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Testimony

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House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and Trade

on "Cross Border Data Flows: Could Foreign
Protectionism Hurt U.S. Jobs"

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Summary of Testimony

- A robust and multi-faceted trade policy that includes new market-opening trade agreements is a key component of growing manufacturing throughout the United States. With 95 percent of the world's consumers outside the U.S. market, exports and sales overseas represent an enormous opportunity for manufacturers in the United States to sustain and grow jobs.
- The use of digital platforms, including sharing data across borders, is increasingly important to the global competitiveness of manufacturers, particularly small manufacturers. The use of such technologies enables manufacturers to lower costs, improve efficiencies and grow exports.
- More than a dozen countries – both developing and developed – have introduced or are actively contemplating new restrictions on the movement of data and information and communications localization rules, from Brazil, China, India and Korea to Indonesia, Nigeria, Vietnam, and Russia. Imposition of such restrictions undermines the global competitiveness of manufacturers in the United States and their ability to sustain and grow manufacturing through reaching new customers outside our borders.
- While recognition of this challenge is growing, the trading system has not fully kept pace. The NAM is seeking a modern Trade Promotion Authority framework that addresses cross-border data flows as a principal negotiating objective and binding commitments in the Trans-Pacific Partnership and Transatlantic Trade and Investment Partnership agreements and through other negotiations.

Testimony

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I appreciate the opportunity to testify on behalf of the National Association of Manufacturers – the NAM – which is the nation’s largest industrial association with more than 12,000 manufacturing members – small, medium and large. Across the country, manufacturing directly employs more than 12 million women and men and supports over 17 million jobs overall.

Manufacturers contributed \$2.08 trillion to the U.S. economy in 2013, the highest level ever. Indeed, manufacturing output has rebounded, after falling from its peak in 2007 of \$1.85 trillion to \$1.72 trillion in 2009. Since then, manufacturing output has rebounded 18 percent, more than offsetting the decrease during the recession. If U.S. manufacturing were a separate country, it would be the eighth largest economy in the world. Improved energy supplies have played an important role in this growth, as has the substantial investment in new and innovative technologies that manufacturers make. Indeed, manufacturers account for more than two-thirds of private-sector research and development, recognizing that innovation and the development of new technology to manufacture and reach new customers is critical to America’s competitiveness in the global economy. Small businesses make up the vast majority of manufacturing firms. Of the 254,941 industrial firms in the United

States in 2011, 79 percent are small businesses with fewer than 500 employees. Nearly 42 percent of these firms have four or fewer employees.¹

A robust and multi-faceted trade policy is a key component of growing manufacturing throughout the United States. With 95 percent of the world's consumers outside the U.S. market, exports and sales overseas represent an enormous opportunity for manufacturers in the United States to sustain and grow jobs. With world trade in manufactured goods expanding from \$4.8 trillion in 2000 to \$11.5 trillion in 2012, manufacturers in the United States have been using exports increasingly to fuel growth. In 2013, U.S.-manufactured goods grew to a record high of \$1.38 trillion.

More than 97 percent of U.S. companies that export are small and medium-sized businesses with fewer than 500 employees.² U.S. employment in trade-related jobs grew six and a half times faster than total employment between 2004 and 2011.³ Jobs linked to exports pay, on average, is 18 percent more than other jobs.⁴

¹ The Manufacturing Institute, "Small Businesses Dominate the Industrial Landscape" (April 2014), accessed at <http://www.themanufacturinginstitute.org/Research/Facts-About-Manufacturing/Economy-and-Jobs/Company-Size/Company-Size.aspx>.

² U.S. Department of Commerce, **U.S. Exporters in 2011: A Statistical Overview**, accessed at http://www.trade.gov/mas/ian/smeoutlook/tg_ian_001925.asp.

