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Re: Draft Joint Report on the Review of the Application of European Union and United States Regulatory Impact Assessment Guidelines on the Analysis of Impacts on International Trade and Investment

Ladies and Gentlemen:

The following comment is submitted on behalf of the Federation of German Industries (Bundesverband der Deutschen Industrie e.V., BDI) in reference to the *Draft Joint Report on the Review of the Application of European Union (EU) and United States (U.S.) Regulatory Impact Assessment Guidelines on the Analysis of Impacts on International Trade and Investment* (the Report).

The BDI supports the objectives agreed at the 2007 U.S.-EU Summit, particularly the *Framework for Advancing Transatlantic Economic Integration Between the United States of America and the European Union* (the Framework), and applauds the results and next steps announced at the inaugural meeting of the Transatlantic Economic Council (TEC) in November. This is a positive start. It is important to maintain a high level of ambition.

Transatlantic trade and investment are important motors of economic growth, well-paying jobs and prosperity. Liberalized markets can revitalize depressed regions, lower consumer prices and increase societal welfare. Regulations that are divergent, incompatible, unduly burdensome, costly, ineffective or restrictive, can hinder the benefits of trade and investment.

The examples cited in the Report demonstrate the clear need to incorporate, into the regulatory process, new policies and procedures for according greater weight to examining and responding to the effect that regulatory or legislative decisions may have on transatlantic investment and trade. Examining cross-border effects indirectly through the reflection of domestic changes is not sufficient. We appreciate the opportunity given to the private sector to comment on the Report.

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The Federation of German Industries (BDI) is the leading umbrella organization of German industry and industry-related service providers. The BDI is an association of associations. The BDI speaks for 37 sector associations, 15 regional offices located throughout Germany, and 100,000 companies with a workforce of eight million individuals. The BDI is a founding member of BusinessEurope, headquartered in Brussels. A list of BDI's members is attached as Annex A to this letter.

The BDI is represented in Washington, DC by the Representative of German Industry + Trade (RGIT).

## **1. The Significance of Transatlantic Investment and Trade**

Transatlantic trade and investment are the bedrock of the global economy. Trade between the EU and the U.S. accounts for nearly 40 percent of global trade. EU and U.S. joint Gross Domestic Product (GDP) account for nearly 60 percent of world GDP. Billions of dollars are transacted transatlantically every day.

Foreign trade and foreign direct investment (FDI) are vital to the U.S. economy. From 1987-2006, the U.S. received \$2 trillion in new FDI.<sup>1</sup> Having dropped sharply after 9/11, FDI is on the rise. In 2006, new FDI reached \$150 billion, the highest level since 2000.<sup>2</sup>

The U.S. subsidiaries of foreign companies employ nearly 5.1 million Americans, supporting a payroll of \$336 billion and providing an average compensation of \$66,000, 32 percent above the private sector average.<sup>3</sup>

Transatlantic trade and investment are a priority for the BDI and its members. In 2006, when German Chancellor Angela Merkel identified the transatlantic economic relationship as a priority issue, the BDI assisted the Chancellor in the development of a proposal to strengthen further economic ties between the U.S. and the EU.

German industry is a leading investor in the U.S., with the highest number of companies on the list of the 50 largest U.S. subsidiaries of foreign corporations.<sup>4</sup> The 3,000 German businesses here support nearly 700,000 jobs.<sup>5</sup> German firms have invested \$200 billion in capital stock and \$20 billion in real estate.<sup>6</sup>

The BDI strongly supports efforts to maintain, and to enhance transatlantic trade and investment by reducing regulatory barriers that can impede trade flows, increase costs to companies and consumers, and impair the competitiveness of American and European businesses.

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<sup>1</sup> *Insourcing Mergers & Acquisitions* by Professor Matthew J. Slaughter, prepared for the Organization for International Investment (OFII), December 2007, pg. 7. Hereafter: "OFII Study".

<sup>2</sup> *OFII Study*, pg. 6.

<sup>3</sup> *OFII Study*, pg. 6.

