

AmCham EU's response to the Federal Register Notice on the EU-US High Level Working Group on Jobs and Growth

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CONSULTATION RESPONSE

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Background and Analysis

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the opportunity to provide input to the EU-US High Level Working Group on Jobs and Growth. AmCham EU firmly believes closer cooperation in the transatlantic relationship is critical to ensuring growth and creating jobs. In times of economic instability, there is a tendency for countries and regions to look inward to find solutions to difficulties they face, however it is often the most essential time to look outward and build on existing alliances to restore confidence.

AmCham EU supports the US and EU's efforts to further integrate their economies via an agreement focused on boosting the transatlantic market and encouraging the creation of jobs and growth. The issues the US and EU face are primarily non-tariff or regulatory issues and are being addressed in a multitude of forums. 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 US and EU 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 US and EU companies, small and medium size enterprises (SMEs), 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. We are mindful that many sensitive political issues and ongoing trade disputes remain, and 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.

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. As a result, citizens in the US and EU feel uncertain about the future and are less optimistic about the possibilities for the next generation. At times, politicians feed those insecurities and call for a return to protectionism, isolationism and 'times of the past'. AmCham EU believes that the US and EU need to look forward, not backward, and work together in a positive, pro-active, ambitious fashion to create opportunities for our companies, farmers, workers, and consumers. We urge both parties to outline a vision of the future transatlantic economy for our citizens which is

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built on the same principles that have existed for the past 60 years – common values and democratic ideals – and provide a vision, hope and optimism that can help create a common path forward.

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 (IPRs) 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 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.

On 28 November 2011, AmCham EU called for leadership from the US and EU to support the jobs and growth agenda. AmCham EU urged leaders to be ambitious in using transatlantic cooperation to deliver the proper environment needed for growth and jobs. We outlined three key ways in which to help achieve this:

- An open (global) investment climate;
- Enhanced regulatory dialogue, to avoid unnecessary trade restrictions; and
- Elimination of all tariff and non-tariff barriers affecting transatlantic trade in goods and services.

The transatlantic economy generates almost \$5 trillion in total commercial sales per year and employs up to 15 million people on both sides of the Atlantic. With such an important economic relationship, based on the \$1 trillion that our companies have invested in one another in 2010 alone, AmCham EU calls upon the US and the EU to send a clear message reinforcing commitment to the highest standards of openness to, and protection for, Foreign Direct Investment. 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.

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. 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 we so urgently need.

In response to the specific points raised in the Federal Register Notice, AmCham EU will address each of the points in turn.

Conventional barriers to trade in goods, such as tariffs and tariff-rate quotas

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 US and EU 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 US and EU. In addition, the cash flow benefits that would be created could be used to help expand investment.

Reduction, elimination or prevention of barriers to trades in goods, services, and investment and reduction, elimination or prevention of unnecessarily 'behind the border' non-tariff barriers to trade in all categories

AmCham EU believes that the removal or reduction of non-tariff barriers is the most important aspect of a potential US-EU 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 US and EU.

In this area, we would encourage governments to structure a potential agreement to look first at prevention, reduction and then elimination of non-tariff barriers.

Below are some comments on some specific areas which we encourage to be reviewed for possible inclusion in any EU-US vehicle.

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 US and EU. As the EU embarks on enhanced harmonisation of its data protection regimes, and the US revisits its own data privacy legislative framework, US and EU 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.

Further, it is important to consider that growth opportunities for the US and EU 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 WTO GATS give 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 US and EU to modernise their approach 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 US and EU 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 OECD 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 US and EU are well positioned to lead the world in the development of a 21st century services and cross-border data transfer agreement.

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.

US and EU 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 US and EU 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 US and EU 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 furthered through the emergence of an EU counterpart to the US Intellectual Property Enforcement Coordinator. Such a 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.

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.

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, and is needed for innovative and creative enterprises (including SMEs) that fuel European competitiveness and innovation. We welcome the reinvigoration of the US-EU Investment Dialogue. The October 2011 meeting of our officials, the first since 2008, clearly establishes that the US and the EU share a common agenda on investment issues, as outlined in the letter dated 14 July 2011 that we co-signed with several other trade associations.

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Maintaining a stable investment environment between the US and EU is important. What concerns us, as the largest foreign investors in Europe, is the possibility that either the US or EU 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 US or EU more difficult in the long-run.

We think that the US and EU should continue their work on investment, and in particular on ensuring that strong investment protections are established and enforced in third countries. 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 all of Europe. We believe that the priority should be placed on ensuring the rights outlined in existing agreements are retained.

