

June 12, 2017

Mr. Edward Gresser
Assistant United States Trade Representative for Trade Policy and Economics
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, District of Columbia 20036

RE: Comments of ACT | The App Association to the United States Trade Representative on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement With Canada and Mexico

Dear Mr. Gresser:

In response to the Federal Register notice issued on May 23, 2017,¹ ACT | The App Association hereby submits comments to the United States Trade Representative (USTR) in response to its public request for input on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement (NAFTA) with Canada and Mexico. The App Association is pleased to contribute its views as USTR examines matters related to the modernization of NAFTA and ways to augment the incredible trade partnership between the United States, Canada, and Mexico. We believe that the renegotiation of NAFTA presents the U.S. government with an opportunity to establish a framework agreement for future bilateral and multilateral trade agreements, particularly with respect to digital trade issues.

The App Association represents more than 5,000 app makers and connected device companies across the country, and the mobile economy, who leverage the connectivity of smart devices to create innovative solutions that make our lives better. The App Association is a global leader in representing small business software developers who are eager to grow and create jobs through increased expansion into new international markets. The App Association currently sits on the Department of Commerce's Industry Trade Advisory Committee on Information and Communications Technologies, Services, and Electronic Commerce,² and frequently engages the U.S. and foreign governments on digital trade matters. For instance, the App Association recently provided detailed oral and written testimony to the U.S. International Trade Commission on digital trade barriers from the perspective of small business software developers and tech companies³.

¹ See <http://bit.ly/2qSBhQE>.

² See <http://www.trade.gov/itac/committees/itac08.asp>.

³ See <http://bit.ly/2sgrJTU> and <http://bit.ly/2r3eFkf>.

The world has embraced mobile technology faster than any other innovation in history. The dynamic, hyper-competitive app ecosystem, which we recently valued at more than \$143 billion,⁴ continues to produce innovative and efficient solutions that leverage mobile technologies to drive the global digital economy across modalities and segments. With U.S. companies in the lead, the vast majority of which are startups or small businesses, the app ecosystem enhances consumer and enterprise interactions.

While the global digital economy holds incredible promise for small app developers, our members face a diverse array of challenges and barriers to entering new markets. These barriers may be laws, regulations, policies, or practices that exclude U.S. goods and services from foreign markets, artificially stimulate exports of domestic goods and services to the detriment of U.S. companies, or fail to provide adequate and effective protection of intellectual property rights for U.S. companies. While these barriers use different means, they have the same end: stifling U.S. exports and investment.

We urge USTR to consider the multi-faceted implications of foreign barriers challenging U.S. exports of goods and services, U.S. foreign direct investment, and intellectual property right protection, in all markets. Mexico and Canada represent two of the top trading partners of the United States, and we strongly believe that a new NAFTA should be updated to reflect the realities of the global digital economy. A renegotiated NAFTA must include a standalone digital trade chapter for two reasons:

- 1) a renegotiated NAFTA should reflect the advent of the global digital economy and facilitate its well-established benefits amongst the signatories of NAFTA; and
- 2) it provides a vital opportunity for U.S. and world leaders to establish a new standard for digital trade in future trade agreements, whether they are bilateral or multilateral; whether they include the United States, or not.

The App Association is committed to working with USTR and other stakeholders to eliminate digital trade barriers in trade agreements, including through the renegotiation of NAFTA. On behalf of America's small business innovators, the App Association strongly urges USTR to adopt the following negotiation priorities:

⁴ See http://actonline.org/wp-content/uploads/App_Economy_Report_2017_Digital.pdf.

- **Facilitate Cross-Border Data Flows:** The global economy relies upon the seamless flow of data between economies and across political borders. As innovative small app development companies seek new markets to grow their businesses and support more American jobs in their communities, they must be able to rely on unfettered data flows. NAFTA's new digital trade chapter should unambiguously preserve this ability.
- **Condemn Data Localization Policies:** American companies looking to enter overseas markets increasingly face foreign regulations that force them to build and/or use local infrastructure as a requisite for conducting business in the country. These data localization requirements seriously hinder imports and exports, jeopardize an economy's international competitiveness, and undermine domestic economic diversification. Small and medium-sized app companies do not have the resources to build or maintain unique infrastructure in every country in which they may do business, and such requirements effectively exclude them from commerce. A renegotiated NAFTA should clearly prohibit data localization policies, subject to reasonable exceptions.