<sup>4</sup> *The Insourcing 50: A List of the Largest U.S. Subsidiaries of Foreign Companies*, OFII, October 2007, pg. 3.

<sup>5</sup> *Trade*, German American Chambers of Commerce, January/February 2008, pg. 17.

<sup>6</sup> *German Business Matters*, RGIT, pg. 7.

## 2. First Principles

As OMB, the European Commission Secretariat General and the other participating organizations go forward, it will be instructive to establish a set of first principles to inform and to help align the initiatives and efforts. The BDI recommends the following principles and guidelines.

### a. Context

The **Framework** reaffirms a common commitment to “deeper transatlantic economic integration and growth” to “benefit our citizens and the competitiveness of our economies”, and to “accelerate the reduction of barriers to international trade and investment.”<sup>7</sup>

To reduce barriers posed by new regulations, Annex I of the Framework seeks to develop a methodological framework to ensure comparability of impact assessments, to identify regulatory officials to participate in the U.S.-EU High Level Regulatory Cooperation Forum (RCF), and to reinforce the existing transatlantic dialogue on regulatory cooperation.

Annex I calls for increased activity in certain sectors, application of the *2002 U.S.-EU Guidelines for Regulatory Cooperation and Transparency* (2002 Guidelines), and implementation of the *Roadmap for Regulatory Cooperation* (the Roadmap). Annex IV identifies objectives for enhancing transatlantic trade and investment from the standpoint of investment.

At its meeting in November, the TEC reconfirmed the U.S.-EU Summit objectives, and announced formation of an Investment Dialogue to reduce transatlantic barriers and to promote open investment regimes.

These are useful mechanisms with generally sound agendas for enhancing transatlantic investment and trade through the reduction of burdensome regulations and other measures. It may be advisable to expand the circle of participants to include legislators on both sides. Affording the private sector continued opportunity to provide commentary and share views will be important also.

### b. Increasing Utility

Economic theory posits that two parties will willingly engage in trade where the transaction increases the utility of each party.<sup>8</sup> The same holds for trade across political and geographic boundaries. In the absence of coercion and other distortive and disruptive elements, international investment and trade generally benefit the transacting parties and the broader societies to which the parties belong.

Regulators should factor this into the respective processes for modifying existing regulations and promulgating new rules and standards. Economic factors should receive due weight in the decisional calculus.

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<sup>7</sup> *Framework for Advancing Transatlantic Economic Integration Between the United States of America and the European Union.*

<sup>8</sup> Similar points were made in the Report.

The regulatory process should observe, and explicitly incorporate, certain procedural elements that are the hallmark of high-quality decision making in the public sector.

The regulatory process should be **transparent** to the greatest possible extent, to parties engaged in the process, to parties that will be subject to the resultant regulation, and to parties that may otherwise have interest in the matter. Transparency lends authenticity and acceptability to decision making by revealing the deliberative process used to reach the given results. This is particularly important to the public.

The regulatory process should be **participative** to the public and **responsive** to public comment. There should be opportunity for public review of, and comment on, proposed regulations well in advance of final action to promulgate regulations and enter them into force. The regulatory authorities should be required to review submitted comments, to factor them into the composition of final regulations, and to indicate the extent to which the final regulations were influenced by the comments.

Given the transatlantic context of the Report, the regulatory process should allow for some measure of **participation by “the other side”**. This may vary from the process used for domestic parties. To the extent possible, regulatory plans, drafts and proposals should be shared with appropriate parties on the other side. The earlier this happens, the easier to identify problems or difficulties. Apart from regulation-specific correspondence, EU and U.S. regulatory counterparts should communicate on a regular basis.

The regulatory process should adhere to procedures that are **rational, justifiable and verifiable**. Rationality implies a reasonable basis for the decision taken. Generally, it will be possible to justify a rationale decision with reference to the criteria and other factors applicable to the decision process. Verification refers to the ability to check the validity of the decision by examining the underlying procedural calculus. These procedural notions bear a close connection to substance, discussed below. They characterize sound decision making.

d. Cost-benefit

To ensure regulations do not unduly burden transatlantic commerce to the detriment of businesses and consumers, the regulatory process should include an **explicit computation and comparison of the expected costs and benefits** associated with the regulation in question. The focus should be on monetizing and quantifying the costs and benefits. Qualitative judgments should be used only where it is not possible to reasonably monetize or otherwise quantify a given risk or benefit.

