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October 31, 2012

Daniel Mullaney
Assistant U.S. Trade Representative for Europe
and the Middle East
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20508
Submitted by Electronic Posting

Re: U.S. EU-Regulatory Compatibility; USTR-2012-0028

Dear Mr. Mullaney:

We submit these comments on behalf of an informal group companies that is highly supportive of the goals shared by the U.S. Government and the European Commission (EC) to reduce excessive regulatory costs, unjustified regulatory differences and unnecessary red tape. *See* "Promoting U.S. EC Regulatory Compatibility," 77 Fed. Reg. 59702 (Sept. 28, 2012)("USTR Regulatory Compatibility Notice").

We likewise applaud and support the objectives of Executive Order 13609 of May 1, 2012, "Promoting International Regulatory Cooperation," 77 Fed. Reg. 26413 (May 4, 2012)("International Regulatory Cooperation Order"). We also note that on November 29, 2012, the Federal Trade Commission (FTC) will be holding a forum on protecting consumer through cross-border codes of conduct such as the new Asia-Pacific Economic Cooperation (APEC) privacy rules developed by the FTC, Department of Commerce, U.S. business and consumer entities, and counterparts within the APEC countries. At the APEC Summit on November 13, 2011, the President stated that "streamlining and coordinating regulations [to] encourage trade and job creation" would be one of the APEC leaders top three priorities.

The EU has expressed similar interests in cooperation, harmonizing, cutting red tape, facilitating international data transfers and streamlining rules applicable to the cross-border data flows essential to operate multinational business. For example, in May 2011 speech about the

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proposed, new EU Data Protection Regulation, Viviane Reding, EC Vice-President and EU Justice Commissioner, stated the following about Transatlantic cooperation:

The EU and the US, have similar concerns with regard to the risks posed to privacy by new technologies. The Commission also shares the main objective of the Bill: strengthening individuals' trust in new technologies through compatible standards. This is a good opportunity to strengthen our transatlantic cooperation. . . . In the age of globalisation of data flows we need a common approach of countries sharing the same values. Otherwise we may end up with standards imposed by others. The EU-US "Safe Harbour" mechanism is a good starting point. We should build on it. The core elements should be security, interoperability and personal data protection. Such a scheme could set the world standard and be a reference for businesses around the world.

In another significant development in the EU, on October 23, the European Parliament adopted a resolution incorporating the following helpful findings and goals to promote transatlantic regulatory alignment:

Recognises that overly burdensome regulatory standards serve as significant barriers to trade, and that additional growth could follow from addressing such barriers; emphasises that an alignment of EU and US regulatory standards should aim at reaching the highest common standard and, thereby, also improve the product safety for consumers; underlines the need to avoid creating new (even if unintended) barriers to trade and investment, especially in key emerging technologies and innovative sectors;

Supports efforts towards maximum upstream regulatory cooperation on standards, regulatory coherence and better alignment of standards, to further promote trade and growth that could improve efficiency and effectively address NTBs [not-tariff barriers]; reinforces the HLWG's [High Level Working Group with U.S.] claim that any deal negotiated that would exclude regulatory cooperation and reform would be economically insignificant and politically untenable on both sides; stresses that regulatory compatibility is the foremost challenge of an ambitious transatlantic agreement, and recalls in this respect that regulatory differences and behind-the-border measures constitute a particular barrier to trade for small and medium-sized enterprises (SMEs); ...

Calls on the stakeholders to make full use of the invitation launched by the HLWG to present, before the end of 2012, concrete proposals to address the impact on trade of the regulatory differences that unnecessarily impede trade; urges stakeholders on both sides of the Atlantic to work together where possible to establish joint positions;

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Takes the view that given the increasing importance of e-commerce, data protection standards play an essential role in protecting customers both in the EU and US; stresses that both the EU and the US need to address rising cyber security threats in a concerted manner and in an international context; points out that interoperability and standards in the domain of e-commerce, recognised at global scale, can help to promote more rapid innovation by lowering the risks and costs of new technologies; .

. . .

