January 15, 2018

Mr. David Weiner
Deputy Assistant U.S. Trade Representative for Europe
Office of the United States Trade Representative
Ref: Request for Comments of Negotiating Objectives for a
U.S.-European Union (EU) Trade Agreement
Docket Number USTR 2018-0035

Re: Negotiating Objectives for a Trade Agreement with the United Kingdom (UK)

Dear Mr. Weiner:

The Software & Information Industry Association (SIIA) appreciates the opportunity to comment on negotiating objectives for a trade agreement with the UK. It is in the interests of the industries that SIIA represents, and the country as a whole, for an agreement to be concluded with the UK. Should an accord be reached with the UK, it would also strengthen the ability of the United States and the UK to shape Chinese trade and investment policies. Should the United States succeed in creating new agreements with the EU and Japan as well, that would additionally strengthen the U.S. position vis-a-vis China.

About SIIA

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital information industries. The more than 800 software companies, data and analytics firms, information service companies, and digital publishers that make up our membership serve nearly every segment of society including business, education, government, healthcare and consumers. As leaders in the global market for software and information products and services, they are drivers of innovation and economic strength – software alone contributes $425 billion to the U.S. economy and directly employs 2.5 million workers and supports millions of other jobs. For more information, please visit the SIIA Policy Home Page at www.siia.net.

SIIA Joins Multi Trade Association Letter Urging Administration to Make Digital Trade a Priority in Negotiations with the EU, Japan, and the UK

On November 6, 2018, SIIA, together with 29 other trade associations, sent a letter to Ambassador Robert E. Lighthizer urging the Administration to make digital trade a priority in its negotiations with the EU, Japan, and the UK. 1 SIIA reiterates that request. It is crucial to ensure the non-discriminatory treatment of digital products, including new and innovative products, and to promote global digital trade by both the United States and the EU reiterating support for the World Trade Organization Customs Duty Moratorium on Electronic Transmissions. And although forced technology transfer is not a problem in the

1 SIIA Website, Multi Association Letter to USTR in Japan, UK and UK FTAs, released November 9, 2018 http://www.siia.net/Portals/0/pdf/Policy/Multi-Assoc%20Letter%20to%20USTR%20on%20Digital%20Trade%20in%20Japan%20EU%20UK%20FTAs.pdf?ver=2018-11-09-103114-697
U.S.-UK trade and investment context, it would have helpful precedential value to include a provision in a U.S.-UK trade agreement banning forced technology transfer. The U.S. and the UK could also lead by committing to promote paperless trading, including the use of customs forms in electronic format. In this context, SIIA endorses again the digital and intellectual property rights negotiating objectives in the 2015 Trade Promotion Authority (TPA) Act (Public Law 114–26—June 29, 2015). SIIA also generally endorses the digital trade and intellectual property rights chapters in the United States Mexico Canada Agreement (USMCA), including the financial services chapter, which includes important financial data cross-border data flows commitments. In this context, it is especially important to ensure that it is possible to use diverse electronic signature and authentication methods to allow transactions through secure online payment systems. SIIA testified positively before the United States International Trade Commission on November 15, 2018 on the digital trade and intellectual property provisions found in the USMCA.  

USMCA and Digital Trade with the UK

SIIA considers that the U.S. government can draw from USMCA digital trade provisions to negotiate with the UK. Such commitments will be important in ensuring continued UK market access for innovative American firms and in establishing a model elsewhere in the world. It is true that the EU may pressure the UK to adopt its position that cross-border data flow commitments threaten local privacy laws, but the U.S. should nonetheless strive to come to an agreement that provides for a positive cross-border data flow commitment with a narrow public policy exception that allows enforcement of local privacy laws, as was done in USMCA. In this context, it should be made explicitly clear in the agreement that publicly available data (including personal data) used, for instance in combatting terrorism and/or crime, should be available to companies providing services such as anti-money laundering or know-your-customer functions. Given that both countries have such competitive cultural industries, it should be relatively easy to avoid a cultural carveout. In fact, it might be worthwhile exploring how an explicit provision banning a cultural carveout (not just the avoidance of a carveout) could have precedential value. There should be an effort to establish closer U.S.-UK cooperation on both digital and intellectual property rights issues vis-a-vis third countries. See below for some issues that should be reflected in an agreement with the UK.

