



The U.S. Chamber of Commerce

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### **Transatlantic Regulatory Cooperation – The Way Forward**

The Chamber sees a growing need to reduce existing, and prevent future regulatory divergences in the global market place. We are also keenly aware of the considerable benefits that fewer legal uncertainties and lower operational costs would have on American and European economic growth. A U.S.-EU agreement on regulatory cooperation would set an important benchmark for regulators around the world and reduce the risk of global regulatory fragmentation.

#### **The Risks of Regulatory Divergence:**

While the U.S. and the EU regulate towards largely similar objectives, the growing interdependence of our economies is now requiring systematic and consistent - as opposed to *ad hoc* – teamwork by U.S. and European rule-makers. A U.S.-EU agreement on regulatory cooperation would set firmly in place the principles, the means (including financial and practical) and the (political) oversight, of regulatory cooperation across the Atlantic for the 21<sup>st</sup> Century.

Our current system of modest and random collaborative efforts between our regulatory agencies will eventually generate intractable regulatory divergences – a prospect with dire economic consequences. When regulators of one part of the transatlantic market act with only partial consideration for the whole market, they risk discrepancies and/or disputes with other parts of the market. In today's globalized economy, the risk of being squeezed between the two U.S. and EU regulatory juggernauts will be enough to drive away the most innovative businesses to the jurisdictions with lax enforcement.

#### **Global Benefits of Action in the Transatlantic Market**

Building an effective and consistent regulatory cooperation system between the U.S. and the EU would have a beneficiary "halo" effect on surrounding regions. When the U.S. and the EU agree for instance on new standards, or data analysis methodologies or procedures, other countries in the world would most probably follow suit and adopt the transatlantic model. In other words, by encouraging

transatlantic regulatory cooperation, we generate beneficiary effects for the global economy.

## **U.S.-EU Regulatory Cooperation Forum**

The Chamber believes the Regulatory Cooperation Forum [“the Forum”] has the potential to become a valuable instrument of regulatory cooperation between our countries. The Forum is the creation of last year’s U.S.-EU Summit (June 2005). The Chamber and other organizations like the Transatlantic Business Dialogue (TABD) advocated in favor of better regulatory cooperation between the U.S. and the EU, and for the establishment of a permanent body, which would orchestrate this cooperation.

Today the Forum consists of bi-annual informal meetings between U.S. and EU public officials (mixture of diplomats, regulators, trade and Commission representatives) with closed door sessions followed by a public meeting with industry and consumer representatives. The Forum is free to discuss whatever it wants, from comparing administrative processes or good practices to arguing the need to regulate specific sectors, industries or economic activities.

Like all new endeavors, the Forum suffers from inherent difficulties and imperfections. In short, it does not have any authority and clear objectives. It lacks specific goals and has no resources. Left untouched, the Forum is at risk of sliding into eventual irrelevance.

The Chamber believes that the Forum can be the catalyst of something important, which could serve as a platform for more systematic cooperation between the U.S. and the EU and also as a model for broader international regulatory cooperation. (N.B.: The Chamber supports inviting other industrialized nations, e.g. Canada, Japan, to join the Agreement at a later stage.)

The Chamber advocates that the Forum should immediately be given the mission to develop the framework for a U.S.-EU Agreement on Regulatory Cooperation [“Agreement”], in time for the June 2007 U.S.-EU Summit under German presidency. In general terms, the agreement would:

- I. Define the transatlantic core values and the principles of “quality and transparent rule-making” on the basis of which U.S.-EU regulatory cooperation must occur**
- II. Delineate the scope of the Agreement**

- III. **Identify and seek consensus on key elements of rule-making that are essential for effective transatlantic cooperation, e.g., the exchange of ideas, information, data and analysis or assessment methodologies**
- IV. **Set a timeline of four to six milestones at which U.S. and EU regulators will be requested to cooperate when rule-making**
- V. **Transform the Forum into a standing body of regulatory experts and define its responsibilities**

I. **Transatlantic Core Values and Shared Principles of Quality and Transparent Rulemaking:**

Effective regulatory cooperation must be based on a set of agreed principles of quality and transparent rulemaking, derived from shared core values.

The U.S. and European economies are intimately intertwined and form a *de facto* common market, the transatlantic market.

The economic actors of this market, including investors, entrepreneurs and consumers, share the same needs, aspirations and concerns, and they expect from their governments and regulators comparable treatment and protection.

Because the U.S. and the EU enjoy similar democratic and market economy values, they also both recognize the importance of maintaining their countries' appropriate levels of health, safety, environmental and consumer protection.

The Agreement will first identify and acknowledge the existence of shared core values and principles of good rulemaking and will guarantee that under no circumstances our regulators would deviate from these fundamental values and principles when rulemaking. The Agreement will pledge that regulators on each side of the transatlantic market apply the same good-rulemaking principles when rulemaking. (N.B.: This aspect of the Agreement is not about transatlantic cooperation *per se*, but about the establishment of mutual "trust".)