The App Association is particularly concerned with requirements, both implemented and proposed, in markets like Russia, China, and India. We strongly support the inclusion of a reasonable prohibition of data localization policies within NAFTA, and subsequent trade agreements, to demonstrate U.S. leadership on this important topic.

- **Prevent Customs Duties on Digital Content:** American app developers and technology companies utilize the internet's global nature to reach the 95 percent of consumers who live outside of the United States. However, the "tolling" of data across political borders to collect customs duties directly contributes to the balkanization of the internet and effectively blocks innovative products and services from market entry.

Since 1998, the World Trade Organization (WTO) has agreed to a moratorium on imposing customs duties on electronic transmissions.⁵ However, this policy has not been proposed or implemented by the United States or its NAFTA trading partners. The App Association strongly urges that a renegotiated NAFTA include a permanent prohibition of customs duties on electronic transmissions, consistent with the WTO, to benefit the NAFTA region and demonstrate opposition to this practice globally.

⁵ See https://www.wto.org/english/tratop_e/ecom_e/mindec1_e.htm.

- **Challenge Requirements that Make Source Code Requisite for Market Entry:** Some governments outside of the NAFTA region have implemented policies that require companies to transfer or provide access to proprietary source code before being granted legal entry to a country’s marketplace. Intellectual property is the lifeblood of app developers and tech companies’ innovations, and the forced transfer of source code presents an untenable risk of theft and piracy, and establishes disincentives for digital trade broadly. The App Association urges USTR to prohibit the disclosure or escrowing of source code as a condition of market entry within a renegotiated NAFTA agreement.
- **Promote the Use of Strong Encryption Techniques to Protect End User Security and Privacy:** App innovators across the United States depend on technical data protection methods and strong encryption techniques to keep customers safe from identity theft and other harms. Unfortunately, several countries continue to demand that “backdoors” be built into encryption frameworks to allow government access. These policies jeopardize the safety and security of data by creating known vulnerabilities that unauthorized parties can exploit. The viability and success of an app developer’s product depends on the trust of its end users. A renegotiated NAFTA should clearly promote the use of technical protection methods and advanced encryption techniques to protect data.
- **Encourage the Protection of Intellectual Property:** The infringement and theft of intellectual property and trade secrets threatens the success of the App Association’s members and, in turn, hurts the billions of consumers who rely on app-based digital products and services. These intellectual property violations can lead to customer data loss, interruption of service, revenue loss, and reputational damage – each of these consequences alone represent a potential “end-of-life” occurrence for small app developers and together they cement their demise. Strong, but fair, protection of intellectual property for copyrights, patents, trademarks, and trade secrets is essential, and a renegotiated NAFTA should include provisions ensuring the fair protection of all intellectual property.

Each of the above negotiation priorities are essential to a successful renegotiated NAFTA that can leverage the power of the digital economy to create prosperity for U.S. businesses and more jobs for American workers. Considering the plethora of issues our members encounter within the NAFTA region and across the globe,⁶ we believe a renegotiated NAFTA can serve as a leading example of a modern trade agreement by incorporating the priorities above.

⁶ We have offered details on these country-specific digital trade barriers publicly, most recently in written testimony to the United States International Trade Commission on April 21, 2017. See <http://bit.ly/2sgrJTU>.

As USTR formulates its priorities for the renegotiation of NAFTA and explores ways to modernize the agreement, digital trade must be a major component to reflect the current state of trade. We ask that through this process, you prioritize digital trade and recognize the incredible advancements it brings to the American economy. We will remain an eager and interested resource throughout these negotiations.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Scarpelli". The signature is fluid and cursive, with a prominent initial "B" and a long, sweeping tail.

Brian Scarpelli
Senior Policy Counsel

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