The cost-benefit computation should give **due weight to the burden anticipated for affected companies**. U.S. and EU regulatory authorities should consider a common threshold for determining when to cancel or modify regulatory plans based on the net cost generated by the cost-benefit analysis.

The substance of regulatory decisions will vary according to the issue or problem to be solved. That notwithstanding, regulatory decisions should, to the greatest extent possible, be based on top-quality data. Regulatory decisions should derive from the processing of information that is **credible, accurate, objective, complete** and **verifiable**. These qualities should be required of quantitative and qualitative data.

Credible data springs from sources known to be (or regarded as being) trustworthy, neutral and objective. Verifiable data can be checked and recomputed. It can be tested to ensure accuracy and completeness. Requiring regulatory decisions to use peer-reviewed data, where available, may be a tool for maintaining quality information, although the cost and logistics associated with peer reviews may be substantial.

The BDI encourages the appropriate U.S. and EU authorities to reach common understanding on the tenets and application of “**sound science**”, a concept used in the U.S. to differentiate from “junk” science.

### 3. Specific Comments

OMB solicited comment with regard to the following:

1. *Both sides value the timely announcement of planned legislative and regulatory initiatives, and of transparency concerning upcoming corresponding impact assessments. In this context it is desirable to establish ways to indicate whether a planned regulatory or legislative initiative, might have an impact on international trade or investment, or might otherwise be of interest to U.S., EU third countries.*

Yes, it would be desirable and important to establish procedures for indicating whether a planned regulatory or legislative initiative might have an impact on international investment or trade, or otherwise be of interest to U.S., EU and third countries. This could be achieved several ways.

Fully implementing the 2002 Guidelines would constitute a big step toward greater communication and exchange of information between the EU, the U.S. and third countries with regard to regulatory cooperation and transparency. The 2002 Guidelines identify important objectives, operational elements, post-implementation factors and procedural aspects that could be taken into consideration.

Establishing, and posting for public access online, a common, master calendar disclosing the regulatory activities (planned, pending, final) of relevant U.S. and EU authorities would promote the objective identified above. It would be important to establish a sound process for identifying and collecting the relevant data, for keeping the information up-to-date, and for creating, hosting and maintaining the host website. Sufficient human and financial resources, and technical capabilities would be relevant to this project .

2. *Both sides underline the importance of having their impact assessment methodologies and procedures incorporated into a transparent set of rules or guidelines that are accessible to the public, accompanied by a rigorous system of quality control. In this context it is crucial to have public consultation and notice and comment mechanisms in place that give the authorities, businesses, and citizens of the, EU, U.S. and third countries the opportunity to voice solicited or unsolicited comments on planned initiatives, and to reflect their input in impact assessment and impact analysis reports.*

Yes, the BDI agrees on the importance of establishing regulatory procedures that allow for comment by interested parties, that require decision makers to examine and take into account comments submitted by interested parties, and that attach impact assessment methodologies and processes to a framework of transparency and rigorous quality control.

To account for systematic differences between the U.S. and EU, and to reflect the important role legislators have regarding regulations, it would be advisable to consider ways to include legislators and their input.

3. *Both sides are committed to make their proposed policies and accompanying impact assessments public, which will allow the other side to respond if it expects international trade and investment issues to be significant. The results of relevant underlying technical analysis and data should generally be published or otherwise made available.*

**Yes**, the BDI supports procedures to grant public access to proposed policies and accompanying impact assessments, including, to the extent practicable, the relevant underlying technical analyses and data that played a substantial role in the regulatory decision making.

