

# AmCham EU's response to the European Commission's Consultation on EU-US High Level Working Group on Jobs and Growth

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CONSULTATION RESPONSE

23 April 2012

## Introduction

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the opportunity to provide input to the European Commission's consultation on the EU-US High Level Working Group on Jobs and Growth.

We are at a crucial juncture in the world economy. Developed economies, which have been the engines of growth for the past century, are now grappling with substantial debt and other challenges. At the same time, emerging markets are increasing in importance, particularly as prominent investors in both our economies. The European Commission's recent report on trade and investment barriers also points to the tendency of these emerging economies towards trade-restrictive industrial policies, containing discriminatory provisions against foreign products, services and investments, impacting EU and US companies. Citizens in the EU and US feel uncertain about the future and are less optimistic about the possibilities for the next generation. Calls for a return to protectionism, isolationism and 'times of the past' are increasing.

AmCham EU believes that the EU and US need to look forward and work together in a positive, pro-active, ambitious fashion to outline a vision of the future transatlantic economy for our citizens built on the same principles that have existed for the past 60 years – common values and democratic ideals – and providing for a common path forward in an interdependent world.

### Overview

In a perfect world, AmCham EU member companies would like to see a transatlantic environment where goods, services, people, capital, data and ideas could flow freely across the Atlantic. Citizens would have confidence that products and services produced in one location would be tested and certified to the same health and safety standards they are accustomed to locally. Cross-border consumer disputes would be solved in a speedy and mutually satisfactory manner. Intellectual property rights (IPR) would be enforced globally, and research and innovation would be shared and leveraged to maximum efficiency. Long standing trade disputes would be resolved, or at least managed in a way that would allow the rest of the transatlantic relationship to prosper. Inefficiencies in the flow of trade and investment would be minimised and companies would be able to use the funds gained from efficiencies on new jobs, research, investment and growth.

The above outcomes will result in growth of the current transatlantic economy – growth in jobs from the current 15 million people employed on both sides of the Atlantic – and growth in total commercial sales, currently standing at \$5 trillion per year. These outcomes will be achieved if we introduce a higher level of

CONSULTATION RESPONSE

ambition in our approach to transatlantic relations, both in achieving further integration between our economies and in dealing with third countries.

With this in mind, AmCham EU supports the EU and US' efforts to further integrate their economies via a comprehensive agreement focused on boosting the transatlantic market and encouraging the creation of jobs and growth. Creating a framework agreement that would allow the countries to move forward on specific issues that impede trade and investment would demonstrate the strong commitment to further eliminate inefficiencies in our economic relationship.

We encourage the EU and US to consider a legal instrument that would become the template for the 'next-generation' of economic or trade agreements. This new instrument, a **Transatlantic Economic Growth Agreement (TEGA)**, should be as broad as possible, with a focus on those issues that provide the most potential benefit to EU and US companies both large and small, farmers, workers and consumers. The TEGA would build on the best terms currently negotiated by each party in other free trade agreements (FTAs), and would also seek to address some of the additional issues that create redundancies and inefficiencies to the detriment of our citizens' overall welfare. Despite many sensitive political issues and ongoing trade disputes, we hope that the governments would be able to design a mechanism to address and manage these issues in a way that allows broader trade liberalisation to advance.

The components of this agreement would include the following key policy areas for transatlantic cooperation:

## 1. Tariffs

**Conventional tariffs on goods:** AmCham EU believes that all tariffs on transatlantic trade should be eliminated. While applied tariffs are relatively low, research shows that when they are applied on such a large base, their elimination could raise EU and US exports by about 17%. This would improve the global competitiveness of European and US firms, especially those – like many AmCham EU members – with significant integrated operations in both the EU and US. In addition, the cash flow benefits that would be created could be used to help expand investment in each other's markets.

**Non-tariff barriers:** AmCham EU believes that the removal or reduction of non-tariff barriers is the most important aspect of a potential EU-US TEGA. Non-tariff barriers to the trade of goods, services and investment represent significant market barriers and are the area of largest potential gain for the EU and US. We would encourage governments to structure a process enabling firstly prevention, then where possible reduction and then elimination of non-tariff barriers.

## 2. Services and Investment

**Services:** The services sector remains Europe's largest untapped source of economic growth and jobs. While services account for approximately 70% of Europe's output, they only account for 23% of Europe's trade. Fully implementing the EU Services Directive could deliver economic gains between €60-140 billion (representing 0.6 – 1.5% GDP) and generate more than 600,000 new jobs. According to Daniel Hamilton's 'Europe 2020' report, Europe's failure to capitalize on services is one of the main factors behind the existence of a gap between the US and EU on GDP and productivity growth. Services sector reform in industries like health, transport, capital markets, telecoms, ICT and social services would provide a significant boost to economic activity and increase Europe's global competitiveness.

**Investment:** As major investors in Europe, AmCham EU members believe that an open investment policy is vital to attract the capital needed to promote growth in Europe generally. Both large and small companies need access to capital to fuel European competitiveness and innovation. We welcome the reinvigoration of the EU-US Investment Dialogue.<sup>1</sup>

Maintaining a stable investment environment between the EU and US is important. What concerns us, as the largest foreign investors in Europe, is the possibility that either the EU or US will take actions that could deter investment, or that the US or EU will take action on a host of issues (e.g. taxation) that are specifically targeted at foreign investors. Such actions would make our continued investment in the EU or US more difficult in the long-run.

With such an important economic relationship, based on the \$1 trillion that our companies have invested in one another in 2010 alone, AmCham EU welcomes the recent statement on principals of investment, and calls upon the EU and the US to work together to achieve the highest standards of openness to, and protection for, Foreign Direct Investment.<sup>2</sup> Both inward and outward investment play vital roles in creating innovation, economic competitiveness, jobs and growth; at this time confidence in investing needs to be rebuilt

We support the inclusion of investment in an EU –US agreement. While the US currently has bilateral investment treaties and other investment treaties with most Member States, it would provide a single regime for the entire EU. We believe that the priority should be placed on ensuring the rights outlined in existing agreements are retained.