³ Baughman and Francois, **Trade and American Jobs, The Impact of Trade on U.S. and State Level Employment: An Update** (2010), accessed at http://businessroundtable.org/uploads/studies-reports/downloads/Trade_and_American_Jobs.pdf; Business Roundtable, **How the U.S. Economy Benefits from International Trade and Investment**, accessed at http://businessroundtable.org/sites/default/files/legacy/uploads/general/BRT_State_Studies_-_US_Total.pdf.

⁴ Riker, **Do Jobs in Exports Still Pay More? And Why?**, U.S. Department of Commerce Manufacturing and Services Brief (July 2010), accessed at http://trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003208.pdf; see also

Whether manufacturers sell to customers down the street, across the country or around the world, manufacturers big and small compete in a highly competitive global economy. Many manufacturers in the United States participate in global supply chains that connect large and small companies and consumers across the world.

To grow America's manufacturing, the NAM is advocating a trade policy that:

- Opens markets overseas;
- Ensures our manufacturers are cost-competitive globally; and,
- Makes sure all our trading partners – and the United States – play by the rules of the global trading system.

Where there's a level playing field in overseas markets, manufacturers in the United States are succeeding. America's existing network of 20 free trade agreement partners account for less than ten percent of the global economy but purchase nearly half of all U.S. manufacturing exports – supporting millions of jobs across the country. In fact, the United States enjoys a nearly \$60 billion manufacturing trade surplus with its trade agreement partners, compared with a \$508 billion trade deficit with the rest of the world.⁵

To grow more opportunities for our nation's manufacturers, we need more trade agreements with more countries. And those trade agreements must be tailored to meet the challenges of a 21st century economy. The NAM is therefore a strong supporter of comprehensive, market-opening and high standard

⁵ See, NAM Trade Toolkit: U.S. Manufacturing and Trade Data, accessed at www.nam.org/issues/Toolkits/Trade-Toolkit/Learn-More/Data.aspx.

outcomes in the major ongoing U.S. trade negotiations in the Asia Pacific and Europe – the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (T-TIP).

While manufactured goods exports have more than doubled since Congress last approved trade negotiating authority in 2002, manufacturers face real and growing barriers overseas, most prominently in countries with which we have not negotiated free trade agreements.

One of the biggest new commercial challenges globally is the issue before the Subcommittee today – the growth of new barriers to the movement of data and information across national borders and foreign government localization barriers that seek to require the use of local information technology infrastructure. These restrictions undermine the global competitiveness of manufacturers in the United States and their ability to sustain and grow manufacturing through reaching new customers outside our borders.

The Importance of Cross-Border Data Flows and ICT Infrastructure Issues to Manufacturers in the United States

The use of digital platforms, including sharing data and information across borders, is increasingly important to industries across many different economic sectors, particularly a broad range of manufacturing industries.⁶ While some manufacturers produce and manage the information and communications technology (ICT) infrastructure, most manufacturers, like other businesses, are major consumers of these new technologies and equipment, which have been an

⁶ Matthieu Pélissié du Rausas, James Manyika, Eric Hazan, Jacques Bughin, Michael Chui, Rémi Said, Internet matters: The Net's sweeping impact on growth, jobs, and prosperity, McKinsey Global Institute, May 2011.

important driver of productivity, competitiveness and new economic opportunity across the globe. New ICT products and services, such as cloud and “machine to machine” technologies, are advancing manufacturers’ ability to grow and reach new markets more efficiently. The importance of ICT products and services is particularly vital to many small and medium-sized businesses. ICT technologies enable small business to acquire information, market their products and communicate and serve foreign customers much faster and in a more cost-effective manner than ever before. As a result, small businesses are better able to expand sales overseas, creating new demand that is served by growing manufacturing and jobs domestically.⁷

Let me provide a few examples of why the issues of digital trade and data flows are so important to a broad range of manufacturers:

- Manufacturers throughout America increasingly use digital platforms that depend on the unencumbered flow of data across borders to reach new customers, run manufacturing and internal operations, and manage global supply chains.
- Manufacturers are among the many businesses benefitting from the “software as a service” (SAAS) revolution. SAAS allows firms large and

