TRANS-ATLANTIC
BUSINESS COUNCIL

December 13, 2013

Mr. Ignacio Garcia Bercero
Director, DG Trade
European Commission
B-1049, Brussels, Belgium

Mr. L. Daniel Mullaney
Assistant USTR for Europe and the Middle East
Office of USTR
600 17th Street NW
Washington, DC 20508

RE: TTIP -- Additional comments on financial services regulatory cooperation

Dear Mr. Mullaney, Dear Mr. Bercero:

The Trans-Atlantic Business Council (TABC) strongly supports the efforts of the U.S. and the EU in negotiating a Transatlantic Trade and Investment Partnership (T-TIP) to deepen an already extraordinary economic relationship through forging a truly barrier-free trading and investment environment across the Atlantic. Success will ultimately be centered on how ambitious and comprehensive an agreement U.S. and EU leaders are willing and committed to negotiate. It is of great importance for T-TIP to include financial services regulation in the negotiations, given its fundamental importance to financial services institutions and real economy companies as end users of financial services.

Addressing looming regulatory obstacles and increasing incompatibility across the Atlantic is a key component for T-TIP, and no sector where regulation frustrates the full potential should be left out of the negotiation. Working to strengthen financial services regulatory cooperation through T-TIP is not about creating an environment conducive to less regulation, but rather it is about creating more effective regulation that recognizes the realities of today's global commerce. Trade in financial services does not stop at political boundaries and neither should regulation. More robust U.S.-EU regulatory cooperation should nonetheless still reflect the sovereign rights of independent regulators.

With this revised version of our initial recommendations, we reiterate our call for T-TIP to address greater regulatory coherence across the Atlantic in the area of financial services.

Should you have any questions please do not hesitate to contact me.

With kind regards,

Tim Bennett

Tim Bennett
Director General
Trans-Atlantic Business Council

The principled approach to EU-US financial services regulatory coordination

The Trans-Atlantic Business Council (TABC) supports deeper integration of the EU and U.S. economies through trade, investment and regulatory cooperation. Improved regulatory cooperation at a horizontal level could enhance regulators' efficiency and thus effectiveness in fulfilling their domestic regulatory mandates. In particular, negotiators should agree on provisions that will establish a clear goal of having counterpart U.S. and EU regulators determine where their regulatory regimes aim for compatible outcomes. New tools and a governing process to guide regulatory cooperation on both a cross-cutting and sector-specific basis will help address divergences in existing sets of regulations and in future regulatory measures.

Financial services is an area ripe for deeper regulatory integration and should be part of the TTIP negotiations. Greater compatibility of well-regulated EU and U.S. financial markets would function as a catalyst of growth for thousands of businesses of all sizes who rely on them for funding, exports and risk mitigation. Ensuring that EU and U.S. regulations are compatible will enhance this important strategic and economic relationship, and create jobs and economic growth in communities on both sides of the Atlantic.

Financial services involve traditional trade and investment provisions pertaining to the General Agreement on Trade in Services (GATS), horizontal issues that are of general importance to a broad range of industrial or services providers, and regulatory issues, which might have market access implications. The latter is of particular importance in order to avoid increasing opportunities for regulatory fragmentation of EU and U.S. financial services markets, which would also frustrate efforts of international bodies such as the Financial Stability Board (FSB) that have been charged by the G20 with finding ways to make national financial regulatory systems more consistent and aligned.

The process of upgrading the framework for financial regulation is well under way in G20 countries and beyond. The G20 reform effort effectively addresses shortcomings in financial regulations and market infrastructures and products. In the process of legislation and rule-making on those issues, regulatory cooperation between the EU and the U.S. should play a significant role in the process of setting international standards and best practices related to financial markets regulation and oversight. It is essential for economic growth that the EU and the U.S. continue to coordinate and collaborate on finding the best approaches to financial markets regulation. A framework for regulatory cooperation within existing forms of dialogue that take place on both a transatlantic and global basis should be the most effective way forward and should add greater transparency to regulatory differences and commonalities.

