

The Honorable Robert Lighthizer
United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Dear Ambassador Lighthizer,

The Canada-Arizona Business Council (CABC) provides the following recommendations regarding Federal Register Notice 2017-10603 *Negotiating Objectives Regarding Modernization of North American Free Trade Agreement with Canada and Mexico*.

I. INTRODUCTION

CABC is a 501(C)6 non-profit Arizona Corporation whose sole purpose is to increase bilateral trade and investment (FDI) between Canada and the State of Arizona and we do so by maintaining the highest connections across every major industry. The CABC represents the 350 Canadian companies operating in Arizona and the 150 Arizonan companies operating in Canada, as well as companies that are interested in bilateral relations.

The Council is sanctioned by both the State of Arizona and the Canadian Government, with a mission to assist and facilitate through various means and ways, the commercial and social interaction of individuals, companies, and organizations in pursuing cross border relationships to increase business, support trade growth and investments.

The Council is the voice of Arizona businesses in Canada, as well as the voice of Canadian businesses in Arizona.

II. General and Product-Specific Negotiating Objectives For Canada and Mexico In The Context of a NAFTA Modernization—Section 2(a) of the Federal Register Notice

CABC recommends that the general negotiating objectives for the *North American Free Trade Agreement* (NAFTA, or the Agreement) target five (5) areas:

1. EXAMPLE Establish that the U.S.-Canada trade relationship, followed by the North American trade relationship, is the global model for a mutually-beneficial, integrated, and expansion-driven economic partnership.

2. EMBED Render permanent post-NAFTA successes such as border and regulatory cooperation initiatives, and ensure proper legislative authorization and resourcing.
3. ENHANCE Include modernized provisions to the NAFTA in areas such as Rules of Origin (ROO), food safety, digital technology, e-commerce, and standards alignment.
4. EVOLUTIONIZE Develop and deploy new “trade-related” programs to streamline compliance issues for small-and-medium-sized enterprises (SMEs) (e.g., certifying supply and value chains as “Ameri-Can-Made”); provide support to those communities and constituencies negatively impacted by past continental trade initiatives; and provide 21st Century workforce mobility and employment-readiness programs.
5. EXEMPTIONALISM Demonstrate that such exceptional economic partners are deserving of exemptions and, or, exceptions from protectionist, national/regional procurement requirements, and enforcement measures.

“Do No Harm” Does Not Equate with “Do Nothing”

As a threshold matter, CABC is mindful that the foregoing five principles extend beyond the “Do No Harm” approach espoused by U.S. Secretary of Commerce Wilbur Ross and many of the largest trade and business associations. However, CABC’s experience in the continental heartland compels this cautionary note: “Do No Harm” sounds too much like “Do Nothing.” NAFTA was a dispositive electoral issue in the U.S. and the failure to take significant and observable actions to follow-through on these campaign promises will lead to political consequences. Specifically, should these voters not see bold action regarding the NAFTA, they will extract concessions from the anti-trade extremes on the political right and left. This only will add greater uncertainty for the respective business communities and trade negotiators in the lead-up to the 2018 U.S. mid-term elections and beyond.

Of similar significance and importance, the Canada-U.S. business community desires to utilize this once-in-a-generation moment to advance the leading framework governing its cross-continental operations. While the NAFTA provided economic growth immediately following its enactment in the mid-1990s, most economic analyses reveal that the NAFTA’s gains “topped-out” by the turn of the 21st century. Indeed, a May 24, 2017 Congressional Research Service (CRS) Report addressing the NAFTA supports the view that the Agreement largely has reached its potential and that new provisions will be needed to experience increased economic and employment growth. Should “Do No Harm” result in “Do Nothing”, the Canada-U.S. business community will be entrenched in an outdated and exhausted trading framework, while the rest of the global trading community advances toward prosperity.