⁷ As documented in **Ahead of the Curve: Lessons on Technology and Growth From Small Business Leaders**,⁷ by the Boston Consulting Group, information and communications technology has a powerful impact on the growth and success of small and medium sized enterprises (SMEs) from the United States and Germany to China, India and Brazil. The report found that SMEs that were technology leaders created twice as many jobs and increased revenue 15 percent in the past three years than those SMEs that lagged behind in the adoption of new technologies. This report shows that SMEs across these five economies could create \$770 billion in new revenue and add about 6.2 million new jobs with the increased adoption of new technologies. **Ahead of the Curve**, Boston Consulting Group (Oct. 5, 2013), accessed at https://www.bcgperspectives.com/content/articles/technology_software_globalization_ahead_curve_lessons_technology_growth_small_business_leaders/.

small to improve operational efficiency and cut infrastructure costs by shifting computation, software, data access and storage resources securely to cloud-based service providers. Common cloud-based services used by manufacturers range from email and file storage to sophisticated sales, e-commerce and human resources applications.

- Manufacturers are also turning to advanced analytics to extract insights from the vast quantities of data generated by our global fleet of manufactured equipment– including jet engines, gas turbines, locomotives and other industrial technologies. These insights – made possible through cloud computing and cross-border data flows – will serve as a further catalyst for growth and innovation as they improve productivity, efficiency and reliability.
- Manufacturers are also at the forefront of building “machine to machine” technologies (M2M or the [Internet of Things](#)) to transfer data remotely between machines that can do everything from locating lost devices and machines through GPS-driven navigation and tracking to providing key information regarding product usage, yield, performance and maintenance.

The use of such technologies has enabled manufacturers to compete more successfully in a tough global economy by lowering costs, improving efficiencies and growing exports. To be able to grow America’s share of the \$11 trillion global market in traded manufactured goods, manufacturers must be confident in their

ability to use digital platforms and to move data and information securely across borders and to be able to store data as their business requires.

Challenges to the Free-Flow of Data and the Use of ICT Technologies

As ICT technologies have advanced, however, many countries are moving to restrict the movement of data and where data can be stored – for reasons that have a lot to do with good old-fashioned protectionism. Around the world, more than a dozen countries – both developing and developed – have introduced or are actively contemplating introducing data localization laws. Over the past several years, manufacturers have seen new barriers proposed or considered in many markets, from Brazil, China, India and Korea to Indonesia, Nigeria, Vietnam and Russia. In some cases, governments are claiming national security concerns, although the measures they are proposing and implementing go far beyond the concerns expressed.

For example, Brazil had proposed a “Civil Internet Framework” that, among other things, would have authorized Brazil’s Executive Branch to require data relating to the Brazilian operations of both domestic and international companies, as well as Brazilian citizens, to be stored in Brazil. While this forced data localization language has since been stripped from the Framework, there continue to be reports that such legislation may be reintroduced.

Similarly with South Korea, the U.S. government and U.S. industry have raised concerns with legislation proposed by South Korea’s Ministry of Science, Information and Communications Technology and Future Planning (MSIP) to the National Assembly that would provide a jurisdictional basis for the regulation of

cloud computing and could potentially impose additional regulations on global technology. While MSIP modified its original proposal to address many of the issues raised by the United States, concerns remain and manufacturers continue closely monitoring the progress of this proposal in the National Assembly. Notably, the Korea-U.S. Free Trade Agreement (KORUS FTA) contains language recognizing that the Parties should not impose unnecessary barriers to data flows.⁸

In 2012, Indonesia issued Regulation 82, “Operation of Electronic Systems and Transactions,” to the 2008 Law 11 on Electronic Information and Transactions. The regulation requires extensive certification requirements and restrictions on electronic systems providers that provide services for the “public use,” which has not been fully defined. Such restrictions include maintaining Indonesian data centers and requiring any data relating to electronic transactions be stored in Indonesia.

