



## **The Impact of USTR’s October 25 Action on Biden Administration Priorities and US Interests**

November 21, 2023

The Global Data Alliance<sup>1</sup> has generated this memorandum to provide an overview of the damage to US interests caused by the October 25, 2023 announcement (“the October 25 action”) by the Office of the US Trade Representative (“USTR”) withdrawing US support for World Trade Organization (“WTO”) trade rules on cross-border data.

### **Executive Summary**

USTR’s October 25 action withdrew US government support for international trade law disciplines that promote: (1) US cross-border access to knowledge, ideas, and information from trading partners; and (2) the international adoption of US-based norms of transparency and due process in relation to measures affecting such cross-border data. The October 25 action has far-reaching implications. It:

- Undermines the [Biden-Harris Executive Order on Artificial Intelligence \(AI\)](#) and US leadership in AI, which require reliable cross-border access to information from abroad.
- Undermines other US priorities that depend upon cross-border access to information from abroad – whether to protect America’s [environment](#), [health](#), [innovation](#), [security](#), or [jobs](#).
- Contradicts White House commitments to pursue “high-standard rules of the road in the digital economy, including [standards on cross-border data flows and data localization](#).”
- Contradicts the [National Security Strategy](#) call to “to promote the free flow of data and ideas with trust, while protecting our security, privacy, and human rights, and enhancing our competitiveness.”
- Contradicts the [National Cybersecurity Strategy](#) call to “rally like-minded countries, the international business community, and other stakeholders to advance our vision for the future of the Internet that promotes secure and trusted data flows, respects privacy, promotes human rights, and enables progress on broader challenges.”
- Isolates the United States from its allies and produces a (wholly avoidable and unnecessary) appearance of US alignment with [Chinese WTO negotiating positions designed to shield China’s digitally authoritarian policies from scrutiny](#). Indeed, China has for years opposed the very same digital trade disciplines that USTR abandoned on October 25, disciplines that the United States had drafted, in part, specifically to counteract digitally authoritarian policies.

Most immediate is the damage to the [Biden-Harris Administration Executive Order on AI](#) – the realization of which depends on cross-border access to data from around the world. This includes health data, climate and emissions data, agricultural and meteorological data, and other data needed – in the

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<sup>1</sup> The Global Data Alliance is a cross-industry coalition of companies that are committed to high standards of data responsibility and that rely on the ability to transfer data around the world to innovate and create jobs. GDA member companies are active in the accounting, agriculture, automotive, aerospace and aviation, biopharmaceutical, consumer goods, energy, film and television, finance, healthcare, hospitality, insurance, manufacturing, medical device, natural resources, publishing, semiconductor, software, supply chain, telecommunications, and transportation sectors. GDA member companies collectively employ millions of American workers across all 50 states. For more information, see <https://www.globaldataalliance.org>

words of Secretaries Blinken and Raimondo – to address “[some of the world’s biggest challenges](#), from curing cancer to mitigating the effects of climate change to solving global food insecurity.”

Absent binding international trade rules on cross-border data, it may not be possible to protect future:

- US cross-border access to information from abroad, as foreign governments will not be required to provide any assurances regarding future cross-border data transfers, and will face few (if any) international trade penalties for unreasonably blocking such transfers; and
- US interests from discriminatory or unfair data access conditions, as foreign governments will be free to restrict US access to information in ways that are discriminatory, unduly restrictive, or disguised barriers to trade.

USTR’s unilateral relinquishment of an opportunity to set such rules – and to advance the White House AI Executive Order’s goals – is a particularly damaging aspect of the October 25 action.

The United States must reengage. In the Indo-Pacific Economic Framework (IPEF), the Americas Partnership for Economic Prosperity (APEP), and trade negotiations with other economies, the United States must do everything possible to reengage with its allies so as to promote the cross-border exchange of information, protect democracy and human rights, safeguard its alliances, and address tomorrow’s challenges. In the sections that follow, this memorandum offers the following observations:

1. The October 25 Action Undermines a US-Led Coalition of Democracies that Have Sought to Oppose Digital Authoritarianism and Protectionism
2. The October 25 Action Jeopardizes US National Interests
3. The October 25 Action Prejudices the Interests of US Enterprises and Workers
4. The October 25 Action Does Not Appear to Meet Procedural Requirements

#### **I. The October 25 Action Undermines a US-Led Coalition of Democracies that Have Sought to Oppose Digital Authoritarianism and Protectionism**

The United States is strongest when it works with its allies. The United States must not abandon the pro-democracy, pro-economic opportunity, and pro-science digital trade disciplines that have helped it assemble a coalition of democracies across APAC, EMEA, and the Western Hemisphere to resist the challenge of digitally authoritarian policies. US government efforts included the [Department of State](#), [Department of Commerce](#), and [USTR](#) and have spanned the Bush II, Obama, Trump, and Biden-Harris Administrations, have included the following dimensions:

1. **Geopolitical.** The United States and its allies have spent decades building support for trade law disciplines that promote the cross-border exchange of ideas, knowledge, and information, while also promoting US-based norms of transparency, due process, and procedural fairness.
2. **Economic.** The United States has been a pioneer in developing these disciplines. The United States was the first country to develop binding trade disciplines that promoted the cross-border exchange of information within widely understood trade law frameworks. Subsequently, US allies negotiated their own digital economy agreements based on US model agreements.

3. **Legal.** The United States has drafted these disciplines based on US legal principles – helping ensure that US values and legal norms remain at the foundation of international economic law.
4. **Democratic.** The United States has always understood that access to knowledge and information is critical to civil and economic freedoms. The disciplines at issue serve to [protect human rights](#) and [counter digital authoritarianism](#). Consistent with the [Presidential Initiative for Democratic Renewal](#), and the [National Cybersecurity Strategy](#), and as stated in the [Declaration on the Future of the Internet](#), the US and its partners must work “to realize the benefits of data free flows with trust based on our shared values as like-minded, democratic, open and outward looking partners.”