While the text of the EU-Canada agreement is not public, the negotiating mandate given to the European Commission for those negotiations largely contains principles which could also form a basis for work between the EU and US. We understand that there are concerns in the EU with certain US restrictions on direct investment in certain industries, such as the US law known as the Committee on Foreign Investment in the United States (CFIUS), and with restrictions at the sub-federal level. We hope that work on investment would be

<sup>1</sup> Please see Annex 1 – 14 July 2011 letter on needs from investment dialogue

<sup>2</sup> Please see Annex 2 – 11 April 2012 Press Statement on Principals of Investment

able to focus on the trillions of dollars, euros etc. worth of investments that take place between the EU and US, and ensure that the appropriate protections are in place.

**Data:** The generation, transfer and processing of data have resulted in a multitude of new services and offerings, such as cloud-based ones, which in turn fuel economic growth, job creation and enhanced services to customers in the transatlantic marketplace. Accompanied by appropriate safeguards for security and privacy protection, the free flow of data is a fundamental prerequisite for continued development of new and innovative services on a transatlantic basis.

The US and EU have engaged in constructive discussions and initiatives to facilitate the flow of data between the EU and US. As the EU embarks on enhanced harmonisation of its data protection regimes, and the US revisits its own data privacy legislative framework, EU and US authorities should expand their cooperative efforts to continue to foster the free transfer and processing of data on a transatlantic basis. Such policy discussions and solution frameworks could also serve as building blocks for more globally coherent approaches to information transfers and processing.

Furthermore, it is important to consider that growth opportunities for the EU and US in cross-border trade in ICT-enabled services are threatened by the potential for restrictions on cross-border data flows. Many countries are considering restrictions on the location of storage and processing for various types of data, however existing trade agreements do not address these issues. For example, exceptions in the World Trade Organisation General Agreement on Trade in Services (WTO GATS) gives countries the right to regulate for national security, privacy, compliance with regulations, protection of public safety, and prevention of fraudulent practices, and to ensure the integrity of the financial system, among other reasons. Any of these rights could be used as an excuse to block data flows, effectively creating barriers to services trade.

It is in the interest of both the EU and US to modernise their approaches to services trade agreements to address these cross-border data issues. These issues should be incorporated in all future services trade negotiations, whether at the bilateral, pluri-lateral or multi-lateral level. Given their strengths as exporters of ICT-enabled services, the EU and US should cooperate to establish a new agreement that can set the standard and serve as a model for the rest of the world. This initiative could build on work completed in 2011 on the EU-US Trade Principles for ICT Services, the Organisation for Economic Co-operation and Development Internet Policy Principles and on the two parties' ongoing work on e-commerce and services trade in their respective bilateral and regional free trade agreements. This issue is especially timely following the European Commission's recently released revision of the EU Data Protection Regulation, which may have a significant impact on transatlantic data flows and the businesses that rely on them, such as cloud computing, business services, financial services, and the entertainment industry. The EU and US are well positioned to lead the world in the development of a 21<sup>st</sup> century services and cross-border data transfer agreement.

### 3.Regulatory issues affecting trade in goods

AmCham EU has been a long-standing supporter of the EU and US' work on regulatory cooperation, both in the broader context and in sector-specific areas. The EU and US share common goals of ensuring citizens' health and safety, even though they often take different approaches to achieve these objectives.

We recognise that these differences are very difficult to harmonise, as they often reflect fundamentally different cultural and legal approaches to public policy. Transatlantic mutual recognition of regulations and standards is the path we should explore further and the work of the High Level Working Group on Jobs and Growth is a unique opportunity towards that end. The agreement at the last EU-US summit to apply mutual recognition to the sensitive area of security is encouraging.

Improving regulatory cooperation makes economic sense. At a time when national budgets are being cut, finding ways to achieve more with fewer resources is critical. One way would be to explore whether there is more that can be done to share data between regulators, so that scarce resources can be used more efficiently.

We believe that Presidential-level support for enhanced technical regulatory dialogue is needed, and that inclusion of this in a possible agreement should be explored. Enhanced technical regulatory dialogues should seek holistic solutions to suit the needs of all parties and not cause any unfair competitive disadvantages. While the expectations and commitment to meet them should be firm, we urge that the process remains flexible and able to evolve over time depending on changing circumstances. The process should also include regular participation of EU and US stakeholders, including industry, given the enormous importance of transatlantic economic relations to both economies.

**Standards:** There is great interest in pursuing work on standards. The EU and US should agree on concrete processes to reinforce cooperation between standards setting organizations (SSOs). Before they agree on a standard, SSOs should at a minimum study the impact of the future norm on the transatlantic market. Systematic bilateral cooperation before approving a standard is key and the 'Bridges Principles' agreed upon at the last transatlantic summit<sup>3</sup> should be made mandatory.

Procedures aimed at promoting the compatibility of future regulations and standards should be made mandatory. An example to that point is European Commissioner De Gucht's recent idea of systematic 'external competitiveness proofing' whereby the legislator would take into consideration the transatlantic impact of the future legislation at impact assessment stage.<sup>4</sup> While there is no identical point in the US legislative process to include a similar review, the US Office of Management and Budget (OMB) could review rules for compatibility

<sup>3</sup> [http://trade.ec.europa.eu/doclib/docs/2011/december/tradoc\\_148393.pdf](http://trade.ec.europa.eu/doclib/docs/2011/december/tradoc_148393.pdf)

<sup>4</sup> The related European Commission Press Release can be found here:  
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/21&format=HTML&aged=0&language>

and include concerns in the Statement of Administrative Procedures, or the OMB could include such a review in the impact assessment that the regulatory agencies must conduct in their rule making process. While neither of these is directly comparable to the US system, they could result in similar outcomes.

Outside of these examples, we know that regulatory cooperation is being looked at in some of the current EU free trade agreements. While those texts are not public, they may include some provisions that could also be used in an EU-US TEGA.

Within governments, we see several different kinds of potential regulatory cooperation: general cooperation on the process of developing, drafting, approving and implementing regulations; cooperation on specific bilateral regulations; cooperation on international and third country issues; and new and emerging work on standards.

