

January 11, 2023

Ambassador Katherine Tai  
United States Trade Representative  
600 17th Street NW  
Washington, D.C. 20508

The Honorable Gina Raimondo  
Secretary of Commerce  
1401 Constitution Avenue NW  
Washington, D.C. 20230

Dear Ambassador Tai and Secretary Raimondo:

As you develop the U.S. opening offer and formulate a strategy to negotiate the digital trade chapter of the Indo-Pacific Economic Framework (IPEF), we urge you to ensure that the formal U.S. position for the rules that will govern the global digital economy advances fairness and competition rather than undermining it. The U.S. position should not follow the mistakes of a handful of past non-discrimination regimes that were included in the Trans-Pacific Partnership (TPP) and the United States-Mexico-Canada Agreement (USMCA).<sup>1</sup> In addition, the Administration should engage in maximum transparency at every step of the negotiation process.

The Coalition for App Fairness (CAF) represents app developers around the world, including many in the United States. These developers serve consumers on every continent, and benefit from competition in the markets they serve.

We commend the Biden Administration's commitment in the domestic arena to policies that promote competition to build a more resilient economy for the benefit of American businesses, consumers, and workers.<sup>2</sup> As President Biden stated in his July 2021 Executive Order, "Robust competition is critical to preserving America's role as the world's leading economy."<sup>3</sup>

To advance these key principles, we respectfully request that you do not repeat some of the past administrations' mistaken approaches to digital trade rules as reflected in the TPP and the

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<sup>1</sup> See Trans-Pacific Partnership Agreement, art. 14.4: Non-Discriminatory Treatment of Digital Products, Feb. 4, 2016; United States-Mexico-Canada Agreement, art.19.4: Non-Discriminatory Treatment of Digital Products, Dec. 10, 2019.

<sup>2</sup> See, e.g., Emily Birnbaum, *Biden Team to Push 'Ambitious' Antitrust Crackdown on Big Tech in Congress*, Bloomberg (Nov. 4, 2022), <https://www.bloomberg.com/news/articles/2022-11-04/biden-plans-ambitious-antitrust-crackdown-on-big-tech-post-midterms>.; Exec. Order No. 14036, Executive Order on Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 9, 2021), <https://www.federalregister.gov/d/2021-15069>.

<sup>3</sup> Exec. Order No. 14036.

USMCA. Those misguided efforts risk serving the interests of several Big Tech monopolists to the detriment of their U.S. competitors, in addition to the hundreds of thousands of U.S. businesses that are forced to rely on these platforms to reach their customers.<sup>4</sup>

***The U.S. Approach to Digital Trade Rules in IPEF Should Promote Fairness and Competition in the Digital Economy at Home and Abroad***

At a time when the U.S. is developing digital governance policy domestically, including bipartisan legislation to rein in Big Tech’s monopoly power,<sup>5</sup> it is critical that the opening offer for IPEF’s digital trade chapter does not contradict or undermine these efforts.

If the Administration were to follow the TPP or USMCA approach on digital trade rules at this stage in the domestic policy-making process, it would be contradictory to the White House’s anti-monopoly stance and its strong support for U.S. legislative efforts on Big Tech. The Coalition is particularly concerned that a repeat of the TPP/USMCA approach (or a similar one) could be exploited to undermine competition at home and abroad, impeding the success of many U.S. companies including our members.

Our concerns focus primarily on the USMCA’s and TPP’s language regarding non-discrimination rules. While we support the inclusion of non-discrimination rules requiring that countries treat “like goods” the same regardless of national origin, the USMCA and TPP broad language goes far beyond that requirement. For example, the USMCA and TPP language provides a basis for U.S. big tech monopolies to attack legitimate anti-monopoly policies in other countries as “illegal trade barriers”—including policies that are similar to the bipartisan legislation on Big Tech that the Administration expressed strong support for during the 117th Congress.<sup>6</sup>

Notably, several countries in the Indo-Pacific region have already acted or are considering taking action to bar online gatekeepers, including Apple and Google, from continuing to abuse their monopoly power over their respective mobile app ecosystems.<sup>7</sup> These measures largely take aim

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<sup>4</sup> See, e.g., ACT/The App Association, *State of the U.S. App Economy 4* (7th ed. 2020), <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>. (“317,673 companies are active in the mobile app market in the United States.”).

<sup>5</sup> See, e.g., Open App Markets Act, S. 2710, 117th Congress (2021); American Innovation and Choice Online Act, S. 2992, 117th Congress (2021).

<sup>6</sup> See, e.g., Eric Cortellessa, *The White House Is Pushing Congress to Rein in Big Tech Before the GOP Takes Over the House*, Time (Nov. 18, 2022), <https://time.com/6235180/tech-antitrust-bills-white-house-congress/>.

<sup>7</sup> See, e.g., Australian Competition & Consumer Commission, *Digital Platform Services Inquiry: Interim Report No. 5 – Regulatory Reform 16-17* (Sept. 2021), <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>; Secretariat of the Headquarters for Digital Market Competition, Cabinet Secretariat, *Competition Assessment of the Mobile Ecosystem: Interim Report Summary* (Apr. 2022), [https://www.kantei.go.jp/jp/singi/digitalmarket/pdf\\_e/documents\\_22220601.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_22220601.pdf); Hamza Shaban and Cristiano Lima, *U.S. Legislators Hail South Korea’s Move to Curb Apple and*

at the same anticompetitive conduct as the Open App Markets Act (OAMA), which was explicitly endorsed by Department of Justice Assistant Attorney General Jonathan Kanter at a recent Senate hearing<sup>8</sup> and enjoyed widespread bipartisan support throughout the 117th Congress.<sup>9</sup>

It is imperative that the U.S. proposal for IPEF focus on addressing truly discriminatory policies. To do so, nondiscrimination rules must distinguish between facially neutral policies, which may have a greater impact on larger firms, versus intentionally discriminatory policies that target firms by nationality.