A piece of the T-TIP negotiations should be to focus on improving the current institutional, regulatory and policy status quo on financial services, which is a services sector that already displays high volumes of cross-border activity in the form of both commercial presence and cross-border services trade. Enhanced compatibility between the EU and U.S. financial regulatory environment would help decrease the opportunities for regulatory arbitrage, reduce the cost of duplicative regulation, and provide legal clarity on prudential, market infrastructure and product issues for financial market participants on both sides of the Atlantic. It would also enhance the ability of financial supervisors to effectively monitor cross-border financial markets activities, reinforce supervisory cooperation, and ensure the goals of public policy can be most effectively achieved.

The Financial Markets Regulatory Dialogue (FMRD) and associated dialogues such as the Insurance Dialogue are already working to pursue these goals. The importance of this work is increasing, as legislation and rule-making in implementing G20 principles in the EU and in the U.S. have in some cases increased barriers to trade in the transatlantic financial market. Explicit legislative or other official action is necessary to facilitate barrier-free access to each other's financial market. Also, there is no explicit mandate on either side to strive for such an objective.

Therefore, we propose consideration of a regulatory framework for agencies of financial regulation on both sides of the Atlantic to explicitly strive for EU-U.S. regulatory cooperation, based on the working assumption that either common standards or mutual recognition should be reached. In clearly limited circumstances in which due to profound differences in constitutional, institutional or legal contexts, neither objective seems attainable, a comply-or-explain approach might be pursued to explicitly lay down why none of the approaches seems feasible.

We recognize that there may be issues for which regulatory harmony cannot be reached and that some topics would be more effectively dealt with as part of trade negotiations. That said, this should not prevent efforts to achieve negotiations on other issues where agreement can be reached. We suggest categorizing financial services issues by means of four boxes. The first two boxes would represent trade domains and need not necessarily be dealt with within the framework of the FMRD, whereas the third and fourth box issues would be addressed within that framework. More concretely:

(1) The first box would include traditional trade and investment provisions consistent with the four modes of delivery of services trade in the GATS.

- The EU and the U.S. should work towards strengthening the national treatment of financial institutions, a commitment to current levels of market access, and removing remaining restrictions to trade at the level of the EU and its member states and at the federal and state level in the U.S. (cross-border supply).

- The EU and the U.S. should work towards establishing and binding free access via foreign direct investment of EU and U.S. domiciled financial institutions across the Atlantic (commercial presence) as well as strong investment protection rules.

- The EU and the U.S. should improve current practical arrangements on the temporary movement of qualified persons by improving the status of qualified persons but also in financial services, by reducing administrative burdens and by providing mechanisms for business visitors (for more details see TABC's submission to USTR, May 2013, 'Workforce' section).

(2) The second box would include horizontal business issues that are of importance to financial markets. These include cross-border, intra-corporate use of data and the interoperability of legislation pertaining to data protection and security, cyber security and also consumer protection issues. European and global companies have a substantial economic need for cross-border data flows between countries and regions with very different privacy regimes. Facilitating responsible global information flows is thus key. There is very useful work underway between the Commission, EDPS and the Article 29 Working Group with the APEC Data Privacy Subgroup to explore how EU Binding Corporate Rules and APEC Cross Border privacy Rules may interoperate. The process is not an attempt to diminish privacy rules, but rather to find ways to recognize the level of validated compliance in other regimes as part of demonstrating adequate compliance with EU requirements. Such cross-recognition would greatly accommodate companies operating in multiple jurisdictions and facilitate EU growth within the global economy as well as provide benefits to consumers regardless of their country.

(3) The third box would include some financial regulatory issues which create difficulties in mutual market access and are, in principle, for legal, political and economic reasons, viable areas for on-going regulatory cooperation (for example, rule-making on derivatives and on trading of securities). All of these topics are presumably at issue in the FMRD which would be the right body to address these topics. In addressing these issues the FMRD should use the following principles as a guide:

    - Undertaking consultation involving industry input and a structured legislators' dialogue in advance of proposing and adopting legislation or regulation;

- Avoiding to the greatest extent possible the imposition of extraterritorial requirements, and wherever possible, recognizing the equivalence of regulatory regimes that achieve similar outcomes and share objectives but that may in some instances differ in approach;
- Using impact assessments when developing draft regulation(s) and their impact on international trade and investment; align with consultation and stakeholder outreach;
- Adopting international standards and global best practices, and promoting the development of high quality international standards by global bodies;
- Supporting closer coordination among regulators in the oversight of entities regulated in both markets to enhance oversight while avoiding overlap and duplication; and
- Periodically review existing regulations to gauge regulatory compatibility.