***Cooperation on Regulatory Process and Procedures:*** We are long-standing supporters of general cooperation on the regulatory process. We need to reinforce the good work that has taken place, most notably on issues such as assessing risk. For most industries, commitment to fully implement the 2002 Guidelines on Regulatory Cooperation and Transparency would be a key first step in promoting more open, efficient regulatory environments. With the regulatory reform processes on both sides of the Atlantic, full and detailed implementation of the guidelines – including interactive consultation of affected industry in the early stages of the regulations development process - would be invaluable to removing unnecessary barriers and inefficiencies.

***Sector-Specific Cooperation:*** Regulatory cooperation is ongoing, and we believe that the work of Transatlantic Economic Council (TEC) has made positive contributions in some specific areas. Next, the TEC should look to apply lessons learned in those areas to new issues, especially in the area of key emerging technologies that are not yet regulated. The TEC works particularly well when addressing new issues and preventing a problem or dispute from occurring, such as the work on developing a common plug for e-vehicles. As we have seen, the TEC is not a forum to resolve trade disputes. We therefore would continue to encourage the governments to use the TEC to seek out and work on new or emerging regulatory and standards related issues, and to give a needed boost or profile to those issues to ensure they are resolved in a timely fashion.

**Financial Services:** In the financial services area, AmCham EU has been a long-standing supporter of the Financial Markets Regulatory Dialogue (FMRD), where the EU and US regulators meet and discuss issues of mutual interest. AmCham EU believes that cooperation between the EU and US remains critical to ensure that markets are safe, sound and well-regulated, while supporting and encouraging economic growth and the creation of jobs. The work of the G20 and other international bodies (Basel, IAIS, IOSCO) to encourage and establish global standards and frameworks for international cooperation remains vital, and AmCham EU believes that such work will be impactful if the EU and US have similar views and approaches.

AmCham EU believes that a level playing field for the global financial services industry is essential. We believe that the best way to achieve this is to ensure that standards agreed on at an international level are fully and consistently implemented on a local level, to maximize global convergence and eliminate systemic risk. Differences between regulatory regimes may occur, and it may play out differently for different parts of the financial sector (i.e. insurance), as a result of variations in local market conditions, legal systems and stages of regulatory development. Common EU and US regulatory objectives can be reached in more than one way, but can be objectively recognised and confirmed through an agreed outcomes-based analysis. We attach as an annex our recent paper on EU and US regulatory convergence in financial services, where we discuss these issues in more detail.<sup>5</sup>

Chemicals: While levels of protection of the chemicals management systems in the EU and US are comparable, the regulatory systems differ fundamentally. Past efforts to improve convergence of regulations have not been very successful. As a first step, EU and US regulatory agencies should assess the regulatory application dossiers and identify key data sets and definitions. A harmonized approach to data assessment would simplify the registration process, improve transparency and be more efficient for companies to develop their application dossiers in both economies.

Trade Disputes: With regard to existing trade disputes, we encourage the EU and US governments to think about how best to address and resolve long-standing trade disputes, particularly with regard to regulatory and standards related issues. The WTO Dispute Settlement Body is a powerful enforcer of trade rules, but as we know some disputes between the EU and US have ultimately been resolved using other means, and some continue to remain unresolved despite WTO rulings. Trade agreements and trade rules have limits, and the EU and US should consider how best to address those issues that impact on trade and investment, which ultimately may not be able to be resolved via the existing trade rules. A possible side agreement, or other potential forum, could be considered as a means to look further at some of the long-standing issues which will be politically important to address alongside any EU-US agreement.

#### **4. Government procurement and intellectual property rights**

**Public Procurement:** AmCham EU would welcome further work between the EU and US on opening public procurement markets. If properly drafted and implemented, an agreement between the EU and US could deepen competitiveness, provide access to each other's markets and eventually enhance procurement markets globally. Work in this area should not side-step the WTO Government Procurement Agreement (GPA), but instead reinforce and support expanding the application of the GPA to more countries. The objective should be to ensure that the EU and US have access to public procurement contracts in other countries, and lead to an overall improvement of procurement markets globally and to help prevent the isolation of EU or US domestic markets.

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<sup>5</sup> Please see Annex 3.



Although we see the merits of equipping the EU with a new instrument to promote free trade and open public markets, AmCham EU is very concerned by some aspects of the European Commission's proposal for a European public procurement instrument.<sup>6</sup> The automatic exclusion of US bidders in sectors where the EU has taken reservations in international agreement is particularly worrying. According to this proposal, US companies would be a priori excluded from some public EU tenders in strategic sectors like water, airports, urban transport etc., and this exclusion would be decided automatically, without a verification of the existence of a lack of reciprocity (while in cases where countries which have not negotiated an agreement with the EU are at stake, a full enquiry would be conducted). This process would amount to a clear discrimination against countries like the US which have negotiated public procurement agreements with the EU.

At a time when the EU and US should be cooperating to resolve such issues, we believe that this measure would signify a step backwards; and would hope that any EU-US agreement reached addresses and resolves such issues. AmCham EU will soon circulate a new paper on the recent EU proposal.

**Intellectual Property Rights (IPR):** AmCham EU is committed to enhancing EU-US engagement, cooperation and coordination on IP matters principally bilaterally, but also vis-à-vis China, other countries and in multilateral forums. We support increased EU customs harmonisation which will facilitate greater EU-US enforcement cooperation.

EU and US companies are confronting the twin challenges of:

1. Combating trade in counterfeit and pirated goods: especially online, but also in other areas like agricultural chemicals and medicines. Illegal online activities are harming consumers, legitimate content providers and good manufacturers, and are also undermining trust in e-commerce, one of the key contributors to economic growth. Increased cooperation between the EU and US in collaboration with all actors in the internet ecosystem is therefore necessary. Such efforts should be aligned with the online freedom of expression principles shared on both sides of the Atlantic.
2. Preventing attempts by third countries to weaken IP protection in their own respective countries and in multilateral forums: without a shared strategy that is based on enhanced cooperation and coordination, a number of major emerging economies will continue to erode EU and US competitiveness by both failing to enforce IP rights in their countries, or in some cases, not doing so in order to build national champions and advance an IP theft-based industrial policy.

