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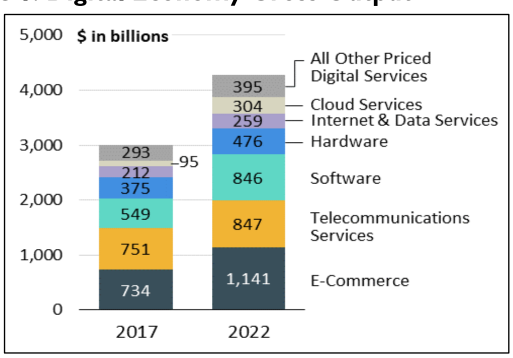
Digital Trade and Data Policy: Key Issues Facing Congress

Digital trade includes trade in all goods and services for which orders are placed digitally. E-commerce generally refers to digitally ordered goods. Services that are digitally ordered may also be delivered digitally (e.g., online banking) or provided through a subscription (e.g., streaming or cloud services). Cross-border data flows are essential to the technologies used to digitally order and deliver goods and services, and to many facets of the digital economy, including digital platforms. Because of this, much debate on digital trade is focused on data policy and technology. Issues facing Congress include approaches to data privacy, data localization, regulation of the technology sector, and the impact of foreign digital regulations on the U.S. economy. Congress could also consider legislation to encourage or require the executive branch to pursue certain objectives or respond to foreign regulation that impacts U.S. technology companies.

Measuring the Digital Economy

Output in the U.S. digital economy, consisting mainly of e-commerce, digital services (e.g., telecommunication, internet, and cloud services), and infrastructure (software and hardware), was $4.3 trillion (9% of the value of all goods and services produced in the United States) in 2022 (most recent data available), an increase of 42% since 2017 (**Figure 1**). As of 2022, e-commerce was the largest activity by output, while cloud services was the fastest growing.

Figure 1. Digital Economy Gross Output



Source: CRS calculations using U.S. Bureau of Economic Analysis (BEA) data.

Note: Excludes federal nondefense digital services due to their small size ($402 million in 2017 and $457 million in 2022).

The total value of digital trade flows is difficult to estimate in part because official international trade statistics do not explicitly measure digital trade. Some measures of trade in digital services exist and provide insight into the growth of digital trade over time. The U.S. Bureau of Economic Analysis (BEA) tracks trade in services that could be delivered digitally, including telecommunications, business, and information services. U.S. exports of such services were $656 billion in 2023 (64% of total U.S. services exports), an increase of 31% since 2018. This growth outpaced the 19% growth in total U.S. services exports during this time. Some international organizations are discussing how to improve the accuracy of statistics on digital trade, including enhanced tracking of international business-to-consumer (B2C) or business-to-business (B2B) e-commerce and cross-border data flows (see **text box**).

Cross-Border Data Flows vs. Digital Trade

Most cross-border data flows are transfers of information between servers unrelated to commercial transactions. Digital trade involves the cross-border transfer of a good or service for money in a commercial transaction. Some cross-border data flows are digital trade (e.g., the online purchase of a dataset from a foreign company) or related to a digital trade transaction (e.g., data flows associated with international e-commerce). As a result, the treatment of cross-border data flows may impact digital trade. Digital trade is increasingly interconnected with data policy and regulation of emerging technologies (e.g., artificial intelligence) and digital platforms, both of which rely on cross-border data flows.

U.S. Digital Trade and Data Policy

Until 2023, the United States generally promoted the free flow of data in its free trade agreements (FTAs), with limited exceptions. The Biden Administration has reconsidered these policies. In fall 2023, the U.S. Trade Representative (USTR) withdrew support for provisions on cross-border data flows, data localization, and the transfer of source code in the Joint Statement Initiative (JSI) on E-commerce. The JSI, a plurilateral negotiation among 91 members of the World Trade Organization (WTO) who collectively account for over 90% of global trade, aims to establish rules on e-commerce that build on existing WTO standards and frameworks. A joint statement was released in July 2024 without the support of the United States and eight other members, despite the removal of the provisions the United States withdrew its support for in 2023.

In 2023, the United States also suspended digital trade talks in the Indo-Pacific Economic Framework for Prosperity (IPEF). USTR Katherine Tai attributed these decisions to the need for policy space to address a lack of a domestic regulatory environment in the United States governing data flows and the technology sector. A coalition of technology companies that support more competition in the app marketplace praised the decision and urged the Administration to advance proposals that would regulate technology firms. Other industry groups across a range of sectors expressed concern with the potential for restrictions on data to harm American workers.