“Do No Harm” As “Don’t Go Backward”

CABC therefore recommends a general negotiating objective that interprets “Do No Harm” as “Don’t Go Backward”. The Canada-U.S. business community has prospered under the evolution from post-WWII security and economic frameworks, the establishment of the Great Lakes-St. Lawrence Seaway (1959), the U.S.-Canada Auto Pact of 1965, the environmental agreements between Canada and the U.S. during the 1970s, the U.S.-Canada Free Trade Agreement of 1989, to the NAFTA. Along the way, U.S. companies entrenched their cross-border operations and developed competitive advantages versus their counterparts around the globe. These processes cannot be unwound without significant disruption and economic consequences.

Modernize With Canada-U.S. and North America

CABC accordingly applauds the current approach of the U.S. to move beyond issuing a formal notice to withdraw from the NAFTA pursuant to Article 2205 (akin to “tearing it up”) to an approach calling for the modernization of the Agreement. As indicated *supra*, the North American maturation unfortunately stalled with the anti-trade politics of the late-1990s and the post-9/11 security and regulatory environments. U.S.-Canada, as well as North American, companies began to witness an erosion of competitiveness as they were locked into a 20th Century trading framework that did not adequately address the digital transformation or expanded services sector. Confronted with these issues, companies began to explore overseas markets thereby further eroding economic growth and job creation in the U.S.

Canada and the United States began to address these concerns by developing innovative initiatives such as *Beyond the Border* (BtB) and the *Regulatory Cooperation Council* (RCC) at the turn of the last decade. Meanwhile, efforts to resolve global trade issues and imbalances via the World Trade Organization (WTO) and regional approaches such as the TransPacific Partnership (TPP) reached mixed or incomplete results. CABC strongly supports the view that bilateral and continental modernization processes present the best political and economic paths forward.

The current moment provides a once-in-a-generation opportunity to examine the U.S.-Canada and North American trading relationships with the objective of designing the exemplary agreement for a mutually-beneficial, integrated, and expansion-driven economic partnership. In short, the next-generation NAFTA (NAFTANext) should be the model for the rest the world. Canada and the U.S. do not compete on the basis of health, safety, labor, or wage standards, and their supply, value, and innovation chains are highly integrated. No two countries are better equipped than Canada and the U.S. to develop a model framework, and this foundational agreement should now include the whole of North America. If the U.S. and Canada cannot develop a 21st Century trading agreement with each other, they will not be able to do so with any other country around the world.

“Get It Right” vs. “The Need for Speed”

The development of an exemplary NAFTANext will require time to properly develop, negotiate, and implement the various provisions. CABC strongly counsels the parties to advance the process as expeditiously as possible, but not at the expense of failing to achieve the objective of developing a beneficial and lasting agreement. History teaches that the opportunities to advance U.S.-Canada trade do not appear with great frequency—now is the time to “get it right.”

CABC nevertheless recognizes the political and business challenges created by a process that extends beyond early 2018. However, CABC’s view is that a political window will be open to the trade negotiators if it can be demonstrated that the NAFTANext negotiation is progressing toward actionable objectives. From the perspective of the U.S. voter, “NAFTA” means more than the actual Agreement. “NAFTA”, and the accompanying negative sentiments, include all that is wrong with international trade, immigration, the decline in manufacturing, and loss of jobs. However, should the U.S. continue to demonstrate significant trade enforcement as it has over recent months using existing measures and new tools, this will “stop the bleeding” (or at least the perception of “bleeding”) long enough to afford sufficient time to advance NAFTANext. Additionally, CABC recommends that the United States Trade Representative (USTR) engage in robust consultations with members of the U.S. Congress as required by the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA 2015). This fostering of conversations with Congress will further establish the “on the ground” buy-in needed to afford the requisite time horizon. Finally, USTR must engage in stakeholder consultations that extend well beyond the current Federal Register Notice process and involve SMEs. CABC stands ready, willing, and able to assist USTR’s outreach efforts and awaits USTR’s publication of stakeholder criteria as required by TPA-2015.

The potential U.S. hosting of the 2017 North American Leaders Summit (NALS) presents the opportunity for the leaders of the NAFTA Parties to meet and candidly share their views as to realistic timelines to achieve the negotiating objectives. Rather than meet in resort villas on the coasts, it is recommended that the North American leaders meet in Phoenix to demonstrate that they are coming together to advance a working NAFTA. This visibility will assist in providing the necessary time resources to “get it right.”