(4) The fourth box would include jointly agreed prudential carve-outs of such provisions that cannot be subject to considerations of mutually assured market access. These issues would mostly be those clearly dominated by financial stability, investor and/or client protection considerations and which, due to insurmountable differences in constitutional or legal provisions on either or both sides of the Atlantic, cannot be bridged in the foreseeable future by either common standards, mutual recognition, "substituted compliance", "equivalence decisions" or similar legal methods. While accepting the pre-eminence of supervisory concerns on both sides of the Atlantic, even in these cases there is scope for progress to be made in further talks improving supervisory conditions and practices across the Atlantic, in particular with respect to an efficient division of labour between host and home regulators. In addition, there should be some consideration paid to the issue of proportionality of financial supervisory and market access considerations. The FMRD should pursue measures that would limit to the extent possible negative spill-over impacts of regulation.

While issues in the first two boxes may not require continuous consultation with financial services firms, once brought into force, on-going regulatory cooperation may have to be based on a more elaborate consultation process involving industry input, a structured legislators' dialogue to determine whether general financial services legislation rather than financial regulation and rule-making are at issue, and high-level political oversight. Also, enhanced transparency of efforts to align regulatory approaches would be welcome, both in terms of work streams, schedules, objectives (in broad categories as described above), and progress to reduce the potential for regulatory fragmentation.

Concerning the third and fourth box, governments and regulatory agencies on both sides of the Atlantic should establish a working program to identify which types of issues should be put into which type of treatment, and how market access issues arising from inconsistent legislation or implementation can be rectified. The default, in all of these questions, should be that issues be treated in the third box with a view to achieving mutually agreed and compatible regimes. As a first step, this working program may need to agree on criteria for issues that would need a prudential carve-out and develop related lists of general prudentially acceptable regulatory practices within financial services. For most financial services regulatory matters, there should be a rebuttable presumption that issues should be approached with a view towards achieving mutually agreed and compatible regimes.

Agreeing such a framework would not replace but rather formalize and facilitate regulatory coordination already established through the FMRD. The FMRD should be an established body within the TTIP infrastructure. This framework would be complementary to global regulatory coordination efforts of the G20, FSB, and other international standard-setting bodies because it would help to facilitate implementation of those agendas and ensure consistency on both sides of the Atlantic which would help drive consistency around the world.

Rather than describing the numerous issues of partly inconsistent or conflicting rule-making in the EU and the U.S. in the field of banking and securities (see Report of the EU-U.S. Coalition on Financial Regulation on "Inter-jurisdictional Regulatory Recognition", June 2012, attached) or in other sectors of financial services, we intend to highlight only the most important areas requiring additional efforts of aligning regulation on both sides with the aim of maintaining an integrated transatlantic financial market while deepening it in the medium-term.

Selected sector-specific market access and regulatory dossiers

Banking and securities

Enhancing capital and liquidity standards

- Most jurisdictions, including the EU and the U.S., are well advanced in implementing the recommendations of the Basel Committee on Banking Supervision (BCBS) on capital and liquidity standards (Basel II, II.5 on the trading book and complex securitizations and Basel III).[1] The U.S. is implementing Basel II, approved final rules covering the market risk elements of Basel II.5 to become effective in 2014, and issued Basel III rules on capital and on the leverage ratio which are effective in 2015. The EU passed legislation on Basel II.5, on main elements of the Basel III framework, i.e. the Capital Requirements Directive IV (CRD IV) which includes new rules on risk-based capital, globally systemically important banks (G-SIBs), and domestic systemically important banks (D-SIBs) as well as requirements on the leverage ratio. Rulemaking on the LCR is varied in the EU and US. In the EU, CRD IV leaves the final detail to the EBA. In the U.S., the Federal Reserve issued a Notice of Proposed Rulemaking (NPR) to introduce a U.S. Basel 3 Liquidity Coverage Ratio (LCR). Comments on this NPR are due by January 31, 2014. The U.S. LCR is 'super-equivalent' to the Basel and CRD IV provisions, thus perpetuating a lack of global harmonisation.
- TABC is concerned that recent regulatory developments are leading to fragmentation of capital rules in the EU-U.S. financial market as jurisdictions are pursuing national ring-fencing policies for foreign banks, rather than continuing to rely on the primacy of home country supervision and consideration of capital and liquidity issues at the group level. There appears to be a lack of trust behind the pressure for national subsidiarization and structural separation of banks.
- Ongoing work on guidelines and supervision of banks' governance and risk management practices should be closely coordinated.
- It will remain important to harmonize the implementation of capital and liquidity rules in the EU and the U.S. to avoid costly and complex adherence to divergent and conflicting rules. Particular emphasis should be given to the potential extraterritorial impact of certain U.S. legislative or rule-making provisions under discussion.