The October 25 action – which reversed these efforts – has had the unfortunate effect of isolating the United States from its allies. It set aside a body of work developed by the United States and its allies over many years to bring greater predictability to cross-border data access and data transfers. It also produced an unfortunate appearance of US alignment with [Chinese WTO negotiating positions designed to shield China's digitally authoritarian policies from scrutiny](#).

## II. The October 25 Action Jeopardizes US Interests

The US national interest is harmed when foreign governments interfere with the ability of the US government to maintain reliable cross-border access to data from around the world. Because the October 25 action abandoned trade-related rules designed to promote cross-border data transfers, it makes it easier for foreign governments to impede US access to such data.

### A. The October 25 Action Undermines the Biden-Harris Executive Order on AI

The United States needs access to data from overseas to fulfill the [Executive Order](#) goal of “[lead\[ing\] the way in \[AI\] innovation and competition](#).” US leadership in AI requires deliberate policy choices that properly manage risks – including the risk that foreign governments will block US access to data needed to fulfill the Executive Order's goals.

The Biden-Harris Administration deserves high praise for the Executive Order's thoughtful, whole-of-government approach to fulfilling AI's “[potential to do profound good](#).” That approach recognizes that US leadership in AI is critical to the broader goals of maintaining America's “scientific and technological edge,” which is (as stated by Secretary Blinken) “[critical to us thriving in the 21<sup>st</sup> century economy](#)” and (as stated by NSC Advisor Sullivan) a “[national security imperative](#).”

Data lies at the core of these national interests. A lack of predictable and reliable cross-border access to data could frustrate the Administration's efforts “[catalyze AI research across the United States](#)” to “[solve some of the world's biggest challenges](#).” A lack of such access would also undermine the ability to evaluate AI systems to ensure that AI is “[safe and secure](#).” When such impediments result in AI data sets that are too small, it also impedes efforts to “[test, understand, and mitigate risks](#)” and to develop [effective](#) safeguards against “societal harms such as fraud, discrimination, bias, and disinformation,” as well those relating to the workplace, competition, and security.

This is why the October 25 action raises such concerns: It threatens to vitiate a core foundational premise of the Executive Order – namely that the United States can count on reliable and predictable cross-border access to data that is critical to continued US leadership in AI. Without the legal certainty and due process that these trade rules on cross-border data can provide, foreign governments may now deny the United States cross-border access to data for any reason or no reason at all.

The United States must reengage. We must – in the words of Vice President Harris – “[recognize this moment we are](#)” and seize it.

## **B. The October 25 Action Undermines Other US Public Policy Priorities**

US government access to cross-border data is also critical to [foreign development assistance](#), [small business promotion](#), [financial equity and inclusion](#); [cybersecurity](#), [human rights](#), [science, innovation and IP](#); [health and safety](#), [environmental protection](#), and many other [regulatory compliance](#) priorities. Many US government agencies have contended with arbitrary or unwarranted foreign government restrictions on cross-border data transfers to the United States. One prominent example is found in EU restrictions on transfers of health-related data needed by researchers at the National Institutes of Health searching for medical treatments. It is important to fully understand how US AI leadership and other priorities will be [directly undermined](#) if other countries can readily impede US cross-border access to data. This is a [longstanding and growing problem that the October 25 action is likely to aggravate](#).

## **III. The October 25 Action Prejudices the Interests of US Enterprises and Workers**

The October 25 action also prejudices private sector interests. US government agencies and independent economists agree: Restrictions on cross-border access to information harm the economy, productivity, and investment – all of which threatens the [40 million American jobs supported by international trade](#). US digitally enabled services exports [exceed \\$650 billion](#) and digitally enabled goods exports are even higher. So, when foreign governments erect barriers to US digitally enabled goods and services – such as aircraft, vehicles, semiconductors, creative content, and financial and other services – they [hurt the millions of American workers who design, produce, and deliver them](#).

America's trade rules on [cross-border data are particularly important for small- and medium-sized businesses](#) (SMEs). US workers and companies of all sizes and [across sectors](#) – not “Big Tech” firms – are most vulnerable to foreign cross-border data restrictions. For example, in one recent study, 30-40% percent of SMEs surveyed said that [data localization barriers were a top challenge](#), and that with more digital connectivity, they could increase sales by 15-40% and hire 10-50 new employees each. [33.2 million](#) US SMEs employ [62 million US workers](#), accounting for [99.9%](#) of all US businesses and [63% of new jobs](#).

## **IV. The October 25 Action Does Not Appear to Meet Applicable Legal Requirements**

Congress has [legislated safeguards](#) to ensure that USTR consults adequately with the public and all parts of the US government. USTR is obligated to consult with [the public](#), [Congress](#), [other Executive Branch agencies](#), and the [50 US states, territories and possessions](#). The swift reaction to the October 25 action strongly suggests a legally and procedurally defective process.

## **V. Conclusion**

Cross-border access to information is critical to advancing the shared public policy goals of the United States and its allies. Their interests are harmed when discriminatory or unnecessary barriers are erected against reliable cross-border access to information. The October 25 action makes it easier for others to do so.

The Biden-Harris Administration must not repeat the negotiating errors committed at the WTO. In the Indo-Pacific Economic Framework (IPEF), the Americas Partnership for Economic Prosperity (APEP), and trade negotiations with other economies, the United States must do everything possible to reengage with its allies so as to promote the cross-border exchange of information, protect democracy and human rights, safeguard its alliances, and address tomorrow's challenges.