

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

SEAN HEATHER
VICE PRESIDENT
CENTER FOR GLOBAL REGULATORY
COOPERATION

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January 8, 2015

Kirby Howard
Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Howard,

The Chamber appreciates the opportunity to have appeared before the Subcommittee on Commerce, Manufacturing, and Trade back in September to testify at the hearing entitled "Cross Border Data Flows: Could Foreign Protectionism Hurt U.S. Jobs?" As requested, please find attached the Chamber's response to the questions I received to be submitted for the record.

Sincerely,

A handwritten signature in black ink, appearing to be 'S. Heather', written over a horizontal line.

Sean Heather
Vice President
Center for Global Regulatory Cooperation
U.S. Chamber of Commerce

Chamber Responses to Questions for the Record

1. From the Chamber's perspective, what does an effective trade policy for cross-border data transfers look like and how does it support U.S. industry?

An effective trade policy requires a two pronged approach. The first prong should be USTR securing strong commitments in trade agreements that bar forced localization efforts by governments that prevent the cross-border flow of data. Further, commitments in trade agreements must also include data transfer mechanisms that facilitate the movement of data while addressing legitimate privacy concerns.

More specifically, trade agreement provisions should address the ability to freely transfer data by: (1) an expressed commitment to allowing cross-border data transfers; (2) a prohibition on data localization requirements; and (3) a non-exhaustive list of data transfer mechanisms. Trade agreement provisions should also meaningfully limit the public policy exemptions allowed under the General Agreement in Services (GATS) Article XIV, by requiring any transfer prohibitions to be no more trade restrictive than necessary. Most importantly, these provisions need to be binding and enforceable, with minimal exceptions for non-conforming measures.

The second prong to an effective trade policy in support of cross-border data transfers is to engage bilaterally with countries outside of trade negotiations as various problematic regulatory proposals arise. A coordinated effort between various U.S. government agencies as well as Embassy staff on the ground is often needed to overly broad, misguided, and protectionist approaches proposed by foreign governments. In the past year, such measures have been proposed in more than a dozen countries. This trend is likely to continue and a whole-of-government response will be needed for the foreseeable future to meet these challenges head on.

2. How do existing restrictions on cross-border data flows impact consumers and end-users?

Restrictions on cross-border data flows deprive consumers of valuable products and services and raise costs. The restrictions serve to take the "world" out of the World Wide Web, severely limiting the potential of the Internet to serve as an engine of growth in the United States and worldwide. Some good examples can be found in the case studies illustrated in the joint U.S. Chamber of Commerce/Hunton & Williams study: *Business without Borders: The Importance of Cross-Border Data Transfers to Global Prosperity*.¹

¹ See Section III, available at https://www.uschamber.com/sites/default/files/021384_BusinessWOBorders_final.pdf.

3. What will policy makers need to consider to maintain U.S. competitiveness and ensure that the benefits of cross-border data flows lead to the creation of more U.S. jobs and domestic investment?

U.S. policy makers need to better appreciate and be prepared to respond to the continued fallout generated from the NSA-related surveillance allegations. Foreign governments have used these allegations as an excuse to win political points or to promote local champions and some governments, including Germany's, have passed laws related to government procurement that bar market access to U.S. companies. The inability or unwillingness of policymakers to distinguish policy measures designed to address government use of data versus commercial use of data is arguably the single biggest threat to cross-border data flows and our competitiveness.

4. There are multiple, ongoing trade negotiations between the U.S. and major trade partners including the TPP, the U.S.-E.U. Safe Harbor, TTIP, and TiSA. In these negotiations how important is it for the countries engaged to reach agreement on cross-border data flow principles?

It is very important for each of the negotiations mentioned above to commit governments to strong rules; and those rules must be binding, enforceable and with limited non-conforming measures in order for the agreements to be effective. The Chamber would add the negotiation with China over a bilateral investment treaty to the list of negotiations where the interests of preserving cross-border data flows must be appropriately addressed. It is difficult to imagine how any of these negotiations could equip American business to be competitive in a digital age without these provisions.

- a. Are there examples in other trade agreements that the U.S. can look to for guidance in this process?

A number of trade agreements have acknowledged the significance of cross-border data transfers to the global economy as a fundamental tenet of the agreement. For example, Article 14.5 of the U.S.-Panama Trade Promotion Agreement highlights the importance of helping small and medium-sized enterprises “overcome obstacles” that impede their participation in electronic commerce and maintaining “cross-border data flows of information as an essential element in fostering a vibrant environment for electronic commerce.”

Similarly, Article 15.8 of the United States-Korea Free Trade Agreement (KORUS) recognizes “the importance of the free flow of information in facilitating trade” and pushes the parties to the agreement to “refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders.”

However, these agreements are lacking because the commitments are merely aspirational. Without binding and enforceable language our trading partners are free to disregard any data flows language.

The KORUS agreement also has more specific language in the financial services chapter, but South Korea is interpreting the language extremely narrowly and not providing proper allowances regarding the transferring and processing of data. Moreover, the KORUS language is limited to one chapter.

Moving forward, trade negotiators need to advance concrete commitments, and cross-border data flow provisions must apply to all sectors.

b. I understand over 3000 companies rely on the U.S.-E.U. Safe Harbor Framework to transfer data between the trade zones. How important is a functioning Safe Harbor Framework to your members?

A functioning U.S.-EU Safe Harbor is extremely important to these companies and their clients when conducting businesses across the Atlantic. Companies from many sectors and sizes rely on this data transfer mechanism to conduct both routine operational functions and to interact with clients while abiding by trusted, well-established data protection methods. A well-functioning U.S.-EU Safe Harbor is not only critical bilaterally, but also can serve as a model data transfer mechanism for other trading partners.

While we are encouraged by the discussions between the U.S. and EU regulators, we believe it is important that proposed revisions to the framework be tailored in response to identified, actual problems. Policymakers must avoid temptations to raise hypotheticals or concerns unrelated to commercial use of data. If not, the viability of the U.S.-EU Safe Harbor as a data transfer mechanism will be in jeopardy.