EU-US coordination is furthered through the development of enhanced coordination on IP issues at the EU Ministerial and Parliamentary levels. For example, this coordination would be enhanced through the emergence of an EU counterpart to the US Intellectual Property Enforcement Coordinator. Such a

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<sup>6</sup> Please see Annex 4.

structural change at the Commission should be complemented in the Parliament through the creation of an IP caucus that could engage its longstanding counterpart in the US Congress.

Finally, EU-US enforcement cooperation is enhanced by greater customs harmonisation, such as through the creation of an integrated EU customs rapid alert and information exchange system that will further transatlantic sharing of intelligence and the development of risk analysis.

## 5. Rules

**Trade Facilitation:** AmCham EU would welcome further work between the EU and the US to improve trade facilitation that would significantly reduce the transaction costs for transatlantic and international trade and minimise bureaucracy. Together, they should promote and support initiatives, such as the ‘national single window initiative’ - that help to effectively ensure that all ports of entry within a country treat imports the same way, from classification definitions and tariff allotment, to registration requirements, as opposed to the current practice which can result in variable assessments of the same product.

The EU and US should cooperate to strive towards implementing a uniform international system of standardised customs processes, efficient customs clearance and mutual recognition of customs and security related standards. The recent TEC announcement on progress on the mutual recognition of EU and US customs security schemes (namely the EU Authorised Economic Operator [AEO] and the US Customs-Trade Partnership against Terrorism [C-TPAT]) is a good example (and should be implemented as soon as possible) of mutual recognition which needs further review in order to generate tangible benefits for AEO and CTPAT licensed operators.

**Rules of Origin:** AmCham EU encourages the EU and US to work on harmonising rules of origin regionally and globally, and implement them bilaterally and globally via the World Customs Organisation and World Trade Organisation.

**Third countries:** AmCham EU is interested in seeing the EU and US cooperate in encouraging application and enforcement of WTO principles globally. While the Doha Development Round (DDA) may not be progressing at the moment, we continue to strongly support the WTO and believe the multilateral approach remains the best means to achieve gains for jobs and growth, within the EU and US, and more globally. In addition, there are some elements of the DDA that can be picked up and progressed through bilateral and pluri-lateral agreements etc., and we would encourage the EU and US to look at such issues more closely.

For example, EU and US negotiators should take the lead on freeing trade for clean technology. US-EU tariffs on clean technologies should be eliminated; EU-US standards and norms governing this sector should be recognised as equivalent, and public procurement should be more open to these technologies on both sides of the Atlantic.

Similarly, we are also supportive of recent discussions on a pluri-lateral agreement in services. Services trade is an area of enormous potential within the transatlantic space, but also in many other markets. Similarly we are supportive of the conclusion of the WTO agreement on trade facilitation and recent efforts for a pluri-lateral agreement on services.

### **Conclusion**

AmCham EU understands the difficulties surrounding this ambitious task. We need a higher level of ambition in our approach to transatlantic relations, both in achieving further integration between our economies, and in dealing with third countries. Clearly this requires the right process to be in place, and we welcome EU and US efforts to construct such a framework. AmCham EU is actively engaged in the issue of transatlantic trade and investment and actively contributes to the various stakeholder initiatives that feed into the process. We hope that these contributions will be useful, and that our leaders provide the necessary leadership to inspire confidence for our businesses to invest in both economies to promote the jobs and growth that are so urgently needed.

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totaled \$2.2 trillion in 2010 and directly supports more than 4.2 million jobs in Europe.*

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CONSULTATION RESPONSE



July 14, 2011

Mr. Karel De Gucht  
Commissioner for Trade  
European Commission  
B-1049 Brussels

Mr. Michael Froman  
Deputy Assistant to the President  
The White House  
Washington, DC

Dear Commissioner De Gucht and Mr. Froman:

We welcome the declaration from the December 2010 Transatlantic Economic Council that our governments would reinvigorate the U.S.-EU Investment Dialogue, and look forward to the first meeting, which we understand will take place in early Autumn .

We hope you and your colleagues can help realize the promise of the transatlantic investment dialogue. Our associations, representing millions of U.S. and European businesses in all sectors and regions of our economies, believe the depth of the transatlantic investment – over €1 trillion each way – is what makes our economic relationship unique. While in many respects this enormous volume of direct investment demonstrates the strength of the relationship, there are many pressing issues on which U.S. and EU coordination of our policy and approach is important. Specifically, the goals of our reinvigorated discussions should be:

- Coordinated efforts in promoting strong investment protections, especially in key third countries such as China, Russia, Ukraine, India and key countries in Latin America;

- Coherent approaches to inward investment from third countries; and
- Consideration of how to further improve the U.S.-EU bilateral investment relationship.

### **Investment Policy and Third Countries**

The United States, the European Union and EU member states have long striven to build strong international standards on the treatment of investment, based on the cornerstone principles of non-discriminatory national and most-favored-nation treatment; fair and equitable treatment and full protection and security; prompt, adequate and effective compensation in the event of an expropriation; free transfers of the invested capital and returns; and an effective investor-state dispute settlement mechanism, all principles reflected in our respective bilateral investment agreements. The major difference between the U.S. and European approaches in these agreements is the provision in U.S. treaties governing rights of establishment. On the basis of these shared sentiments, the United States and European Union have been able to issue a number of joint statements related to investment issues, including the May 2008 Transatlantic Economic Council Statement on Open Investment, and the December 2010 Trade Principles for Information and Communication Technology Services, which provide a basis for future work.

We in the U.S. and European business communities strongly support our governments' pursuit of strong standards in all of these areas and caution against changes that would weaken the core principles, including by limiting the ability of our companies to transfer investment capital back to our home countries for reinvestment or by creating exceptions that appear innocuous, but could undermine the value of international investment treaty protections.

The Lisbon Treaty inclusion of foreign direct investment in the EU's common commercial policy means the EU now has the power to negotiate investment agreements. The members of our organizations on both sides of the Atlantic have a significant interest in the approach the EU will take toward the existing EU member state bilateral investment agreements and in future investment agreement negotiations, as these affect both the broader investment protection regime and the investment climate in the targeted countries. The Investment Dialogue should discuss all implications of the EU's new investment policy.