CABC fully appreciates that its recommended consultative process provides a timing and tempo that differs from the statements of the U.S. Administration and many business leaders. However, CABC’s overarching objective is to have a beneficial and lasting agreement. A hastily reached agreement developed for a quick political victory will have little economic impact and will create the very uncertainty sought to be avoided. Simply, voters in the U.S. Midwest and elsewhere will want to revisit the issue at the next possible electoral moment. In order to achieve the necessary political goodwill and economic benefit, USTR must take the time to “get it right.” It follows, however, that the business community will need some assurances that the underlying framework governing its current supply, value, and innovation chains will not shift at a moment’s notice. CABC strongly recommends that USTR hold the course on

modernization and avoid any discussions of “tearing up” the NAFTA during the negotiations.

III. Treatment of Specific Goods—Section 2(c) of the Federal Register Notice

CABC defers to its member trade associations and companies to advance numerous issues relating to the treatment of specific goods. However, CABC notes the following goods that have been raised by multiple stakeholders:

Hydroponic Systems and Lighting

The demand for food production for the growing world population and emerging indoor gardening market means that the agricultural and horticultural industry is under considerable pressure to substantially improve the efficiency of agricultural and horticultural technologies, including indoor lighting solutions, plant nutrients, and hydroponic growing systems. New technologies, greenhouse horticulture, and other insights have enabled major progress in allowing crops to be commercially produced in non-conductive climates, and improving production, product quality, and plant health; however, the treatment of such goods under the HTSUS have not reflected the evolution of the industry and use agricultural and horticultural use cases. These innovations promote sustainability, predictable growth cycles, and economic growth. The HTSUS classifications for hydroponic systems and lighting should be revised in the context of their role in agricultural and horticultural uses. By way of example only, the exception parenthetical to 9405 in Subchapter XVII, Note 2(ab) should include 9405.40.60 in addition to the existing exceptions of 9405.60.60 and 9405.92.

Sphagnum Peat Moss

Sphagnum peat moss is a critical growing medium in horticulture. Canada is the primary source for quality sphagnum peat moss based products sold and used in the United States. It is imperative for the United States horticultural industry that sphagnum peat moss remains duty-free.

IV. Customs and Trade Facilitation Issues that Should be Addressed in the Negotiations—Section 2(d) of the Federal Register Notice

Beyond the Border

CABC recommends that the NAFTA Parties embed the U.S.-Canada *Beyond the Border* process into NAFTANext. Specifically, CABC recommends that the NAFTA include provisions endorsing the work of BtB to date, including receiving the legislative approvals required to implement the March 2015 *U.S.-Canada Preclearance Agreement*. CABC also is encouraged by the concept of unified cargo processing (UCP) that has been deployed at Arizona ports of entry along the Mexico border. Under UCP, U.S. and Mexican customs personnel work side by side on U.S. soil to conduct

outbound and inbound inspections. Each country's officer can make the determination as to whether to send a shipment to secondary inspection. Even in the case where a more invasive inspection is required, UCP ensures that a shipment is only unloaded once, if at all, rather than what exists today, whereby a truck could be unloaded in its country of origin and its country of destination.

It is recommended that the NAFTA establish a U.S.-Canada BtB and a U.S.-Mexico BtB, each chaired by the respective cabinet officials (e.g., Secretary of U.S. Homeland Security) that will meet at least half-yearly and issue annual reports to the respective authorities.

A NAFTA COAC

In the U.S., the Commercial Operations Advisory Committee (COAC) has been an effective mechanism for members of industry to communicate their unique needs directly to U.S. Customs and Border Protection leadership and to develop lasting policies and procedures to make cross-border trade more efficient and more secure. The COAC is codified into existing U.S. legislation.

COAC provides a model for stakeholder engagement in all three NAFTA countries. Private sector entities in all three countries should have a central forum for discussing emerging challenges in NAFTA trade and present their recommendations to customs authorities in Canada, the U.S. and Mexico.

