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AmCham EU's Position on Proposals to Strengthen the Market Abuse Regime in the European Union

The American Chamber of Commerce (AmCham EU) welcomes the European Commission's initiative to further strengthen the Market Abuse regime in the European Union (EU). AmCham EU supports the proposals, initially tabled on 20 October 2011, to review the Market Abuse Directive by way of a Regulation and a Directive on insider dealing and market manipulation. However, the text of these initial proposals was not able to capture behaviours such as the manipulation of market-based benchmarks which can lead to investor losses and market distortions.

These indicators, based on banks' self-reported estimates of wholesale borrowing costs, are essential elements in the financial markets as they constitute the basic reference rate for pricing a number of instruments, such as derivatives and loan contracts valued at trillions of euros. They include the London Interbank Offered Rate (Libor) for different terms and currencies and variations for other markets such as Euribor for the euro area and Tibor for Tokyo.

Therefore, following the recent scandals of Libor manipulation, there is a need to restore confidence in the financial markets as well as secure the appropriate degree of protection for investors and ultimately, consumers. From this perspective, AmCham EU members support the incorporation of additional amendments to the October 2011 proposals aimed at ensuring the highest possible investor confidence and market integrity.

New Amendments Proposed

The amendments to the proposal for the Regulation on insider dealing and market manipulation (market abuse) consist in the extension of its scope to also include benchmarks (Recital 20(a) and Article 2(3)), the incorporation in Article 5 of a definition of "benchmark" largely consistent with the one used in the proposal for a Regulation on Markets in Financial Instruments (MiFIR), and the addition of "manipulation of benchmarks" as an offence of market manipulation defined in Article 8.

The amendments to the proposal for the Directive on criminal sanctions for insider dealing and market manipulation aim at making the manipulation of benchmarks a criminal offence and hence, punishable. Benchmarks are included in the definitions (Article 2). Article 4 is modified to explicitly capture manipulation of benchmarks when committed intentionally as a "criminal offence of market manipulation". Finally, the European Commission also broadens the criminal offence by incorporating behaviours of "inciting, aiding

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and abetting and attempt” (Article 5) also in relation to the manipulation of benchmarks.

The proposed Regulation and Directive are planned for a single reading and vote in Committee on 5 October 2012 and a single reading and vote on 2 January 2013 by the Plenary of the European Parliament.

Legal Certainty and Consistency

AmCham EU welcomes these amendments as they clearly identify the actual or attempted manipulation of a benchmark itself, as well as any other action that manipulates the calculation of the benchmark, including the benchmark’s methodology, as an offence and include this kind of behaviours into the general prohibition of market manipulation. This will increase legal certainty and deter any potential manipulation of benchmarks since competent authorities in EU Member States will be able to impose administrative sanctions without the need to prove any effect on prices.

However, the amendments are drafted in wide terms and some of the provisions may require some additional clarification. For instance, the definition of “benchmark” as proposed by the Commission is too broad and raises a number of issues relating to scope, enforcement and jurisdictional limitations. The definition captures “all commercial indices”, which includes proprietary and non-financial commercial indices. In our view, there should be a regulatory distinction between firm sponsored ‘private’ indices and survey based ‘public’ indices in terms of the level of governance required. Some of our members publish thousands of indices, and a protocol that may have been drafted from the perspective of survey based public indices may not be appropriate for all benchmarks.

In terms of enforcement, it is not clear how the EU intends to deal with wrongdoers from third countries, or with firms or individuals outside the jurisdictional reach of EU regulators.

Finally we welcome the fact that proof of intention will be necessary for the criminal sanctions to be imposed under the proposed amendments to the Directive. But unlike the primary criminal offences, the accessory offences of “aiding, abetting and inciting, and attempts” in the proposed Directive do not appear to require proof of intention. We believe that intent should be an element for any criminal offence – principal or accessory.

Global Cooperation and Convergence

Given the cross-border nature of the financial services industry, and in particular the global use of benchmark indexes, any measures adopted must ensure a level playing field for the financial services industry in all continents. AmCham EU encourages the EU institutions to strive for transatlantic cooperation and regulatory consistency, starting with its major trade partner - the USA.

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As noted in previous AmCham EU position papers, the strength of the financial services industry in the EU and US economies mean that both the EU and US should set the standard when it comes to market reform and safer financial markets and institutions. Therefore, we believe that any EU and US regulatory reform should be coordinated in order to prevent the creation of opportunities for regulatory arbitrage in less well regulated jurisdictions. This will ensure that international financial markets are well supervised and regulated in a manner that support a safe, sound international financial system without limiting economic growth and its associated benefits.

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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 US investment in Europe totalled €1.2 trillion in 2008 and currently supports 4.8 million direct jobs in Europe.

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