In the past, the Investment Dialogue discussed steps Washington and Brussels could take to help improve the investment climate in third countries, including such issues as China's "Indigenous Innovation" policy. These discussions, which should be built upon the principles listed above, should be intensified and broadened, in particular to include Russia, Ukraine, India and other major countries. In addition to reinforcing the cornerstone principles noted above, a major theme of such "third country" discussions should also be about how the United States and EU can use investment and other agreements (and instruments) to mitigate the anti-competitive effects of government supports in them for state-owned and state-favored enterprises.

### **Inward Investment**

The U.S. and EU are both the world's largest hosts as well as the largest sources of foreign direct investment, with the vast majority of the FDI in each coming from the other. This situation is changing, as key emerging economies have begun expanding their investments in our markets. As President Obama emphasized in his recent statement on the U.S. open investment policy, and as the Commission underscored in last November's Communication on Trade, Growth and World Affairs, this inward investment should be welcomed: it provides capital for economic growth, and gives investors from these countries true stakes in our societies.

We recognize, however, that influxes of investment from non-traditional sources can lead to adverse public reactions and may raise legitimate national security and transparency concerns. Any approach to evaluating inward investment should contain safeguards to ensure it is limited only to legitimate national security concerns. Public apprehension regarding foreign investment can also be mitigated by a set of principles and rules that offer greater transparency around those investments made by sovereign wealth funds and state-owned enterprises. The Investment Dialogue should address these concerns and ensure the United States and European Union do not adopt measures that impede investment and adversely impact our bilateral relationship.

### **The Bilateral Investment Relationship**

Investment is the critical underpinning of the transatlantic economic relationship. That investment flowed largely because both the United States and Europe traditionally welcomed foreign capital, respected private property, and upheld the rule of law for our market-based economies. But it benefits as well from a network of legal instruments; even dated Treaties of Friendship, Commerce and Navigation are still frequently called upon to remind our governments of the need to observe the international obligations between our countries.

Our associations are still considering whether, when and how the United States and the European Union should update this legal relationship, but we believe our officials can and should begin considering it in the context of the formal Investment Dialogue.

### **Stakeholder Input**

A critical aspect of the U.S.-EU Investment Dialogue should be an active discussion with stakeholders, especially in light of the equities U.S. and EU firms own in one another's territory. Our associations will gladly host extended meetings with our officials both on the margins of, and between, meetings of the Dialogue.

Again, we support a vigorous discussion by U.S. and EU officials about investment policy, and look forward to a meeting of the U.S.-EU Investment Dialogue taking place soon.

Yours Sincerely,

**American Chamber of Commerce to the  
European Union  
BUSINESSEUROPE  
Emergency Committee for American Trade  
EUROCHAMBRES  
European-American Business Council**

**National Association of Manufacturers  
Organization for International Investment  
Transatlantic Business Dialogue  
U.S. Chamber of Commerce  
U.S. Council for International Business**

## **PRESS STATEMENT**

### **AmCham EU welcomes EU US Statement on Shared Principles for International Investment**

**Principles promote the fair competition and open, transparent, non-discriminatory regulatory environments that are needed to boost investment, economic growth and jobs**

**Brussels, 11 April 2012** – AmCham EU welcomes the Joint Statement of Shared Principles for International Investment agreed to by the European Union and United States governments. Investment is vital to getting the EU and US back onto the path of economic growth, job creation and prosperity. Both inward and outward investment are critical to boosting our economies in today's inter-dependent world.

“Every step towards facilitating and protecting investment is welcome. Investment and entrepreneurship are vital to put our economies back on track. Countries that apply these principles significantly increase their chances of (re)building business confidence and attracting the investment needed to maintain and create sustainable jobs and prosperity.” said Sharon Leclercq-Spooner, chair of AmCham EU's Trade and External Relations Committee.

This agreement reflects the close cooperation between the two economies in addressing the economic challenges and providing stability and predictability for further investment both within the transatlantic economy and in other countries.

The transatlantic economic relationship is the largest and most integrated in the world as explained in the EU and US government press releases:

EU press release and further info:

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=796>

Text of statement of the EU and US on shared principles for international investment:

[http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc\\_149331.pdf](http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf)

US press release:

<http://www.state.gov/r/pa/prs/ps/2012/04/187645.htm>

Further info on US Trade Representative website:

<http://www.ustr.gov/countries-regions/europe-middle-east/europe/european-union>

AmCham EU speaks for American business committed to Europe on trade investment and competitiveness issues. It aims to ensure a growth orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and play a role in creating better understanding of EU & US positions on business matters.

For more information, please contact: Anna McNally, Communications Director  
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28 November 2011

## **AmCham EU calls for improved transatlantic cooperation in financial services regulatory reform**

The American Chamber of Commerce to the European Union (AmCham EU) believes that cooperation between the US and EU remains critical in order to ensure that markets are safe, sound and well-regulated, while supporting and encouraging economic growth and the creation of jobs. The work of the G20 and other international bodies to encourage and establish global standards remains vital, and AmCham EU believes that such work will be impactful if the US and EU have similar views and approaches.

AmCham EU believes that a level playing field for the global financial services industry is essential. We believe that the best way to achieve this is to ensure that standards agreed on an international level are fully and consistently implemented on a local level, to maximise global convergence and eliminate systemic risk. Differences between regulatory regimes may occur as a result of variations in local market conditions, legal systems and stages of regulatory development. We believe that such differences should be kept within the narrowest possible band. Minimising differences between regulatory regimes will help to ensure a safe global financial system that supports international commerce and global growth, while simultaneously limiting the ability for barriers to entry and regulatory arbitrage, whereby operations are adapted so as to take advantage of loopholes in regulation.

### **Regulatory reform in a transatlantic framework: key concerns**

AmCham EU believes that current reforms must take greater account of international companies' needs for international financial services (whether these are provided by banks, exchanges, insurance companies or other financial institutions). It has been demonstrated that global corporations, government enterprises and regional firms benefit significantly from the services that large cross-border financial services firms offer, with these services being indispensable for the efficient operation of businesses operating in multiple jurisdictions.