***The U.S. Approach to Digital Trade Rules in IPEF Should Not Block Congress or the Administration from Advancing U.S. Policies to Restore Competition to Digital Markets***

As a bipartisan group of Senators recently pointed out, international trade agreements such as IPEF that bind the United States on matters of international trade also limit Congress's domestic law-making ability.<sup>10</sup> Accordingly, the Coalition is concerned that the dominant tech platforms, such as Google and Apple, will try to use IPEF as a backdoor mechanism to tie the Administration's and Congress's hands as they grapple with critical big tech regulatory and legislative reform.

Unfortunately, our concerns about Big Tech attempting to weaponize U.S. trade policy to protect their monopoly power is not hypothetical. For example, Apple and Google tried to commandeer U.S. trade policy in 2021 to block South Korea's passage of a bill that would prevent the companies from leveraging their mobile app store dominance to shut out competing payment options.<sup>11</sup> According to one report, "After South Korean lawmakers proposed the app store bill

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*Google's App-Store Dominance*, Washington Post (Aug. 31, 2021), <https://www.washingtonpost.com/business/2021/08/31/apple-google-app-store-south-korea/>.

<sup>8</sup> *Oversight of Federal Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Competition Policy, Antitrust and Consumer Rights of the S. Comm. On the Judiciary*, 117th Cong. (Sept. 20, 2022) (statement of Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Justice, Antitrust Div.), <https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Kanter%20-%202022-09-20.pdf> ("The [Open App Markets] Act identifies and prohibits some of the most egregious anticompetitive practices which are currently prevalent in the mobile app ecosystem.").

<sup>9</sup> OAMA was approved by the Senate Judiciary Committee with a bipartisan vote of 20-2 in February 2021. Ryan Tracy, *App-Store Bill Targeting Apple, Google Is Approved by Senate Panel*, The Wall Street Journal (Feb. 3, 2022), <https://www.wsj.com/articles/app-store-bill-targeting-apple-google-is-approved-by-senate-panel-11643910888>.

<sup>10</sup> Letter from S. Comm. on Finance to President Joseph R. Biden, Jr. (Dec. 1, 2022), <https://www.finance.senate.gov/imo/media/doc/Letter%20to%20POTUS%20on%20IPEF%20Authority%20FINAL%2012.1.22.pdf?source=email> (signed by Senators Ron Wyden, Michael Crapo, Debbie Stabenow, Charles Grassley, Maria Cantwell, John Cornyn, Robert Menendez, John Thune, Thomas Carper, Richard Burr, Benjamin Cardin, Rob Portman, Sherrod Brown, Pat Toomey, Catherine Cortez Masto, Tim Scott, Bill Cassidy, Steve Daines, Todd Young, Ben Sasse, John Barrasso).

<sup>11</sup> See Chris Morris, *South Korea Moves to Ban Apple and Google's Payment Exclusivity*, Fortune (Aug. 24, 2021), <https://fortune.com/2021/08/24/south-korea-apple-google-app-store-exclusivity/>; see also

last year, the Information Technology Industry Council, a Washington-based group that counts Apple and Google as members, urged the [USTR] to include concerns about the legislation in an annual report highlighting ‘barriers’ to foreign trade.”<sup>12</sup> The group had previously been successful in getting the USTR to condemn the measure.<sup>13</sup>

In this instance, Google and Apple ultimately failed in their efforts. On August 31, 2021, South Korea enacted the world’s first national law to explicitly address anticompetitive practices of app stores.<sup>14</sup> Nevertheless, we urge you to guard against including any provisions in IPEF that could strengthen the hand of Big Tech in their efforts to block competition-enhancing laws at home and abroad.

### ***Conclusion***

The IPEF negotiations present the Biden Administration with an opportunity to submit an opening offer that serves the national interest, rather than solely the interests of the Big Tech gatekeepers.

Because transparency is critical to the integrity and outcome of this process, we ask that you publicly post (i) the text of the U.S. opening offers prior to their submission; and (ii) the composite negotiating texts after each round of negotiations. Doing so will provide an opportunity for affected stakeholders, including the Coalition’s members, to provide informed and timely input as these consequential rules are being developed.

We thank you for your attention to this important matter and look forward to continuing to engage with the Administration as you work through the final language for the U.S. opening offer and future rounds of negotiation.

Sincerely,



Rick VanMeter  
Executive Director

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David McCabe and Jin Yu Young, *Apple and Google’s Fight in Seoul Tests Biden in Washington*, N.Y. Times (Aug. 23, 2021), <https://www.nytimes.com/2021/08/23/technology/apple-google-south-korea-app-store.html>.

<sup>12</sup> McCabe and Young, *supra* note 11.

<sup>13</sup> Office of the United States Trade Representative, 2021 National Trade Estimate Report on Foreign Trade Barriers (2021), <https://ustr.gov/sites/default/files/files/reports/2021/2021NTE.pdf>; *see also* McCabe and Young, *supra* note 11.

<sup>14</sup> Shaban and Lima, *supra* note 7.