Some Members of Congress supported suspending support for the provisions, describing them as potential hindrances to data privacy, anti-monopoly, and other digital safeguards. Other Members criticized the decision, arguing that it was made without sufficient congressional consultation, ran against the interests of U.S. businesses and workers, and ceded U.S. leadership to other governments such as China. The House Committee on Oversight and Accountability began an investigation into the alleged lack of consult and the transparency of USTR's communications with civil society and other agencies. In an October 2024 report on the Federal Trade Commission (FTC), the Committee asserts the FTC and the Department of Justice (DOJ) Antitrust Division may have pressured USTR to abandon certain digital trade provisions.

Data Localization

Until 2023, the United States sought provisions within trade agreements to limit the use of data localization and raised concerns over the use of these measures in other countries. Data localization policies require that data generated within a country be stored and processed on servers within that country or in a cloud environment hosted and controlled by a firm physically located in the country. This restriction on the movement of data across borders may act as a trade barrier by requiring firms to comply with different regulations across countries and increasing the cost of storing data. Countries may implement data localization policies to address privacy and national security concerns, particularly related to the storage and transfer of sensitive data. TikTok's Project Texas is an example of a planned data localization effort to address data security concerns for U.S. user data. The project would store all data generated by U.S. users in Oracle's U.S. cloud environment with access controlled by a U.S.-based data security team.

Data Protection

Data protection efforts generally aim to secure personal data through enhanced security requirements or restricting the collection and flow of sensitive data. Restricting certain cross-border data flows may ease privacy and national security concerns but may be a barrier to trade if it interferes with firms' ability to engage in e-commerce. Most U.S. trade agreements include mutual commitments to protect personal information but do not provide standards for parties to follow.

The United States has not enacted comprehensive federal data protection legislation. In 2024, both Congress and the Biden Administration pursued more limited data protection measures to restrict cross-border data flows in instances when national security or the security of sensitive data on U.S. citizens is at risk. An October 2024 Notice of Proposed Rulemaking (NPRM) by the DOJ, which followed a February 2024 executive order issued by President Biden, aims to restrict data brokerage activities and prohibit certain bulk data transactions with foreign adversaries. The Protecting Americans from Foreign Adversary Controlled Applications Act (H.R. 7521) and the Protecting Americans' Data from Foreign Adversaries Act (H.R. 7520), both passed as part of a supplemental appropriation (P.L. 118-50), aim to protect U.S. citizens' data from access by foreign adversaries.

Foreign Digital Economy Regulation

A number of foreign jurisdictions are pursuing regulation of some aspects of the digital economy. The European Union (EU) has enacted several pieces of legislation (see **text box**). Some stakeholders have voiced concerns that some EU digital regulations discriminate against U.S. technology firms. South Korea and Brazil, among other countries, have proposed regulation of digital markets that target large digital platforms. In 2024, Canada enacted a digital services tax (DST). The stalled implementation of an Organization for Economic Co-operation and Development (OECD)/G20 global tax framework addressing profit shifting may result in the proliferation of foreign DSTs that impact U.S. firms.

EU Regulations on the Digital Economy

General Data Protection Regulation (GDPR). Aims to protect individuals when their personal data is collected.

Digital Markets Act (DMA). Aims to increase competition in the digital marketplace; designates some large platforms as 'gatekeepers' subject to additional regulations.

Digital Services Act (DSA). Sets rules on user safety, content moderation, and platform accountability and transparency; designates some large platforms as 'Very Large Online Platforms' (VLOPs) subject to additional regulations.

AI Act. Sets rules on transparency, placing systems on the market, monitoring, and supporting innovation; requirements based on four risk levels: unacceptable, high, limited, minimal.

Considerations for Congress

Since removing support for some digital trade provisions at the WTO in 2023, USTR has not proposed new digital trade objectives. Congress has been active in areas that may shape the future of U.S. digital trade policy, such as data protection. Congress may consider how regulation of digital markets and emerging technologies such as AI may shape future U.S. digital trade policy and relations with other countries on digital issues. Congress could consider, for example, whether and how the United States may regulate U.S. or foreign digital platforms operating in the United States. Congress could also consider issues related to taxation of digital services, such as whether to urge the executive branch to respond to foreign DSTs, which some Members argue disproportionately impact U.S. firms, or to implement the OECD/G20 global tax framework, which would require congressional approval.

Congress could also consider to what extent future policy may depart from or conflict with standards set in agreements such as the U.S.-Mexico-Canada Agreement (USMCA) and the U.S.-Japan Digital Trade Agreement. Congress also could consider to what degree Members should be consulted by USTR on digital trade issues and whether to modify consultation requirements in a renewal of Trade Promotion Authority, the most recent version of which expired in 2021 (P.L. 114-26).

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