We believe that there is a real risk of uncoordinated legislative and regulatory reform as the local implementation of international standards gathers pace. Failing to correct this situation will lead to significant fragmentation of the regulatory environment, and the resulting differences in regimes will lead to regulatory barriers and an increase in the cost of capital and of providing financial services. In turn, this will directly impact the cost and availability of credit and reduce demand for investment and the ability to innovate. Without

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innovation and investment, it is unlikely that manufacturing and services firms will be able to compete globally, drive exports or boost the growth potential of the economy. This could undermine the tax revenues and jobs such companies provide.

AmCham EU understands and supports the intent behind current regulatory reform aimed at minimising systemic risk and shielding taxpayers from future bailouts of financial institutions. However, treating financial regulation in a purely national (or regional in the case of the EU) context only works if the implications are purely national. When markets and firms are international, nationalistic approaches will fail, and current regulatory reforms can only create safer and sounder markets if they take into account the continuing needs of global companies for cross-border financial services.

### **Recommendations**

We believe that the overriding aim of US and EU financial services regulatory reform should be to:

- Eliminate inefficiencies in the international flow of goods and services;
- Link national regulatory reforms in order to prevent the creation of opportunities for regulatory arbitrage in less well regulated jurisdictions, and the unnecessary cost of multiple approaches to tackling the same problem; and
- Find ways to cooperate and ensure that international financial institutions are well supervised and regulated in a manner that supports a safe, sound international financial system without limiting economic growth and its associated benefits

The simultaneous re-writing of regulations and rules in the EU and US provides an unprecedented opportunity for both systems to work together and align in a legislative context, as well as to focus on the shared goals of minimised systemic risk and increased investor protection. It is most efficient to do this now while regulations are in transition and being shaped and passed, not once they have been finalised and implemented into local laws.

We believe that governments around the world, and specifically the US federal government and its EU counterparts, need to seize this opportunity to:

- Build on the G20 reform agenda for financial services;
- Support the development of international standards e.g., in the Financial Stability Board, Basel, International Organisation of Securities Commissions, etc.);
- Coordinate the implementation of these standards where necessary into detailed local and regional rules and laws; and
- Link various reforms- international, regional, national- so that jurisdictions do not create widely different requirements (e.g. Dodd-Frank and the Volcker Rule in the US, various EU reforms, and the proposed banking reforms in individual European states, most notably the United Kingdom).

AmCham EU has been a long-standing supporter of transatlantic convergence. We believe it is vitally important to reiterate our support as the increased volume of regulatory change will challenge the regulators' ability to meet both domestic political pressures and the need for wider international convergence in an environment where the resources for such activities remain scarce.

### *Drivers of divergence*

We believe the legislative process itself makes transatlantic cooperation more difficult. The primary legislation that has been drafted in both the US and EU has been much more restrictive than in the past, and has made it more difficult for regulators to find the flexibility to progress towards convergence. The Dodd-Frank legislation contains several very prescriptive provisions that allow US regulators little flexibility in their approach, while the EU has passed legislation that contains 'equivalence' provisions that seem to require foreign regulation to meet the requirements of the EU. In addition, the different timetables for implementing legislation on both sides of the Atlantic has and will continue to create difficulties for EU and US regulators to achieve common approaches.

We currently see three specific circumstances in which the EU and the US may diverge:

1. Areas where primary legislation creates stringent requirements that diverge;
2. Areas where the implementing regulations are crafted in a manner that creates divergences; and
3. Areas where the timing of EU and US actions create differences that encourage markets, consumers and practices to shift from one jurisdiction to another (e.g., because the other jurisdiction is delayed in making similar changes).

AmCham EU urges policy makers to reconsider methods of tackling these three drivers of divergence. The approach to coordination by the US and EU will need to evolve to incorporate more intensive dialogue between US Congress and EU lawmakers in order to ensure that concerns are addressed in the formation of primary legislation. US and EU regulators need to coordinate more effectively to ensure that more detailed regulations are as convergent as possible. In this regard, the work of the Financial Market Regulatory Dialogue (FMRD) will continue to be critical. In particular, different timings of reforms should be addressed; this is a particularly challenging issue that requires case-by-case examination so as to manage the various implementation schedules and minimise dislocation.

We wish to stress that convergence to slightly higher standards is preferable to having differences between regimes. That said, we do not agree that convergence to the maximum global standard for the sake of international convergence is necessarily appropriate. Some regimes are outliers for various local or historical reasons and in this context, the work of the US and EU should provide a strong basis for the work required at the global level. Despite some of

the differences and disputes we have had, the US and the EU remain innately similar and, as such, should be able to find common ground when developing appropriate legislation, regulation and standards.

#### *Diversification of regulatory tools*

Despite the challenges that may face the EU and the US, AmCham EU will continue to press for the EU and US to redouble their efforts to act together and in a coordinated fashion. One way that governments can continue to pursue their mutual goals would be to look behind strict rules-based regulation and use the range of regulatory tools available to them in order to achieve greater transatlantic cooperation. This approach has been advanced by President Obama and the US Office of Management and Budget where, under two executive orders, independent regulators and agencies have been encouraged to look at stricter regulatory rules to ‘identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public’.<sup>1</sup> In the past, AmCham EU has supported mutual recognition as one such tool, and while it may have fallen out of favour, we think it should be revisited in the coming years. Another possible tool could be to ensure that rule-makers on both sides of the Atlantic are explicitly required to consider and assess the risks associated with divergence from the approaches taken in other markets.

#### *Stakeholder engagement*

AmCham EU has been a long-standing supporter of the FMRD, but we believe that the dialogue between the EU and US should be deepened and broadened to include a wider range of stakeholders. The process should be opened to incorporate input from a broader range of interested parties. We understand that discussions between the EU and US take place on a regular basis at all levels, however, the final outcome of these discussions remain unclear to stakeholders. In addition, the process has become less transparent, in particular for stakeholders who do not have the capacity to follow the details of financial legislation. Financial regulation has been moving quickly, for understandable reasons, but the process has stretched the EU Better Regulation principles/US Administrative Procedure Act and made it challenging for interested parties to provide meaningful input into the process. As a result, we are concerned that the final outcome of any new financial services legislation will lack relevant input and may result in significant unintended consequences that will hinder economic recovery.