When regulating, U.S. and EU regulators would agree that, based on shared regulatory objectives, they will conform to a set of principles of good (or "high-quality") rulemaking, including: transparency, consistency, accountability, and preference for market-based solutions and metrics. These principles would guide their actions and their respective administrative processes already in place or currently being reformed.

Other key principles, like the necessity to justify new regulations on a sound assessment of “risk” may prove to be more challenging to include in the Agreement, because of different perceptions of risk, hazard and the precautionary principle across the Atlantic. At the very least, the Agreement can guarantee that regulators on both sides of the Atlantic will base their regulatory activities on sound science and reasonable need assessments and that all decisions will be based on thorough and unbiased assessments and performed on the best available objective, factual, scientific and technical evidence.

In areas of lingering differences of principles between the U.S. and EU, the Agreement will task the new Forum to continue a constructive dialogue aimed at reducing these differences and at making sure these differences do not create obstacles or dampers in U.S.-EU commercial relations.

## **II. Scope of the Agreement:**

The Agreement will clearly define what is understood by “regulatory cooperation.” The Chamber supports a narrow definition of cooperation where the objective is not to “harmonize” U.S. and EU rulemaking administrative practices, and certainly not to propose “joint rulemaking.”

The Agreement will limit its scope to the making of new or updated regulations. In other words, the Chamber is not envisioning that the Agreement revisits existing regulations – rather the Agreement should be forward-looking and therefore only target the making of future regulations, especially in areas of new technologies, products, services and other business practices. The convergence of existing regulations should continue to be managed under ongoing mutual recognition efforts and similar international, regional and/or bilateral means to make regulations compatible.

## **III. Key Elements of Rulemaking Cooperation:**

The Agreement will identify key elements of rulemaking that are essential for effective transatlantic cooperation, e.g., the exchange of ideas, information, data and analysis or assessment methodologies, and task the “new Forum” (i.e., entity created by the Agreement) to pursue maximum convergence and removal of technical and legal obstacles to transatlantic cooperation in these areas. These key elements of rulemaking cooperation include but are not limited to:

- a) Similar (but not necessarily identical) procedural requirements
- b) Impact assessment and measurement guidelines
- c) Confidentiality agreements
- d) Treatment of data
- e) Exception, disagreement and “opt-out” clauses

- f) Process for open stakeholder consultation
- g) Presumption of the validity of rulemaking rationales proffered by the transatlantic partner; mandatory explanation of the rationale for any deliberate divergences

The negotiators of the Agreement will initially seek to reach a basic consensus on these issues with an understanding that further bilateral discussions may be warranted once the Agreement is in place. The new Forum will be tasked to manage this dialogue.

### **Procedural Requirements**

The Agreement will not seek to merge U.S. and EU administrative processes or to push for joint rulemaking. Rather, it will guarantee that whatever rules are being considered, and whatever the administrative processes to make these rules, both sides will trust each others' rulemaking systems and whenever possible they will take into consideration the other party's views or concerns, and impact on the transatlantic market.

### **Impact Assessment & Measurement Guidelines**

The Agreement will lay out a number of guidelines to conduct impact assessments related to the probable "outcome" of the proposed regulations.

Regulators perform various impact assessments to make their cases in favor of new regulations. By nature, impact assessments are subjective. In order to reduce differences of interpretations or perceptions across the Atlantic, similar or comparable impact assessment principles and methodologies need to be agreed by the contracting parties.

To accomplish these goals, the Agreement will first have to identify the types of impact assessments deemed necessary to achieve "top-quality regulations" sought by the contracting parties including risk, cost-benefits, international trade, small business, and competitiveness impact assessments.

The Agreement will then identify "similarities" in the U.S. and EU impact assessment methodologies and measurements and task the new Forum to pursue a constructive dialogue in this field, which will help regulators on both sides of the Atlantic develop compatible systems to identify, predict and assess the likely consequences of proposed rules.

The Agreement will task the new Forum to identify areas where specific U.S.-EU impact assessment cooperation is feasible, notably in areas where impact assessment results or data set of one party could be "safely" used by another party, without the need to reproduce similar tests, analysis, modeling, etc.

Significant economies of scale and savings could be thus achieved by U.S. and EU regulators.

### **Confidentiality Agreements**

The Agreement will address the challenges of confidentiality and allow for exchange of confidential information between U.S. and EU regulators. Transatlantic regulatory cooperation simply cannot happen if confidentiality guidelines are not in place. Precedents exist (e.g., competition/anti-trust U.S.-EU cooperation).

The Agreement will define general confidentiality principles and specific steps/guidelines to allow regulatory agencies to exchange confidential information and data.