In February 2014, the Indian National Security Council proposed significant new restrictions on cross-border data flows, including requiring that all communications between users in India stay in India and be stored locally on Indian servers.⁹

Industry has also raised serious concerns over a draft decree issued by Vietnam’s Ministry of Information and Communication that would impose

⁸ “Recognizing the importance of the free flow of information in facilitating trade, and acknowledging the importance of protecting personal information, the Parties shall endeavor to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders.” KORUS FTA, Art. 15.8.

⁹ Thomas K. Thomas, “National Security Council proposes 3-pronged plan to protect Internet users,” *The Hindu*, Feb. 13, 2014, accessed at www.thehindubusinessline.com/features/smartbuy/national-security-council-proposes-3pronged-plan-to-protect-internet-users/article5685794.ece.

registration and licensing requirements on providers of information technology services. The decree would also restrict cross-border cloud computing and data services.

These and similar types of barriers undermine U.S. commercial opportunities overseas, impede the ability of manufacturers to conduct business and weaken our competitiveness. For companies that maintain their own servers, the imposition of cross-border data restraints or server localization requirements impedes their ability to implement their own business strategies, raises costs and would potentially force companies to make the choice between doing business in a particular country and housing their data on local servers or choose not to do business because they do not want the risk of data being held locally.

In addition, restrictions on cross-border data flows, including local storage requirements, undermine cloud computing by reducing economies of scale, forcing service providers to locate servers based on government mandate, rather than business decisions. Local storage requirements may require the deployment of duplicative technology resources in countries where providers would not otherwise plan to deploy those resources. As well, cross-border data flow restrictions and server localization requirements undermine the ability of cloud-based providers to achieve critical economies of scale and maximize server capacity. Typically, cloud providers offer services to many companies at the same time and may store data securely across borders in order to take advantage of economies of scale. The economic and secure benefit of innovative cross-border services that are in high demand, such as cloud technologies, is

diluted when countries impose policies which fragment these services into nation-based solutions lacking the economic benefits of scale, high resource utilization rates and demand aggregation, and the legal certainty and consistency necessary to provide a truly global service that benefits all types of customers. The loss of a cost-effective and easily manageable cloud technology solution would be particularly harmful to small businesses that are increasingly relying on cloud solutions to market and sell overseas.

Modernizing ICT Trade Rules

Given the growing importance of this issue to manufacturers in the United States, in March 2014, the NAM Board of Directors unanimously approved new policy language seeking that new trade agreements include “commitments to liberalize cross-border data flows of information and access to digital products and services, and prohibit related localization requirements, such as requirements to use local data information infrastructure and storage.”

Efforts to address these issues have also been undertaken globally. In 2008, the Asia Pacific Economic Cooperation (APEC) forum issued a “Digital Prosperity Checklist” that recognized the importance of the “free flow of information.”¹⁰ APEC followed that initiative with both the APEC Innovation Principles in 2011 and the APEC Privacy Framework in 2012 that explicitly emphasized the importance of these issues.¹¹

¹⁰ Digital Prosperity Checklist, APEC (Nov. 2008), accessed at http://mddb.apec.org/documents/2010/TEL/TEL41-DSG-WKSP1/10_tel41_dsg_wksp1_003.pdf.

¹¹ See APEC, Promoting Effective, Non-Discriminatory, and Market-Driven Innovation Policy (Nov. 2011), accessed at http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm/2011_aelm_annexA.aspx; APEC Privacy Framework Pathfinder,

The Organisation for Economic Cooperation and Development (OECD) developed “Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data” in July 2013 that established a framework that supports cross-border data flows.¹²

As well, in April 2011,¹³ the United States and European Union (EU) agreed to a set of trade principles on ICT services that highlight the importance of ensuring the free flow of data across borders and avoiding localization requirements.¹⁴ As noted previously, the KORUS FTA included general provisions on this issue, as well as more specific language relating to financial services.