#### **Specific areas of concern**

AmCham EU would prefer to avoid lengthy equivalence processes wherever possible. We believe that automatic recognition should be achievable in many cases, such as with clearing houses. AmCham EU believes that there is a risk that equivalence provisions are used as protectionist tools and that end users will suffer from a lack of competition and choice as a result. US legislation is generally extra-territorial, and AmCham EU continues to press for some form of

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<sup>1</sup> Section 4 of Executive Order 13563 and p.3-4 of EO13579

simple recognition process. Below we list eight areas where we have specific concerns about divergence that exists between the US and the EU:

#### *Accounting*

AmCham EU calls on the EU and the US to continue cooperating on international accounting standards. The end goal of both the EU and the US must be one set of high-quality global accounting standards for multi-national companies. For this reason, we are supportive of a move to International Financial Reporting Standards (IFRS) in the US and we strongly believe that this move would encourage growth in transatlantic trade.

#### *Alternative Investment Funds*

AmCham EU believes that EU and US convergence is particularly important in Alternative Investment Funds and ongoing work on third-country issues will continue to be a main focus in this domain. AmCham EU is particularly concerned by recent proposals to introduce additional criteria for supervisory cooperation agreements that must be in place for marketing by third-country Alternative Investment Funds (through private placement, or eventually through a passport). In the aim of achieving a level playing field between the EU and US, AmCham EU urges the EU to avoid limiting professional EU investors' access to investment opportunities and depriving EU companies of a valuable source of capital by introducing such additional criteria.

#### *Capital*

AmCham EU supports international efforts to improve the quality and to increase the quantity of capital. We believe that the Basel III regulations should be implemented in an internationally consistent way. Divergences from Basel III should be kept to a minimum and mutual recognition of equivalent non-EU jurisdictions is essential.

#### *Data*

In both the US and the EU, industry will be required to provide extensive data sets to regulatory authorities, including reporting of data on swap transactions to repositories. It is in the interests of regulatory authorities and the industry that the data requirements are standardised, and in particular that there is convergence on a legal entity identification standard for inclusion in such reports.

#### *Derivatives*

AmCham EU has been a long-running supporter of the draft Regulation on Over-the-counter (OTC) derivatives, central counterparties (CCPs) and trade repositories (EMIR), and supports the move towards central clearing as required by the G20. Given the global nature of the derivatives business, convergence in the delivery of this commitment is especially important. We support a balanced and non-discriminatory approach to third-country regimes, founded upon

recognition of those that achieve equivalent outcomes to European regulation, and allowing CCPs and trade repositories located outside the EU to provide services to EU customers.

AmCham EU was particularly concerned by recent proposals to introduce ‘extraterritorial’ provisions to EMIR, mirroring equally concerning provisions in the Dodd-Frank Act in the US. It is encouraging that a process has been established for discussion between EU and US rule-makers on the detail of the derivatives regime, and this represents an important test case for the capacity of policy-makers to deliver complementary regulatory regimes that avoid the erection of barriers, such as those that will arise if, for example, intra-group transactions are treated differently based on the location of one of the affiliates.

#### *Insurance*

Although currently at an early stage, AmCham EU welcomes enhanced dialogue on insurance regulation, namely Solvency II, and believes that equivalence discussions between the EU and US should be viewed as part of bilateral negotiations between equals. At present, group solvency and group supervision are elements of Solvency II in which EU and US regulatory approaches appear to diverge. AmCham EU notes that the more limited application of insurance regulation in the US (only operating insurance entities) may mean that over-prescriptive EU definitions of group solvency and group supervision would exacerbate divergence between the EU and the US. An outcomes-based approach which focuses on policy-holder protection would be more constructive. In the case of group supervision and risk management practices, AmCham EU notes that divergences in accounting standards may ultimately determine the level of convergence in insurer solvency, and without such convergence it will be difficult for EU and US regulation to be aligned.

#### *Markets Regulation*

Regulators both in the EU and US are in the process of setting up new regulation around the functioning of exchanges and trading platforms, and the instruments that are traded. Given the inherent global nature of trading in financial instruments, it is important to closely observe to the work done in global forums, such as the Committee on Payment and Settlement Systems and the Technical Committee of the International Organization of Securities Commissions (CPSS-IOSCO) working group. AmCham EU supports the recognition given to the differences between various financial instruments being traded on different trading platforms, although we note that in some cases the practical functioning and requirements of some proposed platforms in both jurisdictions remains ambiguous.

AmCham EU also recognises G20 concerns around trading in commodities, more specifically to tackle volatility in food and energy markets, but we underline that EU or US legislation in this field should be aligned with commitments made at the G20 level to ensure that approaches in both jurisdictions are harmonised to the greatest extent possible.

Lastly, we support a balanced and non-discriminatory approach to access for third country firms to EU markets. There is a broad variety of circumstances in which investors, issuers and firms in the EU directly and indirectly interact with third country investment firms, highlighting the global nature of European capital markets when compared with the more domestic US capital markets. The regime put forward to deal with the treatment of third country issues needs to be sufficiently flexible so as to avoid restricting such interactions. This particularly applies to the imposition of burdensome licensing requirements on third country firms willing to operate in the EU. Rather than focusing on strict equivalence or the provision of exemptions to third country firms doing cross-border business, we consider that an appropriate way forward under the Markets in Financial Instruments Directive (MiFID) would be to introduce a uniform exemption allowing third country firms to meet certain minimum standards to deal with at least eligible counterparties and professional clients.

#### *Resolution of Cross-Border Firms*

AmCham EU supports the initiative of bank regulators from the EU, the US and other countries are working together under the auspices of the Bank for International Settlements to develop a harmonized framework to prepare for the risk of failure by systemically important banks. Unfortunately, significant divergences are already emerging; the new US requirement to prepare ‘resolution plans’ under the Dodd-Frank Act applies to systemically important banks, a term that captures mostly non-US banks, including many with very limited US operations.