Affirmative Data Flow Obligation: This is a key ask as so much is derived from this obligation, like for instance the interoperability idea. Cross-border data flows means two things in this context. First, the ability to transfer data (personal or non-personal) across borders. Second, the ability to store and/or process data locally or internationally. Modern digital trade chapters normally describe this provision as an obligation not to mandate the use of local computing facilities. Both of these obligations are needed in trade agreements because a country could permit cross-border data flows but still mandate local data storage and/or processing, thereby effectively reducing the value of permitting cross-border data flows. For example, some countries require that copies of data stay within their nations even though the data is also moved abroad for processing and storage there.

The affirmative obligation is needed to facilitate e-commerce and cross-border data flows, remove unjustified barriers to trade by electronic means, and ensure an open, secure and trustworthy online environment. The UK may come under pressure from the EU to avoid cross-border commitments entirely or to include the broad exceptions language developed by the EU, which reads: “Nothing in this agreement

---

2 SIIA Website, SIIA Testimony to USITC re: USMCA, released November 1, 2018  
https://www.siia.net/Portals/0/pdf/Policy/SIIA%20Testimony%20to%20USITC%20re%20USMCA.pdf?ver=2018-11-01-100710-170
shall affect the protection of personal data and privacy afforded by the Parties’ respective safeguards.” Although the UK’s room for maneuver may be limited by trade arrangements it makes with the EU, it is essential for the U.S. government to find a way to limit this exceptions language so that enforcement of privacy rules cannot be used to distort trade or discriminate against foreign competitors.

**Interoperability:** There should be a commitment on both sides to ensuring that there are mechanisms available to the private sector to transfer personally identifiable information. The USMCA’s Article 19.8:6 provides for a useful template in this regard. There should also be a mutual commitment to make the APEC CBPR system more widely adopted as the USMCA’s Article 19.8:6 does. The agreement should establish procedures that companies can use to demonstrate that they are in compliance with UK rules and regulations on conditions for onward data transfers, and that these procedures should not be a disguised means of discrimination.

**Financial data:** Financial data should be included in an agreement with the UK. Given the relative size and importance of both countries’ financial sectors, this should be a major priority. The USMCA’s Chapter 17 on financial services provides a useful template in this regard. Regulatory cooperation in financial services should be addressed in any future agreement and discussions on market access and on regulatory cooperation should be closely linked.

**Proprietary Software, Encryption Keys, and Data:** There are many different business models in the digital trade space. For example, software code development through open source or through copyright/patent protection are equally legitimate from an SIIA perspective. The parties should not establish requirements that force suppliers to share source code, encryption keys, and/or proprietary algorithms. Businesses should be free to choose the business model that works for them. That goes as well for companies that invest in curating data, including scientific data. Such companies have an interest in protecting proprietary data and should be able to do so. The agreement should neither diminish protections for proprietary data or content, nor the incentive to engage in private sector publishing reporting on that research. Recent open access proposals (“Plan S”) by several EU member state research agencies could risk undermining these incentives and erect significant barriers and unnecessary obstacles for digital publishers and information providers. The United States and the United Kingdom should articulate in the agreement that that access to government data or publicly funded research should continue to incentivize private sector dissemination of proprietary data and/or publishing of research results.

**Intellectual Property Rights (IPR):**

There should be a robust IPR chapter meaning it should contain high standards that can be emulated in other trade agreements around the world. The two countries should find ways to enhance cooperation on enforcing IPRs and develop a common standard of the measures available to stakeholders with respect to infringing activities over the Internet.

**Digital Taxation:**

The British government proposed in October 2018 a Digital Services Tax (DST). The proposed tax is complex. It is supposed to go into effect in April 2020 and raise Pounds 1.5 billion in four years. The tax would apply to revenues of companies that are linked to the participation of users in the UK. Moreover, if there is an international agreement on digital taxation, the tax could be eliminated in 2025. Although this form of taxation will not be the subject of a U.S.-UK trade agreement, SIIA considers it important that
this issue be addressed satisfactorily as soon as possible, preferably through an international agreement, although a bilateral solution could be acceptable as well.

**Customs Duties on Digital Products**

It should be possible to reach an agreement with the EU on a prohibition of customs duties on digital products. There should, in fact, be a recognition of the need to prohibit customs duties for digital products. This will ensure that customs duties do not impede the flow of information, data, research works, music, video, software, and games for the benefit of authors, creators, artists and entrepreneurs.

On behalf of SIIA, I would like to thank you for the opportunity to comment. Please do not hesitate to contact us if you believe we can be of further assistance.

Sincerely,

![Signature]

Carl Schonander  
Senior Director, International Public Policy  
Software & Information Industry Association (SIIA)  
1090 Vermont Avenue, NW  
Washington, D.C. 20005  
United States