V. Appropriate Modifications to Rules of Origin or Origin Procedures for NAFTA Qualifying Goods—Section 2(e) of the Federal Register Notice

Mineral Fuel, Chemicals, Plastics, and Rubber Products

Canada and the U.S. are the home to one of the largest polymer, chemical, plastics, and advanced materials sectors in the world. CABC recommends that the NAFTA modernize its archaic rules of origin for mineral fuels, chemicals, plastics, and rubber products.

Specifically, NAFTA includes only restrictive tariff-shift rules, with alternative regional-value-content tests with high content thresholds. In contrast, most regional trade agreements negotiated over the past decade (including the TPP) provide an alternative of meeting a tariff shift rule or a processing requirement rule (e.g., chemical reaction). CABC recommends that NAFTA meet these modern standards to ensure that its polymer, chemical, plastics, and advanced materials sector remain competitive and "home-grown."

VI. Any Unwarranted Sanitary and Phytosanitary Measures and Technical Barriers to Trade Imposed by Canada and Mexico that

should be Addressed in the Negotiations—Section 2(f) of the Federal Register Notice

Mutual Recognition of Food Safety Standards

The United States and Canada entered into a groundbreaking Memorandum of Understanding in May 2016 that mutually recognized the food safety standards of the other party. Since that time, Canada and the U.S. have advanced separately on reforming their food safety regimes via the Safe Food for Canadians Act (SFCA) and the Food Safety Modernization Act (FSMA). CABC recommends that NAFTANext include provisions mutually recognizing the new food safety regimes of each country as well as any future changes unless otherwise determined by the relevant regulatory agencies.

Harmonization of Phytosanitary and Veterinary Certificates

CABC encourages the NAFTA Parties to harmonize the requirements for phytosanitary and veterinary certificates across Mexico, Canada, and the United States.

VII. Relevant Barriers to Trade in Services between the United States and Canada and Mexico that should be Addressed in the Negotiations Section 2(g) of the Federal Register Notice

and

Relevant Digital Trade Issues that should be Addressed in the Negotiations—Section 2(h) of the Federal Register Notice

CABC advises that the greatest deficiency in the NAFTA is the failure to establish a modern framework to govern the rise of the integrated U.S-Canada and North American services sectors, as well as prescribed rules for managing the continental digital economy. The WTO Trade in Services Agreement (TISA) and the TPP negotiations provide foundational approaches to these issues; however, the NAFTA modernization provides the opportunity to review these areas through the lens of achieving bi-lateral and North American competitiveness.

Cross-Border Electronic Data Transfers

CABC supports the inclusion of provisions in a digital chapter of NAFTANext that allows for the cross-border transfer of information, including personal information, by electronic means when the activity is for the conduct of the business by investors in a NAFTA Party and, or, their service suppliers. CABC recommends that a NAFTA Party may only restrict such data transfers to achieve and legitimate public policy objective and in a manner that does not constitute “arbitrary or unjustifiable discrimination or a disguised restriction on trade.”

Given recent legislative attempts on matters such as Canada's Anti-Spam Legislation (CASL) and resulting disruption to cross-border economic activity, CABC recommends that NAFTANext require mandatory consultations with NAFTA Parties and stakeholders prior to the implementation of any public policy restriction on cross-border electronic transfers.

Localization of Computing Facilities

CABC supports the inclusion of provisions in a digital chapter of NAFTANext that prohibit the forced localization computing facilities.

Transfer of Source Code

CABC supports the inclusion of provisions in a digital chapter of NAFTANext that prohibit a NAFTA Party from requiring the "transfer of, or access to, software source code as a condition for the import, distribution, sale or use of such software, or products containing such software, in Party's territory." CABC supports exceptions to this prohibition for software utilized in critical infrastructure and if otherwise negotiated pursuant to a commercial contract.

Customs Duties on Electronic Transmissions

CABC supports the inclusion of provisions in a digital chapter of NAFTANext that prohibit a NAFTA Party from imposing customs duties on cross-border electronic transmissions. CABC agrees that nothing in this chapter shall preclude parties from imposing internal taxes, fees or other charges on "content transmitted electronically."