Calls, in particular, for every effort to be made towards the creation of truly open and integrated transatlantic financial services and digital markets, given the positive effects this would have on both sides of the Atlantic in a reasonably short time frame; encourages the discussion of the inclusion of a financial services chapter, given the interconnected nature of our markets; highlights the importance of intensified exchanges and cooperation of financial services regulators on both side of the Atlantic in order to share best practices and identify regulatory gaps;

Is strongly convinced that it is necessary to tackle the issues of equivalence, convergence and extraterritoriality as those are critical to understanding how the EU and the US can face both the uncertainty of their own current economic and financial problems as well as facing global standard setting and competing models to financial regulation and supervision

In his International Regulatory Cooperation Order, President Obama specifically directed “the promotion of good regulatory practices internationally, as well as the promotion of U.S. regulatory approaches.” The Order seeks to advance “appropriate strategies for engaging in the development of regulatory approaches through international regulatory cooperation, particularly in emerging technology areas.” The Order states:

The regulatory approaches taken by foreign governments may differ from those taken by U.S. regulatory agencies to address similar issues. In some cases, the differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts might not be necessary and might impair the ability of American businesses to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

We look forward to working with the U.S. Government, and colleagues based in the EU to promote “reforms to existing significant regulations that address unnecessary differences in regulatory requirements between the United States and its major trading partners, consistent with

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[the International Regulatory Cooperation Order],” by helping provide information establishing where regulatory differences are unnecessary. And, while we recognize the International Regulatory Cooperation Order is not, by its terms, binding on independent agencies, the logic of the Order applies equally to such agencies. Indeed, in Executive Order 13579 of July 11, 2011, “Regulation and Independent Agencies,” 77 Fed. Reg. 41587 (July 14, 2011), the President stated that “[i]ndependent regulatory agencies, no less than executive agencies, should promote” wise regulatory decision-making, and requested that independent regulatory agencies engage in “careful analysis of the likely consequences of regulation,” and make regulatory “decisions ... only after consideration of their costs and benefits (both quantitative and qualitative),” to the extent permitted by law.

Thus, the present USTR request for comments, and the obligations of the International Regulatory Cooperation Order should apply to independent regulatory agencies no less than other executive agencies. Moreover, while the International Regulatory Cooperation Order appears to exclude the Dodd-Frank Wall Street Reform and Consumer Protection Act, “and other laws relating to financial regulation,” we note that the Dodd-Frank Act itself directs “international coordination” and “international harmonization” in numerous provisions, so the goals of the Executive Order, and of the USTR Regulatory Compatibility Notice, should apply equally in the context of financial regulation.

The item identified in this letter provides an initial suggestion from an informal group of companies to promote greater transatlantic compatibility. We hope to have the opportunity to develop these suggestions further with USTR, and add additional items for your consideration. The preliminary view indicated here is essentially a “placeholder” to stimulate further attention and dialogue on these issues. We would be pleased to identify business, legal and regulatory experts in these areas to discuss the subjects in substantive detail, and to provide additional data and formal assessments.

Indeed, given the importance of and support for this initiative, we would respectfully request that USTR re-open the comment period and ensure greater attention to this effort than it has received to date. Our canvassing of companies and trade associations indicates that there is not as much awareness of USTR’s request for comments on regulatory compatibility as the subject warrants.

Preliminary View on Promoting Greater International Regulatory Compatibility
Regarding Data Protection

Relevant Sector: Technology and Consumer Protection

Relevant Agencies in U.S. and EU:

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U.S. – FTC, Commerce, HHS, CFPB, Banking Agencies, White House, State Attorneys General

EU – EC Justice, Member State Data Protection Authorities

Relevant Citations in U.S. and EU:

U.S. – FTC Act, HIPAA, Gramm-Leach-Bliley, Electronic Communications Privacy Act, Children’s Online Privacy Protection Act, and numerous other federal and state privacy, data security and data breach notification statutes

EU – Data Protection Directive (officially Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data), Member State implementing legislation

ePrivacy Directive (2002/58/EC) (regulating the processing of personal data and the protection of privacy in the EU electronic communications sector)

Description/Assessment of Differences, Benefit-Cost Impacts, Impediments: Perceptions of substantive differences have stymied international data transfers to the detriment of consumers and businesses between different EU Member States, on both sides of the Atlantic, as well as with multinational businesses that operate in additional regions; technology development and deployment, and innovation, in the EU has been impeded by EU rules; emphasis on enforcement over prescriptive rules has increased risks of doing business in the US

Possible Responsive Steps or Solutions: Promote interoperability of EU and US regimes as well as regimes in additional markets; promote mutual recognition leading to “adequacy” determination for U.S.; expand current Safe Harbor arrangement; develop codes of conduct for “cloud computing” and other inherently international information technologies; promote more compatible cybersecurity and data breach practices; promote improved understanding of privacy laws and law enforcement assistance laws and procedures in the EU and US; promote modernization of Mutual Legal Assistance treaties among the EU and US.



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Thank you for considering our initial views in support of promoting the goals and objectives of greater international regulatory compatibility, including to the extent desirable and appropriate, transatlantic regulatory harmonization and coordination, mutual recognition, interoperability, and streamlining.

As previously noted, we would strongly encourage USTR to re-open the comment period, and ensure greater attention to this important initiative to promote international regulatory compatibility.

Respectfully submitted,

Alan Raul

Alan Charles Raul