



June 12, 2017

Mr. Edward Gresser
Chair, Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Re: Comments on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement with Canada and Mexico (Docket Number USTR-2017-0006)

Dear Mr. Gresser:

Pursuant to the request for comments issued by the U.S. Trade Representative (USTR) and published in the Federal Register at 82 Fed. Reg. 23699 (May 23, 2017), Engine respectfully submits the following comments for consideration as the USTR and Trade Policy Staff Committee (TPSC) develop the U.S. government's negotiating objectives and positions with regard to the modernization of NAFTA.

As a technology policy, research, and advocacy organization that works with policymakers, industry, and civil society to craft public policy to foster startup activity, Engine has a strong interest in ensuring that startups benefit from the economic prosperity that international trade provides. Engine is grateful for the opportunity to engage with the Office of the U.S. Trade Representative in response to its May 23, 2017 Federal Register notice, titled "Request for Comments on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement (NAFTA) with Canada and Mexico." Startups nationwide are impacted by digital trade, technical barriers to trade, and trade-related intellectual property rights issues, and we hope that USTR will maintain the parts of the current NAFTA agreement that have made innovation possible.

America's entrepreneurial spirit is deeply rooted in our nation's trade history, and startups have always been central to job creation and innovation in our country. Today's startups are able to drive our economy because sensible trade rules provide the backbone for international growth. The Internet allows startups to easily and cheaply expand their customer base worldwide. Despite the global nature of the Internet and digital trade, for startups in the U.S., the top two export destinations are Canada and Mexico.¹ In order to preserve and strengthen this beneficial trading relationship, we support modernizing the North American Free Trade Agreement (NAFTA).

Startups are an integral driver of invention, innovation, and economic growth throughout the nation. They have been disproportionately responsible for disruptive innovations that have

¹ U.S. Chamber of Commerce. "The Facts on NAFTA."
https://www.uschamber.com/sites/default/files/the_facts_on_nafta_-_2017.pdf

driven productive growth, from autos and airplanes to air conditioning and apps. Furthermore, the Internet has fundamentally transformed how many startups connect with customers. As startups scale up, digital services, interconnectedness, and reduced barriers to trade have opened up a limitless universe of customers.² It is important to protect the gains that have been made in trade policy, particularly with our NAFTA partners.

Policies Benefitting Startups to Include in NAFTA Modernization:

There are a number of key protections in U.S. law that would benefit startups if included in NAFTA modernization including the protection of cross-border data flows, intermediary liability protections and copyright safe harbors.

NAFTA must protect cross-border data flows and trade in digital content:

Startups have flourished with the growth of digital trade as online services facilitate transactions and communications among millions of businesses and consumers. Increased regulatory burdens to digital trade act as a barrier to entry for small companies. Startups would welcome NAFTA modernization if the new provisions decreased barriers to trade.

- **Creating additional customs procedures.** Startups expanding to international markets should not face additional customs formalities, inspections, requirements and procedures that add complexity to international trade. Startups are trading in both physical and e-commerce products and adding customs procedures to either category could have a negative impact on scaling a business and reaching new customers.
 - NAFTA modernization should prohibit customs duties, taxes, and other barriers to digital products and services. Any updated agreement must ensure non-discriminatory treatment of digital products transmitted electronically.

NAFTA must create intermediary liability protections:

Startups across the country rely on clear rules that enable connections and trade flows online. New companies must be able to host online transactions without being held liable for the content surrounding each transaction. Modern technology allows even the smallest of online platforms to reach thousands if not millions of people. Tampering with intermediary immunity would frustrate the development of the companies and organizations that drive our economy, facilitate free expression, and provide access to information.

- **Section 230 of the Communications Decency Act.** Section 230 has created the necessary conditions for the extraordinary growth and innovation of the Internet in the United States by enabling digital platforms to host speech without the platform itself being considered the “speaker.” The intermediary liability provided by Section 230 has lead to the creation of pioneering platforms for collaboration, communication, and mobilization that are used by billions of people.
 - NAFTA modernization should include provisions to clearly prohibit governments from making online services liable for third-party content. Section 230 is at the core of virtually all online innovation and is a crucial factor to economic success of the American startup economy.

² United States International Trade Commission. “Digital Trade in the U.S. and Global Economies, Part 2.” <https://www.usitc.gov/publications/332/pub4485.pdf>.

NAFTA should adopt laws that protect a balanced copyright system:

In the United States, industries that rely on copyright exceptions like fair use generate \$4.5 trillion in annual revenue and employ a large portion of the U.S. workforce.³ NAFTA modernization should recognize the importance of fair use, DMCA safe harbors, and other copyright law exceptions to protect our startup ecosystem.

- **Fair Use.** Startups benefit from balanced intellectual property laws that provides incentives to create while still preserving the creative reuse and interoperability that are so critical to innovation. Principles like fair use and limited copyrightability are critical to ensuring that startups and users can benefit from and build off existing works.
 - Fair use and U.S. copyright law, while imperfect, strike the right balance to protect creators and users of copyrighted works. NAFTA should be updated to adopt this set of copyright limitations and exceptions.
- **Safe Harbors.** The Digital Millennium Copyright Act (DMCA) provides a solid foundation for all startups engaging in digital trade. The DMCA “safe harbors” create a balanced system that protects users, consumers, and copyright owners. Without the safe harbors, critical tools for startups would not be possible, including social media platforms, search engines, online marketplaces, and cloud services.
 - The DMCA safe harbors have allowed startups to flourish and innovate since their enactment. NAFTA should be updated to codify these safe harbors.

Policies that Negatively Impact Startups:

Startups should be focused on scaling their businesses to create jobs and grow the economy. When foreign governments seek to impose regulatory barriers on startups, it hinders their ability to innovate. Increased burdens on trade in the form of increased government regulation must be prohibited in any NAFTA modernization.

The following practices should be prohibited.

- **Data localization laws.** Requirements by foreign governments mandating that data is managed, stored, or processed locally are prohibitive trade barriers for startups. A startup should not be restricted from global trade due to data localization laws. Forcing data localization limits competition, growth, and overall security of startups looking to trade abroad.
- **Weakening encryption.** When foreign governments demand access to encryption keys or source code as a condition for entering their markets, it undermines the safety and security of the Internet ecosystem. Allowing governments to require backdoors to content would compromise U.S. technology and harm startup growth. Moreover, weakening encryption harms national security, network communication, and consumer choice.
- **Imposing facilities-based regulatory and licensing requirements.** When foreign governments impose complex and unnecessary licensing requirements on startups to

³ Capital Trade. “Fair Use in the U.S. Economy.”

<http://www.cciagnet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf>

protect local incumbent industries, it acts as a serious barrier to entry. NAFTA updates should prohibit governments from imposing these regulatory and licensing requirements.

- **Requiring discrimination that protects local content.** NAFTA currently contains broad “cultural” carve-out for Canadian content, to the detriment of U.S. content. Startups are negatively impacted when they have to treat the distribution of local content differently from non-local content. NAFTA should prohibit discrimination against trade of digital products.

Thank you for the opportunity to provide comments on the upcoming NAFTA modernization negotiations. Engine hopes to continue to assist the USTR during the process. International trade plays an important role in our startup ecosystem.

Sincerely,

A handwritten signature in black ink, appearing to read 'Evan Engstrom', with a stylized flourish at the end.

Evan Engstrom
Executive Director