Nondiscriminatory Treatment of Digital Products

CABC supports the inclusion of provisions in a digital chapter of NAFTANext that prohibit a party from providing less favorable treatment to digital products, and the creators and owners of those digital products, than it does to its domestic like digital products.

Exemptions and Restrictions

CABC supports exemptions from the foregoing digital provisions for government procurement, national security, and financial institutions

Regulatory Cooperation Council

The history of the Canada-U.S. and North American economic relationship demonstrates that the rapid development of innovative and disruptive technologies will outpace the political and legislative capacities to repeatedly modernize the governing bilateral and continental agreements. The U.S.-Canada Regulatory Cooperation Council (RCC), launched in 2009, provides the leading framework to achieve "behind

the border” regulatory convergence on emerging and new technologies such as autonomous vehicles, artificial intelligence, next generation air traffic control systems, and heretofore unimaginable consumer products. CABC supports the inclusion of provisions in a digital chapter of NAFTANext that embed the RCC into the Agreement. While the scope of the RCC extends beyond “digital” technologies, its inclusion in this new NAFTA chapter will be a model for future bilateral agreements.

Digital Business Visitors

No modernization of the digital and service provisions of the NAFTA can be complete without addressing the cross-border movement of legitimate business travelers in the digital technology sector. Presently, business visitors (e.g, B-1 visitors) may move within the NAFTA areas for legitimate travel relating to sales calls, meetings, training, emergency repairs, and after-sales service. Unfortunately, inconsistent treatment of those travelling to raise venture capital, discuss digital products and services, collaborate on projects, provide training and installation on digital products, and test and calibrate digital sensors on equipment and machinery often lead to erroneous claims that such business travelers require work permits subject to labor market impact reviews. It must be emphasized that the overwhelming majority of these situations are authorized under the applicable laws and underlying policies governing business visitors; however, customs and immigration officials utilize interpretative guidance in field manuals and other areas that does not account for the modern day movements of digital business visitors.

CABC recommends that the NAFTA Parties engage in a large-scale review of the interpretive guidance provided to customs and immigration officials relating to the movement of digital business visitors. At a minimum, this guidance should provide business visitor status to those that meet all criminal and security admissibility standards and with appropriate documentation for the following:

- Raising Capital (e.g., venture capital)
- Development and Design of Digital Products, Software, and Hardware
- Project Collaboration in Digital, Graphic, Sonic, Artificial Intelligence, and Autonomous Vehicles
- Installation of Digital Technologies
- Testing, Ongoing Repair, and Calibration of Sensors on Machinery or Equipment
- Training Regarding Digital Products and, or Services

CABC emphasizes that these areas do not require new legislation or a modernization of the NAFTA Chapter 16 professionals list. Rather, these are interpretative reviews and enhancements to existing business visitor guidance documents.

Chapter 16 Management-Consultant Visas

CABC does recommend that the NAFTA parties include a review of the interpretative guidance for issuance of Management-Consultant professional visas authorized by Chapter 16 of the NAFTA. While these areas were and continue to be strongly disfavored by customs and immigration officials, the rapid expansion of the digital technology and services sector requires a review of the standards for issuance of visas pursuant to these grounds. CABC asserts that a modernization of the digital business visitor standards, coupled with a review of the standards for issuance of a NAFTA Management-Consultant visa, will obviate the need to reopen NAFTA Chapter 16 and the NAFTA professionals list.

VIII. Relevant Government Procurement Issues that should be Addressed in the Negotiations—Section 2(l) of the Federal Register Notice

CABC counsels the NAFTA Parties to deploy and employ innovative strategies for increasing bilateral and continental access to government procurement markets. However, this access should be contingent on the level of integration within the sectors and between the respective Parties. Simply, NAFTA Parties should not wave the flag of free and open global procurement; rather, the NAFTA Parties should develop procurement agreements that recognize the “exemptional” nature of Canada-U.S. and North American trade. Canada and the U.S. presently employ this approach in the defense arrangements and on shared projects such as the planned Gordie Howe Memorial Bridge between Detroit-Windsor. NAFTANext should provide flexibility to certify government-funded projects as “Ameri-Can Made” or “North American Made” and potentially default to these procurement models unless expressly prescribed by legislative or the procuring agencies. Similarly, CABC recommends that NAFTANext expressly authorize sub-national governments to enter into regional, state-province, and municipal reciprocal procurement agreements on projects where federal funds may be utilized.