¹ Please see Annex 1.

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 US and EU. 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 CFIUS, and with restrictions at the sub-federal level. We hope that work on investment would be able to focus on the trillions of dollars, euros etc. worth of investments that take place between the US and EU, and ensure that the appropriate protections are in place.

Public Procurement

AmCham EU would welcome further work between the US and EU on opening public procurement markets. If properly drafted and implemented, an agreement between the US and EU 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 US and EU 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 US or EU domestic markets.

AmCham EU has previously provided comments on a potential European public procurement instrument – we believe some of the thoughts we included in that paper are also applicable to potential work in the US and EU context, and have attached the paper for additional review.²

Other issues

Rules of Origin: AmCham EU encourages the US and EU to work on harmonising rules of origin regionally and globally, and implementing them bilaterally and globally via the WCO and WTO.

Trade Facilitation: AmCham EU would welcome further work between the US and the EU to improve trade facilitation that would significantly reduce the transaction costs for transatlantic and international trade. 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 US and EU 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 Transatlantic Economic Council announcement on progress on the mutual recognition of EU and US customs security schemes (namely the EU

² Please see Annex 2.

Authorised Economic Operator [AEO] and the US Customs-Trade Partnership against Terrorism [C-TPAT]) – is a good example.

Trade Disputes/Dispute Settlement: We must be mindful that not all non-tariff barriers can be addressed in a free trade agreement. It is important to balance the desire to be ambitious with some of the existing realities Calibration will be key. AmCham EU believes that markets should be open to goods and services, and customers and consumers should be able to select the products that most appropriately meet their needs. However we believe that it would be better to move ahead with an ambitious agreement, leaving aside some long-standing differences, and preferably find alternative mechanisms the US and EU could use to address and resolve these disputes. It is of utmost importance to find further ways to improve US-EU cooperation, and thereby aid jobs and growth and take advantage of the possibilities, rather than delay progress because of issues, despite their importance, that are relatively smaller than the potential overall benefits.

Opportunities for enhancing the compatibility of regulations and standards

AmCham EU has been a long-standing supporter of the US and EU's work on regulatory cooperation, both in the broader context and in sector-specific areas. The US and EU 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. The US and EU have similar, although not identical, health and safety concerns for their citizens. 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 in a possible agreement should be explored. Enhanced technical regulatory dialogues should seek holistic solutions to suit the needs of all parties and would not cause any unfair competitive disadvantages. While the expectations and commitment to meet them should be firm, we urge that the process remain flexible and able to evolve over time depending on changing circumstances. The process should also include regular participation of US and EU stakeholders, including industry, given the enormous importance of transatlantic economic relations to both economies.

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.³ 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 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-USTEGA.

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.

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 emerging technologies. The TEC works particularly well when it is focused on 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.

With regard to existing trade disputes, we encourage the US and EU 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 US and EU have ultimately been resolved

³ 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=EN&guiLanguage=en>

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using other means, and some continue to remain unresolved despite WTO rulings. Trade agreements and trade rules have limits, and the US and EU should think about how best to address those issues that impact on trade and investment, but 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 US-EU FTA.

In the financial services area, AmCham EU has been a long-standing supporter of the Financial Markets Regulatory Dialogue (FMRD), where the US and EU regulators meet and discuss issues of mutual interest. AmCham EU believes that cooperation between the US and EU 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 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 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 US and EU 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 US and EU regulatory convergence in financial services, where we discuss these issues in detail.⁴

Standards. There is great interest in pursuing work on standards. The US and EU 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 summit⁵ should be made mandatory.

Enhanced cooperation for the development of rules and principals on global issues of common concern and also for the achievement of shared economic goals relations to third countries

⁴ Please see Annex 3.

⁵ http://trade.ec.europa.eu/doclib/docs/2011/december/tradoc_148393.pdf

AmCham EU is interested in seeing the US and EU cooperate in encouraging application and enforcement of WTO principles globally. While the Doha Development Round 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 US and EU and more globally. In addition, there are some elements of the DDA that can be picked up and progressed through bilateral, pluri-laterals, etc., and we would encourage the US and EU to look at such issues more closely.

For example, US and EU negotiators should take the lead on freeing trade for clean technology. US-EU tariffs on clean technologies should be eliminated; US-EU 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. US and EU companies are world class providers of many services, and we would encourage the US and EU to support efforts for a pluri-lateral agreement on services.

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.