Improving banking resilience and establishing bank resolution regimes

- Coherent implementation of rules for significant institutions: Specific rules for G-SIBs should be implemented in a similar manner and in a way which respects the rights and responsibilities of the home regulator. We urge the EU and the U.S. to make it clear that the definition of criteria, the supervisory tools and the requirements regarding the loss-absorbency capacity on systemically important financial institutions be implemented consistently and in a way that recognizes each other's domestic approach. This holds true with respect to the treatment of domestic systemically important banks, too. The FSB/BCBS framework was issued a year ago, and implementation in the EU and the U.S. should be closely aligned; implementation is due by January 2016.
- Similarly, rules on the winding down of systemically important institutions in case of failure must be aligned to allow mutual recognition of regimes and to avoid competitive distortions stemming from differences in treatment. Regardless of the resolution strategy adopted for a particular institution (i.e. single point of entry versus multiple point of entry),

[1] See Basel Committee on Banking Supervision. Report to G20 Leaders on monitoring implementation of Basel III regulatory reforms. August 2013.

authorities in the EU and U.S. will have to cooperate to plan and execute G-SIB resolution plans. A proper assignment of the task to the home country supervisor is an important element in an efficient framework.

- TABC supports on-going efforts to establish legal frameworks of bank resolution, including cross-border dimensions, clearly defined rights of and procedures for supervisory authorities to intervene early, orderly preparations of resolution plans by financial institutions, and a strengthening of market infrastructures. Also, cross-border crisis management groups as well as co-operation arrangements have to be arranged; the FSB reported to the leaders that groups are established now but that improvements in practical conduct are still necessary.
- Legal frameworks for cross-border resolution: U.S. and EU authorities should continue their work towards establishing comprehensive and harmonized legal frameworks for the resolution of financial institutions including harmonized international rules to cope with cross-border issues in resolution. The respective legal issues pertaining to the proper resolution of financial contracts subject to various U.S., EU member state and third country jurisdictions poses particular problems which should be addressed comprehensively. The FSB has published draft guidance on legal gateways for information sharing and intends to do more to support recognition of resolution action with respect to financial contracts. We strongly support this work. There is still considerable debate and legislative action in the EU and the U.S. on domestic structural banking policy which might lead to divergent rules pertaining to the resolvability of banks which might endanger the integration of the transatlantic market place. Early consultation on and mutual adjustment to structural policies are clearly desirable and should aim at avoiding market fragmentation.
- Emerging rules for the bail-in of creditors in case of a resolution are not clearly aligned. This may lead to significant cross-border issues. A coordinated approach would be clearly desirable. The FSB rightly called for an international approach to the adequacy of loss absorption capacity in resolution. This should ensure that the amount, composition and nature of loss-absorbing capacity for use in bail-in are appropriate to the resolution strategy for that individual bank and facilitate recognition between jurisdictions if foreign banks effectively already meet national loss-absorbing requirements.

