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Hon. Kevin Brady, Chairman
Hon. Richard Neal, Ranking Member
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Hon. Orrin Hatch
Hon. Ron Wyden
Committee on Finance
U.S. Senate
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Ambassador Lighthizer, Chairmen Brady and Hatch, and Ranking Members Neal and Wyden,

Since its inception, the North American Free Trade Agreement (NAFTA) has been an unqualified bipartisan success. Given the changing realities of commerce in the 21st century, we appreciate the administration's willingness to modernize the agreement. We seek to contribute to efforts to create a NAFTA that will continue to foster the digital commerce revolution of the past few decades.

Digital trade is now an integral part of our economy. It has become so, in large part, because of the permissive legal framework enshrined in U.S. law. Key elements of this framework include the free flow of data and digital goods, the right to private encryption and limited liability for online intermediaries. In order to foster innovation and economic growth at home and abroad, the United States should promote adoption of these policies by our trading partners.

In light of this general framework, R Street and FreedomWorks urge USTR negotiators and policymakers in Congress to consider the following objectives as NAFTA negotiations and oversight continue:

USTR's Digital Trade Objectives

Similar to TPP's digital trade section, the administration's objectives for digital trade in NAFTA provide a positive foundation. These goals could be helpfully supplemented with the more detailed proposals outlined in a recent CRS report on Digital Trade and U.S. Trade Policy.¹ The provisions secured by U.S. negotiators in the Trans-Pacific Partnership also offer an excellent template for similar issues in NAFTA.

Algorithmic Transparency

The United States should recognize the important innovation currently underway with the development and use of algorithms and artificial intelligence. It should resist efforts that would stifle this innovation in the name of transparency, particularly measures as invasive as requiring disclosure of source code. Transparency is an important virtue, especially for algorithms used by the government in its criminal justice system, but not all algorithms pose the same challenges.

Evaluation of the costs and benefits of individual use cases is necessary to ensure that overly precautionary policies do not hinder the potential benefits of new computing techniques. We should always inquire about the available alternatives before foreclosing avenues of innovation that may be imperfect. For example, eschewing algorithms for fear they may be biased could require us to rely on human judgment that may be even more biased. The administration's objective on this point is right on target. It states that NAFTA should: "Establish rules to prevent governments from mandating the disclosure of computer source code."²

Intermediary Liability

Immunizing online platforms from legal liability for the actions of their users was essential to the commercial internet's development in the United States.³ Keeping this protection strong is essential to ensuring that the United States continues to lead the world in digital commerce. Without such immunity, online platforms will face the enormous costs of filtering and moderating *all* user-generated content on their sites. These costs would have been prohibitive for today's leading platforms when they were startups, and they will be no less prohibitive for the next generation of online entrepreneurs. U.S. negotiators have a unique opportunity in the NAFTA renegotiation to enshrine and spread this vital protection through an international agreement.

¹ Rachel F. Fefer, et al., *Digital Trade and U.S. Trade Policy*, Congressional Research Service, June 6, 2017, <https://fas.org/sgp/crs/misc/R44565.pdf>.

² Office of the United States Trade Representative, "Summary of Objectives for the NAFTA Renegotiation," *Executive Office of the President*, July 17, 2017, 9. <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>.

³ 47 USC § 230(c)

Data Localization

With passage of Trade Promotion Authority in 2015, Congress added a new negotiating objective directing USTR to “protect cross-border data flows and prohibit data localization for all sectors.” Despite this mandate, the U.S. Treasury raised concerns about the ability of financial regulators and supervisors to obtain data stored overseas during the 2008 financial crisis. As a result, the ban on data localization requirements was exempted from the financial services chapter of the Trans-Pacific Partnership (TPP). While the overall data localization provisions in TPP were positive, exempting one industry was a mistake that NAFTA trade negotiators should avoid.

Thank you for your time and consideration. Please do not hesitate to contact us with questions or concerns.

Respectfully,

R Street Institute

FreedomWorks