Based on the European Commission's consultation papers published so far, it appears that the EU will take a very different approach, requiring development of both resolution and ‘recovery’ plans by all banks and investment firms, whether they are systemically significant or not. The new EU requirements will reportedly cover non-EU subsidiaries and branches of EU banks and investment firms. While both regimes have significant extraterritorial elements, neither regime sets out a workable system to ensure or facilitate international coordination. Meanwhile, the UK is considering pushing ahead with its own recovery and resolution plan requirements, as well as a major industry restructuring, without awaiting completion of the EU-level work on recovery and resolution plan requirements, or allowing sufficient time to receive and study the plans submitted by EU institutions to determine what structural changes are appropriate.<sup>1</sup>

While we understand the importance of improved recovery and resolution planning and support these regulatory initiatives, inconsistencies in the timing and scope of the new requirements are likely to lead to significant inefficiencies for global financial institutions. In addition, imposing new national or regional requirements without a meaningful framework for transatlantic coordination means that regulators have failed to learn from the collapse of Lehman Brothers. The US has failed to take international issues into account in the Dodd-Frank Act, and as representative of industry we urge the European Commission to take the lead in addressing this situation, for instance by

proposing the negotiation of international agreements to enhance regulatory coordination in this area.

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totalled €1.4 trillion in 2009 and currently supports more than 4.5 million jobs in Europe.*

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<sup>i</sup> As proposed in the Independent Commission on Banking ‘Vickers Report’, September 2011.

European Commission  
B-1049, Brussels  
BELGIUM

Monday September 22<sup>nd</sup> 2011

**RE: European Commission's Consultation on Access of 3<sup>rd</sup> Countries to the EU's Public Procurement Market.**

Dear Mr. Schlegelmilch, Dear Mr. Nootboom

The American Chamber of Commerce to the European Union ("AmCham EU") is comprised of global companies with significant investments and workforces in Europe. AmCham EU fully supports efforts by the European Commission ("Commission") to further open public procurement markets beyond existing international commitments. We therefore welcome the Commission's consultation to ensure that any initiative regarding third countries' access to the EU's public procurement market furthers the liberalization of procurement markets internationally.

To that end, AmCham EU welcomes the adoption of a new legislative initiative. If properly drafted and implemented, a new instrument could deepen competitiveness and enhance procurement markets globally. Conversely, any legislative initiative should not be a tool for economic protectionism, nor for side-stepping the WTO dispute settlement process under the WTO Government Procurement Agreement ("GPA").

Of the two alternative approaches outlined in Option 3, **AmCham EU supports Approach (B) as the best path to promote the liberalization of procurement markets.**

Conversely, Approach (A) would in principle require that contracting authorities exclude third country goods, services and companies not covered by EU international commitments, thus having an immediate disruption on procurement markets and supply chains. Outside of the EU, implementation of Approach (A) would likely be viewed as a protectionist measure, akin to a "Buy Europe" policy. It may lead to an increase in retaliatory trade measures, whereby other governments respond with their own protectionist measures. Internally, Approach A would burden EU contracting authorities, imposing new, across-the-board localization requirements that would in many cases unduly increase the cost of public projects. Approach (A) is a blunt instrument, ill-suited to achieve targeted reciprocal access for EU companies.



Although Approach (A) provides an exception mechanism, invoking such a procedure in thousands of individual instances and adjudicating individual requests would present an unworkable burden on Member State, Local, and EU-level authorities.

AmCham EU believes that a Foreign Procurement Trade Defence Instrument (“FP-TDI”) in line with Approach (B) would better serve the intended purpose of expanding procurement markets for EU suppliers. Certain principles should be reflected in the proposed instrument:

- The FP-TDI’s **objective** should be to improve procurement markets globally, not to isolate EU domestic markets.
- The **scope** of the instrument would need to be clearly defined. The reference in the consultation to *‘third countries goods, services and companies that are not covered by the EU’s international commitments’* is not clear. It is very important that the Commission rigorously defines the situations where the instrument could apply; knowing in advance the applicable law will be a key factor to be taken into account by participants to future European public tenders.
- The process should be **informed; transparent; subject to judicial review** and should ensure that **due process** is respected.
- The process should ensure **coherence amongst Member States** and provide **legal predictability**. It is important that the **Commission**, under the control of the EU judicial bodies, **be the only institution in charge of granting the ex ante authorization** to apply restrictive measures.
- In order to be WTO-compliant, **the FP-TDI should be limited in scope**, providing only for measures that restrict access to the procurement market in the EU.
- The **conditions** for imposing restrictive measures (in particular the concept of lack of *“sufficient access to public procurement markets”* of foreign countries), and the practices prompting the measures, should be **clearly defined** in the EU legislation; this will not only facilitate the operation of the FP-TDI, but also will send a clear message to third countries in terms of the procurement practices that the EU may target.
- FP-TDI should **target the discriminatory practices** in the target country, as the purpose of the measure is to open the procurement market of the targeted country and not to protect EU or third-country companies on the EU procurement market.
- Restrictive measures should not disrupt existing supply chains and therefore should not exclude from tenders products that merely incorporate components from the targeted country. **Clear rules of origin provisions will need to be established.**

- Specific rules will need to be drafted to discipline the participation of **foreign state influenced entities** in public tenders in the EU, especially in cases where EU funds are disbursed to finance the projects.
- Finally, once the Commission has reached a preliminary conclusion that the conditions for the imposition of measures are satisfied, it should issue a warning to the third country involved and indicate what companies, sectors, goods, or services the FP-TDI may target. This **“yellow card,” which should be published** in the Official Journal, would (1) increase the political pressure on the target country, potentially leading to a resolution of the issue prior to the imposition of measures; and (2) allow companies that may be affected by the measures to exercise their rights of defence.

AmCham EU looks forward to playing its part in contributing to the EU’s on-going work regarding third countries’ access to the EU’s public procurement market.

Yours Sincerely,



Karl Cox  
Acting Chair – American Chamber of Commerce to the European Union

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