

For Immediate Release: February 28, 2024

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Biden Digital Trade Update Paved Way for Smart Data Security Executive Order

Washington, D.C. – *Today as the Biden administration announces a new Executive Order on data security that prevents the large-scale transfer of Americans' personal data to countries of concern, American Economic Liberties Project's **Rethink Trade Director, Lori Wallach**, released the following statement:*

"With this order and the 2023 update of U.S. "digital trade" policy that reasserted U.S. authority to regulate where Americans' data can be sent, President Biden is standing up for Americans' privacy and putting our security first after decades of Big Tech giants and data brokers profiting off our personal data without limit or oversight.

By rejecting anomalous Trump-era "digital trade" rules forbidding government oversight of data flows and reasserting the U.S. government's rights to protect our security and privacy, the U.S. Trade Representative paved the way for today's Executive Order. The Trump-era "digital trade" rules that industry supports would make today's Biden administration action to protect our data security an "illegal trade barrier" that must be eliminated.

Companies that profit by trading in our personal data have spent a fortune trying to confuse the public and policymakers into thinking that regulating cross-border flows of personal health, financial or geolocation data as today's EO rightly does is somehow the same as forbidding access to Wikipedia or news websites and that any government oversight of where data can flow, be processed or stored must be forbidden in trade agreements that pre-empt such domestic regulation. This Big Tech campaign is and was absurd and today's EO shows that the administration is prioritizing our personal well-being over Big Tech's exploitation of our personal data."

BACKGROUND: In 2023, the Office of the United States Trade Representative (USTR) updated the U.S. approach to "digital trade" to make U.S. trade policy compatible with congressional and executive branch proposals on data security and privacy. Lobbyists representing large digital platforms and data brokers had convinced the Trump administration to promote trade rules that forbid government regulation of data, including personal data. **These rules ensure companies, which are called "covered entities" in the rules, can move data without limit not only between countries signing an agreement, but to any country. And the clause that appears to be an exception is written to be useless.** That clause replicates the language of the WTO General Exception (GATT Art. XX) that has [failed in 46 of 48 attempted](#) uses to defend domestic policies. **And there is no effective WTO national security exception** The WTO also has ruled against the U.S. in five out of five attempted uses of the national security

exception (GATT Art. XXI) to defend various China-related trade policies in the past three years.

That is why the Trump-era rules would undermine today's EO. No previous U.S. trade pact had included terms that pre-empt executive agency and congressional authority over data regulation or provided data brokers and platforms control of Americans' personal data. Industry lobbyists convinced Trump officials to insert these terms into the 2019 U.S.-Mexico-Canada Agreement and to propose them for global World Trade Organization (WTO) talks. With most countries opposed to the U.S. proposals, the WTO digital trade talks deadlocked from 2019 on.

Industry lobbyists hoped to make the anomalous data rules a new norm by pushing the Biden administration to include them in the Indo-Pacific Economic Framework (IPEF). In 2022 and 2023, USTR worked with other Biden administration agencies and Congress to consider how to make U.S. digital trade policies consistent with congressional and administration digital governance goals. As a result, the U.S. government did not include the industry-demanded terms in its IPEF proposals and informed the WTO that the U.S. no longer supported the Trump-era proposals. (Ironically, the U.S. updating its position unjammed the WTO talks, which are now heading to an initial agreement in 2024 after five years of deadlock.) **The “digital trade” data language industry lobbyists seek, below, would forbid the policies in today's EO:**

USMCA Article 19.11: Cross-Border Transfer of Information by Electronic Means

1. No Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person. (emphasis added)

2. This Article does not prevent a Party from 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.–

USMCA Article 19.12: Location of Computing Facilities

No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.

[covered person means: (a) a covered investment as defined in Article 1.5 (General Definitions); (b) an investor of a Party as defined in Article 14.1 (Definitions); or (c) a service supplier of a Party as defined in Article 15.1 (Definitions), but does not include a covered person as defined in Article 17.1 (Definitions); [note: 17.1 is definitions of financial institutions]

Some other WTO countries have a very different approach to the obligation language. For instance the EU-New Zealand Free Trade Agreement includes rules designed to shut down the sort of forced localization of data practiced by China, Russia, Turkey et al. while preserving space for governments to regulate for data privacy. It forbids a list of specific data localization practices for data flows taking place between the signing countries.

Learn more about Economic Liberties [here](#).

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