IX. Issues of Particular Relevance to Small and Medium-Sized Businesses that should be addressed in the Negotiations—Section 2(o) of the Federal Register Notice

CABC strongly recommends that SMEs serve as a leading consultative stakeholder community in NAFTANext as a means to achieve greater economic competitiveness and political support for a modernized Agreement. Key issues included *supra* that are of particular relevance to SMEs include:

- Embedding the Beyond the Border into NAFTANext
- Embedding the Regulatory Cooperation Council into NAFTANext
- Ensuring mutual recognition of Canada-U.S. food safety standards
- Achieving Consistency in the Application of Business Visitor Travel, including digital business travelers and
- Reviewing the criteria for the issuance of Management-Consultant Visas pursuant to Chapter 16 of the NAFTA

Beyond the foregoing, CABC recommends that two pilot projects be included as part of the NAFTA modernization:

NAFTA Supply/Value Chain Certifications

First, CABC supports the development of a NAFTA supply/value chain certification that will reduce the administrative costs imposed on SMEs that provide goods and services to the original equipment manufacturers (OEMs) and other large scale stakeholders that regularly operate in the NAFTA region. The past decade has witnessed significant gains in government-private sector partnerships to combat against terrorism, narcotics and human trafficking and smuggling, as well as promote health and safety. Indeed, the global trend has been to adopt risk assessment principles that allocate compliance and monitoring responsibilities to the private sector, backed by strong audit, inspection, and enforcement measures deployed by governments. It follows that these responsibilities for monitoring and compliance with NAFTANext rules of origin and other provisions should fall to the private sector. For example, automotive OEMs are best positioned to determine the sourcing of supply chains in compliance with rules of origin. Redundant filings of certificates of origin, or ad hoc modification of blanket certificates of origin in times of shortage of supply, create uncompetitive administrative costs and disincentives to grow U.S.-Canada and North American trade. Given the rapid deployment of new customs and tracing technologies, and an overall movement toward greater advanced reporting through tools such as single window, there is an opportune moment to utilize NAFTANext as a means to authorize such supply chain certifications that will benefit SMEs at all tiers.

Workforce Initiative for North America (WINA)

CABC advises that the greatest challenge facing further continental integration is its likely disruptive effect on those workers displaced by trade as well the shortage of a skilled workforce required to satisfy the business demand of companies operating in the Canada-U.S. and North American space. The initial NAFTA attempted to address this issue by establishing base-line labor standards via a side agreement and reverting to domestic trade adjustment assistance programs to assist displaced workers. The success of these attempts was marginal at best.

The workforce challenge confronts every jurisdiction on the continent and includes a mixture of issues ranging from health, education, labor mobility, standards and certifications, demographics, and talent attraction and acquisition to name a few. These issues extend beyond the scope of any one trade agreement. However, for reasons discussed *supra*, the U.S. and Canada, as well as North America, are uniquely situated to provide a model for the rest of the world.

CABC accordingly calls for the creation of a Workforce Initiative for North America (WINA) that will examine past, current, and proposed workforce development, training, and assistance programs. This will be a partnership between the NAFTA Parties, at all levels of government, in close collaboration with the private sector. The overarching objective is to achieve “cooperative competitiveness” between Canada, the U.S., and Mexico on workforce issues. North American has made things together for the past half century. The next half century will requires that the continent to work together. CABC calls for each NAFTA Party to establish a cabinet-level lead for WINA.

X. CONCLUSION

CABC appreciates this opportunity to provide comments regarding this once-in-a-generation to modernize the NAFTA. We look forward to working with you and your team.

Respectfully submitted,

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