4. *As regards methodologies concerning the impact on trade and investment per se, both sides have identified possible elements for consideration in their respective rules and guidelines for impact assessment. In particular, if preliminary analysis suggests that a proposal might significantly affect international trade and investment, guidance should be provided on the type of analysis that would be useful to make decision makers aware of the international impacts. This could include:*

- *an analysis demonstrating the need for any proposed regulation that might directly impede international trade or investment,*
- *an analysis of the degree in which different groups (foreign and domestic businesses and consumers) are affected by such a proposal or*
- *a recommendation that existing international standards or regulatory approaches, if applicable, should be analysed as an explicit regulatory alternative.*

The **BDI agrees** on the importance of ensuring that regulatory procedures take explicit account of the effect that proposed (or existing) regulations may have on transatlantic investment and trade, and concurs there is a need to modify existing regulatory procedures on both sides of the Atlantic to give greater prominence and attention to the effects on transatlantic investment and trade.

As explained in the Report, domestic considerations play a dominant role in existing regulatory procedures in the U.S. and EU, even where the regulatory guidelines require the authorities to evaluate non-domestic impacts. Given the interconnectivity of global commerce and modern societies, greater attention should be given to the transatlantic and international ramifications of proposed regulations. Evaluating regulatory effects on international investment and trade should constitute a mandatory element of regulatory procedures, and should be performed directly by the responsible authorities, not indirectly as proxy to changes experienced in the respective domestic nations.

## Conclusion

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The declarations, goals and initiatives launched at the 2007 U.S.-EU Summit, in concert with the transatlantic fora and projects commenced in prior years, represent a solid foundation for strengthening further transatlantic economic relations. Streamlining transatlantic investment and trade through the alignment of future regulations and the reduction and avoidance of regulations that are unduly cumbersome and costly to business and consumers, will play a key role in realizing the Summit objectives.

It is important to maintain a high level of ambition, and to push hard for tangible results that will produce lasting results. The BDI urges the participating executive branch, governmental and regulatory authorities, plus the other key stakeholders, to recognize that each regulatory system may offer particular advantages worthy of adoption in the context of transatlantic investment and trade. We stand ready to support this important effort, and would be pleased to answer any questions you may have regarding the comments contained in this submission.

Respectfully submitted on behalf of the BDI



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CC

Mr. Dominic Mancini, OMB (per email)



**BDI Member Associations**

- German Aerospace Industries Association (BDLI)
- German Airports Association (ADV)
- Association of the German Automotive Industry (VDA)
- German Building Materials Association (S+E)
- Association of the German Chemical Industry (VCI)
- Federation of the German Cigarette Industry
- German Construction Industry Federation (HDB)
- German Electrical and Electronic Manufacturers' Association (ZVEI)
- VDMA Federation of the German Engineering Industry
- Federation of German Fine Ceramic Industry (AKI)
- Federation of the German Food and Drink Industries (BVE)
- German Foundry Association (DGV)
- Glass Industry Federation (BV Glas)
- BITKOM German Association for Information Technology, Telecommunications and New Media
- Association of Interconnected Energy Companies and Regional Energy Suppliers in Germany (VRE)
- German Mining Association (WVB)
- Federation of the German Non-Ferrous Metals Industry (WVM)
- Association of the German Oil and Gas Producers (WEG)
- SPECTARIS. German Industrial Association for Optical, Medical and Mechatronical Technologies
- Federation of Paper - Cardboard and Plastics - Processing Industry (HPV)
- Association of the German Petroleum Industry (MWV)
- German Association of Research-based Pharmaceutical Companies (VFA)
- Association of Plastics Processing Industry (GKV)
- Association of German Potash and Salt Industry (VKS)
- German Pulp and Paper Association (VDP)
- German Rubber Manufacturers' Association (wdk)
- German Shipbuilding and Ocean Industries Association (VSM)
- German Steel Federation
- Structural Steel and Power Engineering Association SET
- WSM Federation of Steel and Metal Processing
- Association of Sugar Manufacturers
- Central Confederation of the German Textile and Fashion Industry
- Federation of German Tourism Industry (BTW)
- The German Association for the Waste Disposal Industry (BDE)
- Federation of German Woodworking and Furniture Industries (HDH)
- Federation of the German Saw and Wood Industry (VDS)
- Working Group for miscellaneous Industries