While recognition of this issue has been growing, the trading system has not fully kept pace. As the NAM and nine other associations explained in a letter to United States Trade Representative Ambassador Froman, “current trade rules are insufficient to ensure that borders remain open to data flows and services

accessed at http://mddb.apec.org/documents/2010/TEL/TEL41-DSG-WKSP1/10_tel41_dsg_wksp1_003.pdf

¹² OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (July 11, 2013, accessed at <http://www.oecd.org/sti/ieconomy/privacy.htm>).

¹³ United States-European Union Trade Principles for Information and Communication Technology Services (April 4, 2011) (U.S.-EU ICT Trade Principles), accessed at <http://www.ustr.gov/about-us/press-office/press-releases/2011/april/united-states-european-union-trade-principles-inform>;

¹⁴ In particular, the U.S.-EU ICT Trade Principles state:

3. Cross-Border Information Flows: Governments should not prevent service suppliers of other countries, or customers of those suppliers, from electronically transferring information internally or across borders, accessing publicly available information, or accessing their own information stored in other countries.
4. Local Infrastructure: Governments should not require ICT service suppliers to use local infrastructure, or establish a local presence, as a condition of supplying services. In addition, governments should not give priority or preferential treatment to national suppliers of ICT services in the use of local infrastructure, national spectrum, or orbital resources.

U.S.-EU ICT Trade Principles (April 4, 2011).

receive non-discriminatory treatment in key markets.”¹⁵ The NAM, along with others in the business community, is working to help countries build a new architecture to address these issues.

In particular, the NAM urged the inclusion of this issue as part of a new and modernized authorization of Trade Promotion Authority¹⁶ and welcomed the Bipartisan Congressional Trade Priorities Act of 2014, which urges negotiators “to ensure that governments refrain from implementing trade related measures that impede digital trade in goods and services, restrict cross-border data flows, or require local storage or processing of data.”¹⁷

The NAM is also pressing for binding provisions in future trade agreements, including both the final TPP and T-TIP agreements that are currently in negotiation. In particular, the NAM is seeking binding commitments in these negotiations that will allow manufacturers and other industries to transfer, access, process or store information across borders; prohibit the imposition of restrictions that would require the establishment or use of local servers generally or as a condition of access to the market; and ensure non-discriminatory treatment of digital products and services.

We agree that there can be areas where exceptions to such binding commitments should be permitted, such as with respect to legitimate national security, intellectual property, privacy and law enforcement. Such exceptions should not, however, be used to create unwarranted or protectionist-based

¹⁵ Letter to Ambassador Michael Froman (Sept. 26, 2013).

¹⁶ NAM Trade Promotion Priorities (2013), accessed at <http://www.nam.org/Issues/Trade/Trade-Promotion-Authority.aspx>.

¹⁷ H.R. 3830, the Bipartisan Congressional Trade Priorities Act of 2014, accessed at <http://waysandmeans.house.gov/tpa/>.

barriers to cross-border data flows or the use of ICT infrastructure. Thus, any exceptions should not be unnecessarily restrictive or constitute a disguised restriction on trade; and, should be consistent with and no broader than the general exceptions (Article XIV) of the General Agreement on Trade in Services.

Both the TPP and T-TIP agreements represent an important opportunity to modernize the international rules on ICT issues in ways that can advance manufacturers' global competitiveness and ensure that markets are open. Even more broadly, the outcomes in these agreements, if successful, can be a model for a new global architecture. Adoption of such disciplines can help countries increase their attractiveness to foreign investment that relies increasingly on access to ICT technologies, services and networks.

Conclusion

All manufacturers with cross-border investment and sales need to see policies put into place that ensure that their data can move across borders, that electronic commerce is accepted and that prohibit requirements to localize technology (such as servers) in any one country. It is important that the U.S. government lead efforts globally, including as part of the TPP and T-TIP, to modernize the trade rules that relate to ICT technology and services to ensure the ability of manufacturers in the United States to grow through greater access to trade and consumers overseas.

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