market access commitments disproportionately hurt SMEs (and their workers) that export digital services or connected goods. According to one estimate, cross-border data flows lead to an 82 percent decrease in export costs for SMEs.[20] And a U.S. Chamber of Commerce study estimated that if U.S. small businesses had better access to global markets, their sales would increase by 14 percent and U.S. economic output would rise by $81 billion, creating 900,000 U.S. jobs.[21]

Global competition in the digital sector is real. Foreign competitors also see opportunities to increase exports of digitally-enabled services and other technology products. Global digital trade barriers undermine the competitiveness of U.S. firms in many sectors against competitors from the EU, India, and China. Export opportunities for digitally-enabled services are expanding rapidly, and the U.S. is well positioned to build on its formidable advantages in these areas. However, these opportunities are endangered by the spread of digital protectionism and the accumulation of discriminatory digital rules that often target American firms. In particular, digital trade barriers such as forced technology transfers and disclosure of source code and/or algorithms threaten to undermine U.S. innovation and potentially infringe on the intellectual property rights of U.S. firms. USTR's failure to address these challenges or recognize the consequences to U.S. companies and workers risks hundreds of billions of dollars to the U.S. economy, impacting businesses both large and small.

In addition to the significant economic harms to U.S. interests that would result from a USTR retreat from engaging on digital market access barriers, the U.S has a critical geopolitical interest in engaging with other nations to shape global rules governing the digital economy, which are still in their nascency. As this is a pivotal moment for the U.S. to demonstrate leadership and work to shape the emerging rules and norms that will govern the global digital economy for years to come, U.S. engagement is not only crucial to America's future economic prosperity, but also in ensuring that U.S. values are embedded in the global rules of the digital economy. If the U.S. retreats from its traditional leadership role, U.S. adversaries who do not share our values will be the ultimate beneficiaries. This could lead to the entrenchment of rules and norms that facilitate state surveillance and censorship and raise other human rights concerns. It is both an economic and moral imperative that the U.S. show leadership in working with allies to cultivate global rules for the digital economy that are consistent with American values.

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[20] *See* Amir Nasr, "New Data Showcase the Strength of Digital Services Exports to Overall U.S. Economy", Disruptive Competition Project (July 26, 2023). Available at: https://www.project-disco.org/uncategorized/strength-of-digital-services-exports-to-u-s-economy/.
[21] *See* "Growing Small Business Exports: How Technology Strengthens American Trade" U.S. Chamber of Commerce Technology Engagement Center, https://americaninnovators.com/small-business-exports/.