Infrastructure

OTC derivatives reform and compatibility of regulation

- Core policy objectives towards a sounder framework for derivatives clearing should be set in line with G20 commitments. The U.S. and the EU are well advanced in implementing the G20 action plan, even with a delay beyond the end-2012 deadline. In future, most standardized OTC derivative contracts will be traded on exchanges or electronic trading platforms and cleared through central counterparties, derivative contracts will be reported to trade repositories and non-centrally cleared contracts will be subject to higher capital and margin requirements. Of course, ongoing efforts should be closely coordinated internationally and in the transatlantic marketplace.
- Inconsistent implementation of G20 principles poses fragmentation risks and avoidable costs. We are concerned that current efforts of rule-making on both sides may effectively result in overly burdensome regulatory costs because of divergent implementation. Also, the compatibility of emerging EU and U.S. rulebooks is not assured which has the potential to lead to complex and conflicting legal provisions for the centralized clearing of contracts and legal uncertainty. Complex equivalence assessments have to be undertaken line-by-line to guide decision-making on equivalence decisions in the EU-U.S. context and in other bilateral relationships, however, the focus should be on whether outcomes are equivalent and the materiality of divergences. Divergences which are not material should trigger non-equivalence decisions. We are concerned that users of derivatives may face an unnecessarily costly reality while providers may have to cope

with conflicting regulatory settings for certain products, such as swaps. We recommend that efforts at regulatory cooperation be strengthened with a view to reaching mutually consistent solutions that meet the regulatory objective while avoiding overly costly and conflicting legal provisions. While recent agreements between EU and U.S. regulators are first steps, the road towards efficient cross-border rules is still difficult but needs to be travelled. We fully support the principle that regulators should be able to defer to each other's regimes in the EU-U.S. context while paying due respect to home country regulatory regimes. Some progress towards "substituted compliance" with CFTC rules at the entity level affecting capital and risk rules seems possible while clearing, reporting and trading rules still diverge substantially which will not allow for a swift move towards such an approach. The EU in turn must decide whether EU rules are equivalent to European Market Infrastructure Regulation (EMIR) rules on derivatives.

- Jurisdictional oversight should not overlap or underlap and regulators should be able to rely as appropriate on the supervision and regulation of regulators in other jurisdictions.
- Regulation of central counterparties: Of equal importance is the regulatory approach to central counterparties. We support the FSB work on providing a regulatory environment with fair and open access for market participants, cooperative oversight arrangements, effective resolution and recovery regimes and appropriate liquidity arrangements. Also, due consideration should be given to the proper supervisory structure in the emerging new EU supervisory architecture as well as in the U.S. context.

Insurance

Transatlantic trade and investment between the United States and the European Union is the most dynamic economic relationship in the world. With products and services across industries and sectors imported and exported across the Atlantic, insurance is particularly important to U.S.-EU trade. Premiums generated from insurance and reinsurance total well over $185 billion annually, representing over two-thirds of the current global premium volume. The significance of our bilateral insurance and reinsurance relationship to transatlantic trade cannot be overstated.

In the Final Report, the High Level Working Group (HLWG) on Jobs and Growth addressed a number of regulatory areas and non-tariff barriers that affect the insurance industry. The report specifically cites bilateral mechanisms for addressing these trade issues which arise from technical regulations and conformity assessment procedures and standards. TABC welcomes this as an important step to cementing the progress already being made through the FMRD and the U.S.-EU Insurance Dialogues.

Regulators and policymakers on both continents essentially acknowledge that regulatory barriers are as much of a hindrance to cross-border trade (and growth) in financial services as other non-tariff barriers. In order to best tackle such regulatory barriers, we urge that the FMRD and the U.S.-EU Insurance Dialogues not be "silo" activities separate from the mission of the HLWG.

TABC firmly believes that support for financial services and insurance issues at the highest levels of government would lead to greater coordination and better regulatory outcomes. We feel that political support would help U.S. and EU insurers become more competitive in rapidly maturing insurance markets, which we hope is a desired goal for policymakers on both sides of the Atlantic.

From our conversations with EU and U.S. stakeholders, there is a shared optimism that greater convergence between the two financial services regulatory regimes is possible. After years of constructive dialogue, EU and U.S. regulators formally came together in 2012 for the first time to discuss supervisory issues. They consequently, issued a joint report that compares the certain aspects of each regulatory and supervisory insurance system. TABC believes this represents a significant step forward for insurance supervisory convergence, which could be threatened by an ambition of full regulatory convergence for all sectors within financial services. TABC would urge T-TIP negotiators not to lose sight of the recent progress made in the area of insurance but rather further embrace and build off that momentum.

TABC also welcomes the HLWG Final Report's request that negotiators include "provisions or annexes containing additional commitments or steps aimed at promoting regulatory compatibility in specific, mutually agreed goods and services sectors." We believe that the insurance sector would benefit from such actions.

