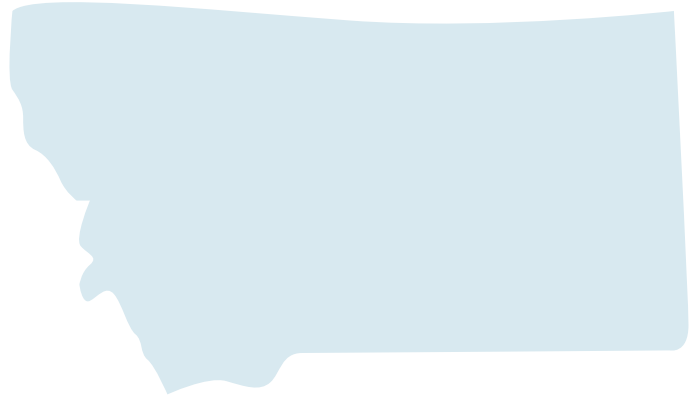


Big Tech’s “Digital Trade” Agenda Threatens Montana’s Tech Policy Goals

Nationwide, state legislators have introduced bills to protect people from biased artificial intelligence (AI) models, online privacy violations, abuses of children and teens’ data, and anti-competitive practices by tech companies—and to guarantee our right to repair our phones, cars and other equipment.

The surge in statehouse tech legislation shows that the American people—and their elected officials at every level—want action now. But few people realize that the very firms whose conduct led to this bipartisan response have a strategy to undermine tech regulation through a stealthy form of international preemption. They want to add rules to international trade deals that limit how state and federal governments can regulate tech.



The most extreme of what these Big Tech interests misleadingly call “digital trade” rules would:

- limit governments’ powers to require impact assessments, bias audits, or pre-deployment testing of even high-risk AI and other programs if this involves government regulators or independent reviewers having access to detailed descriptions of algorithms or to source code;
- forbid right to repair polices that require manufacturers to share repair tools that depend on access to code or algorithms;
- ban regulation of international data transfers, guaranteeing rights for firms to choose where our personal data moves and is stored; and
- prohibit requirements to keep certain data locally stored, for instance to keep sensitive data within the state for privacy or any other reason.

Montana lawmakers’ initiatives to regulate the tech industry must not be thwarted by “digital trade” rules being pushed by Big Tech firms. We must ensure that Montana tech bills—including some measures already signed into law—are not undermined by this international preemption plot.

The rest of this explainer details how “digital trade” provisions conflict with specific Montanan policies relating to data privacy and right to repair.



DATA PRIVACY

Consumers and regulators have many new concerns about data privacy as AI systems have proliferated in all sectors of the economy. State bills aimed at preserving privacy have gained ground in recent years, including measures meant to limit the sharing of personal information.

Montana's Genetic Information Privacy Act, which takes effect in 2025, restricts entities in foreign adversaries of the United States from holding Montanans' sensitive genetic data:

"(7) Genetic data and biometric samples of Montana residents collected in the state may not be stored within the territorial boundaries of any country currently sanctioned in any way by the United States office of foreign asset control or designated as a foreign adversary under 15 CFR 7.4 (a). Genetic data or biometric data of Montana residents collected in the state may only be transferred or stored outside the United States with the consent of the resident."

This bill both bans the storage of specific sensitive data in certain countries and restricts the cross-border movement of data. If the "digital trade" rules Big Tech seeks were widely in effect, these limits could be challenged as inconsistent with the "digital trade" ban on regulation of cross-border data flows.

RIGHT TO REPAIR

The "digital trade" source code secrecy guarantees wouldn't just shield AI from government oversight: they also would undermine market competition and consumers' rights to access the repair tools and information needed to keep their phones, cars, and other equipment operating.

Montana bill SB 347, which was considered in the 2023 legislative session, was intended to grant the owners and independent repairers of agricultural equipment access to the tools necessary to perform repairs. For electronic products, including internet-connected agricultural equipment, these "tools" also include software, code, and other algorithmic tools:

"(1) (a) A manufacturer shall ensure that any farmer, including any staff or independent technician, and any independent repair facility that provides assistance to farmers in the state, has electronic access on fair and reasonable terms to any tools, specialty tools, software, and documentation used in effecting the services of diagnosis, maintenance, or repair of agricultural equipment, including: (i) software; (ii) manuals; (iii) product service demonstrations, training, seminars, or clinics; (iv) on-board diagnostics through a diagnostic port or wireless interface; (v) other publications with information on service, parts, operation, and safety; and (vi) embedded software required to authorize a repair and return agricultural equipment to full, working order."

Right to repair laws that require manufacturers to make available to consumers and independent repair shops tools, parts, and information necessary to repair electronic products could be undermined by algorithm and source code secrecy rules since the broad definition of algorithms would encompass repair tools such as diagnosis software, firmware, and digital keys. Other potentially affected legislation includes HB 475 (2023), another version of the right to repair law for agricultural equipment, and HB 195 (2023), which would have extended the right to repair to powered wheelchairs.

The good news is that very few of the hundreds of trade agreements in effect worldwide include Big Tech's "digital trade" rules. The bad news is that Big Tech lobbyists are using their power and money to try to rig numerous trade deals that are being negotiated right now to derail the wave of tech regulation underway nationwide. To learn more, please visit: www.rethinktrade.org