### **Treatment of Data**

U.S. and EU regulators abide by strict rules of data collection, analysis and dissemination. The U.S. and the EU will have to agree on technical, legal and ethical guidelines to be able to share information and data.

The Agreement will look at the treatment of data in several ways:

- a) Identify best practices and technologies in data treatment, and task the new Forum to look for commonalities and efficiencies in data treatment
- b) Set guidelines for confidentiality agreements or “safe harbors” to allow for the sharing of data
- c) Create incentives to avoid duplicate or redundant data collection and analysis
- d) Prima-facie reciprocal validity in treatment of technical/economic data

### **Flexible Geometry:**

The Agreement may initially cover a sub-set of regulatory bodies. It can be open to include other agencies as a matter of executive discretion.

## **IV. Phases of Cooperation:**

The phases of cooperation will logically have to follow the regular administrative rulemaking processes used on each side of the Atlantic. Obviously, the U.S. and EU have very different administrative systems, complicated by the fact that the EU is not a federation and that its sovereign member states have their own distinct administrative processes and rule-making bodies in place.

Regulators in modern democracies tend, nonetheless, to follow a fairly similar approach to rulemaking, especially from the initial conceptualization of a rule to the final proposal for rulemaking. The first phase of rule-making (conceptualization to final rulemaking proposal) offers several opportunities of international cooperation which the Agreement will include.

The first phase of rulemaking includes an initial period of identification and definition of policy objectives during which regulators share ideas and consider multiple regulatory options to respond to the policy objectives. During that period of initial assessment, choice is still open and there is no formal process in place. This initial phase offers an ideal platform for initial consultations with international partners. It allows for shared thinking and early warning. This should be a priority phase of cooperation (but not necessarily formal) and must be included in the Agreement (A).

Regulators then go through a period of initial assessment and information gathering, possibly through consultation. An administrative process is set in motion and during this phase, regulators perform data collection and assessment or analysis, which could also involve outside consultations and involvement of third party experts (B). This period is then generally followed by additional and more refined impact assessments of each relevant option, which usually open the door to consultations and eventually to a final proposal for rulemaking. The Agreement will allow for a second cooperation period during this phase of rulemaking. This cooperation period would be formal and mandated in the respective administrative processes. In addition to exchange of information, regulators will, upon request, exchange data and if necessary file formal comments that must be taken into consideration by the other party.

A subsequent phase of rulemaking begins when regulators agree on a rule proposal and launch the administrative process to have this rule approved. During this phase, parties interested by the rule proposal have one or several occasions to review, assess and give comments. The Agreement would guarantee that U.S. and EU governments and private parties would be allowed to comment and that their comments would be taken into consideration when the regulators prepare and issue the final rule (C).

Yet another phase of rulemaking starts when the formal process of final rulemaking begins. This process allows for reviews, legal contests and comments and there also the Agreement will guarantee that U.S. and EU governments and private parties are allowed to address their issues and comments and have access to legal and administrative contest (D).

Once the final rule is approved, the implementation phase begins. The Agreement will guarantee that U.S. and EU parties are allowed to review or address issues relevant to the implementation and enforcement of the new rule (E).

The Agreement will define several “cooperation linkages” to take place between the U.S. and EU at specified phases (A to E) of their respective rulemaking streams. While the U.S. or the EU may be in the process of proposing a new rule, the other party will be guaranteed to have several opportunities for cooperation from the rule inception phase to much later during the final rulemaking phase.

Under no circumstances, the Agreement will require that if one party is in the process of proposing a new rule, the other party must start proposing a similar rule. The Agreement is not advocating “joint rulemaking” but comity between rule-makers.

The “cooperation linkages” defined in the Agreement will specify when and how U.S. and EU regulators are expected to cooperate with their transatlantic counterparts. The Agreement will also define the kind of cooperation (early warning, exchange of ideas, information, data, comments, etc.) required during each phase. The Agreement will define cooperation broadly and include informal communication to formal exchange of information and data to filing comments and possible legal or administrative contest.

#### **V. Body of Independent Experts – The New Forum:**

The Agreement will transform the Forum into a body of about 20 or fewer independent regulatory experts with equal representation from the U.S. and the EU. The Forum members will form a nucleus of experts who understand, appreciate and respect the administrative, legislative and legal processes in places on both sides of the Atlantic.

The existing Forum’s format should remain in place until the Agreement is effective. Its role until then should be solely focused on the preparation of the Agreement.

The “new” (i.e., once the Agreement is effective) Forum will have several responsibilities:

- a) Promoting transatlantic trust and mutual understanding between U.S. and EU regulators
- b) Foster efficiencies and convergence between U.S. and EU rulemaking processes in designated areas of good rulemaking (see Section III “Key Elements of Rulemaking Cooperation”)
- b) Resolve misunderstandings and disputes.

Funding for the new Forum will be provided for by the U.S. and EU governments and possible private sector/industry participation.