TABC's comments herein are rooted in the overriding objective of growing and maintaining the largest bilateral insurance trade and investment relationship possible. With that in mind, we want the European Commission and U.S. Administration to consider these thoughts:

- Regulatory Awareness: U.S. and EU regulators and policymakers should recognize different supervisory methodologies (e.g., state-based versus country-level), but agree to analyze these methodologies based on outcomes and whether or not those outcomes are equivalent. This approach (and mindset) should achieve similar levels of protection for policyholders. A practical example of the lack of deeper mutual recognition between U.S. and EU regulators occurs in a situation where a national supervisor demands a more holistic view of an entire insurance group's operations. The natural reaction is usually for the regulator to request additional information, including complex data from the parent entity. As local regulators become increasingly sophisticated, such requests can be expected to multiply (absent any global or regional attempts to rationalize the process). This is a troubling trend for companies with a large global presence. In order to address this, we would encourage efforts by the U.S. and EU to design an approach for each jurisdiction to recognize robust group supervision conducted in another jurisdiction in order to prevent duplicative regulatory requests.

- Global Policy Coordination: Efforts by leaders in the U.S. and the EU should be coordinated with other global policy setting institutions such as the G20, the FSB and the International Association of Insurance Supervisors (IAIS), especially in light of the recent announcement by IAIS of their intent to develop an international capital standard for the insurance industry. From TABC's standpoint, a single transatlantic voice would be most influential to communicate with such institutions. Going forward, close cooperation between the EU and the U.S. will be important in determining and regulating global systemically significant insurance companies and other financial institutions.

- Reinsurance Collateral Requirements: EU and U.S. policymakers should set a goal of achieving full parity of treatment for reinsurers trading on a cross-border basis between the EU and U.S. so that there are no statutory collateral requirements for approved reinsurers under either supervisory regime when trading into the other's jurisdictions. This goal can be achieved by the conclusion in the first instance of a "covered agreement" (to use Dodd-Frank terminology) on reinsurance prudential issues between the EU and the U.S. to enable mutual recognition of each other's reinsurance supervisory regimes to occur, the removal of all discriminatory rules currently applicable and the forestalling of new discriminatory rules.

- Industry Perspective: Consultative meetings with the private sector should be scheduled regularly, with the goal of bringing increased transparency to the process and ensuring that policymakers' decisions are informed by industry based perspectives and experiences.

- Pensions Policy: Pensions policy is very much a national policy matter for the U.S. and individual EU Member States informed by national employment, contract and other policies. It is not an area which requires regulatory or policy harmonization. It is however a sufficiently important area to ensure that proposals by the EU Commission or U.S. Government do not have major impacts on a transatlantic basis. For example, additional calls on capital into corporate-sponsored pensions would divert significant funds from investment in growth and jobs, and could act to chill investment sentiment.

In conclusion, we believe that the fundamental goal of the insurance industry—to protect policyholders from risks while ensuring financial security—is consistent with the stated goals of the U.S. and EU political leadership for the T-TIP. Insurance is a fundamental ingredient for creating a robust and seamless economy that can sustain growth and job creation on both sides of the Atlantic. As such, we hope that the above recommendations will be seriously considered.

Accounting

For a number of years now, cross-border filers have benefitted from the willingness of the U.S. and EU to accept financial statements prepared according to IFRS and U.S. GAAP, respectively. In the United States, while U.S. issuers are still required to use U.S. GAAP, the Securities and Exchange Commission (SEC) eliminated the requirement that foreign registrants who file their financial statements on the basis of IFRS as promulgated by the IASB have to reconcile their financial statements to U.S. GAAP. Similarly, the EU agreed to allow U.S. GAAP issuers to file their financial statements in the EU without accounting for material differences with IFRS. These measures have had a positive impact by reducing the costs of preparing financial statements and have further encouraged cross border investment flows.

As the IASB and US FASB move forward with projects to improve their standards, we urge U.S. and EU regulators to continue to allow such access. Although the IASB-FASB joint standard-setting projects under the 2006 Memorandum of Understanding IFRS-U.S. GAAP convergence projects are nearing completion, the TABC believes it is essential that we do not lose the positive benefits we have already achieved.