

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

SEAN HEATHER
EXECUTIVE DIRECTOR
GLOBAL REGULATORY COOPERATION

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September 29, 2011

Michael McCarthy
Executive Director
Administrative Conference of the United States
1120 20th Street NW Ste. 706 South
Washington, DC 20036

Dear Mr. McCarthy:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region, is deeply committed to promoting and advancing international regulatory cooperation to the benefit of regulators, consumers, and businesses. On April 28, 2011, the Chamber was pleased to partner with ACUS to host a program on the role and responsibility of regulatory agencies to engage in international regulatory cooperation. In part, as a result of that collaboration the Chamber is pleased ACUS has agreed to review its 1991 recommendations regarding international regulatory cooperation with an eye to revising and updating it.

The original ACUS recommendations on international regulatory cooperation were prescient in recognizing the needs for U.S. regulators to engage with their foreign counterparts in order to satisfy their statutory mandates in a globalized economy. Twenty years later, the world is becoming increasingly inextricably intertwined, and regulators must engage in some form of international regulatory cooperation in order to meet their regulatory obligations. Updates to the 1991 ACUS recommendation and closer adherence by regulators to any new recommendations are fundamental to fulfilling their regulatory objective related to health, safety, the environment, etc. However, regulators engaged in international regulatory cooperation are increasingly in a position to also aid in boosting U.S. trade and competitiveness.

The Chamber appreciates the opportunity to offer comments designed to maximize the value of the ACUS report and shape updated ACUS recommendations.

GENERAL COMMENTS ON SUMMARY AND BACKGROUND INFORMATION

Benefits to Regulatory Cooperation

First, the Chamber believes it is imperative that the report clearly underscore the benefits of international regulatory cooperation from a regulator and consumer perspective. As mentioned in the introductory section of the ACUS report the primary benefit of international cooperation is that it helps regulators accomplish their statutory obligation. The world is now an interconnected marketplace, and participation in various forms of international regulatory cooperation is essential to regulatory effectiveness over global supply chains. Further, undertaking international regulatory cooperation makes the job of regulators easier by efficiently allocating resources through cooperation with like-minded foreign counterparts. These actions also lead to enhanced consumer protections as competing regulatory frameworks become more aligned assuring higher levels of protection.

A secondary and supplemental benefit of international regulatory cooperation is the removal of non-tariff barriers to trade, resulting in an increase of U.S. trade, exports, and competitiveness. In his 2010 State of the Union Address, President Obama established the national goal of doubling U.S. exports in the next five years, and the Administration subsequently launched the National Export Initiative. International regulatory cooperation can make a meaningful contribution to boosting exports by facilitating the removal of non-tariff barriers to trade.

It is also important for the ACUS report and subsequent recommendations to endorse that these two benefits, enjoyed by regulators, consumers, and business alike – helping regulators better achieve their statutory mandates domestically and the removal of non-tariff barriers to trade – are not inconsistent with one another. A regulator’s statutory obligation to meet its regulatory objective need not be compromised when a regulator engages in international regulatory cooperation to minimize the frictions regulations can have on trade at home or abroad. It is important that the final ACUS report and corresponding recommendations make this point clearly.¹

¹ The Chamber commends the ACUS report’s existing commentary in this regard, but would encourage an even stronger articulation of this point.

Defining International Regulatory Cooperation

As ACUS deliberates its recommendations, it is important that it have a common definition of the various forms in which international regulatory cooperation can take. The Chamber believes international regulatory cooperation can be divided into the following methods:

1. Domestic regulatory promulgation – this includes:
 - a. Regulators working directly with their foreign counterparts in coordination regarding emerging regulatory policies to develop regulations that meet a legitimate regulatory objective in a manner that is no more trade restrictive than necessary.
 - b. Consideration during the rulemaking process for the potential impact regulation may have on trade and U.S. global competitiveness as part of cost benefit analysis and impact assessments.²
2. Removing regulatory divergence – this includes:
 - a. Advocating the advantages of U.S regulatory best practices, the body of U.S. administrative law, and the transparency of the U.S. regulatory system as a whole; and
 - b. Encouraging foreign regulators to adopt or mutually recognize U.S. regulations.

Regulation as Trade or Investment Barriers

In section III, page 8, the ACUS report enumerates several ways in which regulatory barriers can become trade irritants or even an outright trade impediments including: “(i) uncertainty about foreign regulations, which could force U.S. manufacturers to “make practical design, production, and commercial decisions without adequate information”;(ii) uncertainty caused by excessive time to process appeals from regulatory decisions; (iii) ineffective or overly lengthy enforcement efforts; and (iv) reimbursable advances (loans) and direct subsidies for EU companies.”

² To this extent the Chamber applauds the ACUS report highlighting recent efforts by OIRA and USTR to note existing obligations of U.S. agencies and the importance of reducing unnecessary regulatory barriers to exports and trade as a means to promote economic growth and job creation. We also suggest ACUS consider adding a reference to OMB’s 2011 Report to Congress on the Costs and Benefits of Federal Regulations, recommending that “in order to promote trade and exports, and thus increase job creation, agencies should promote regulatory cooperation initiatives with key trading partners.” See http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf.

The Chamber believes ACUS lists most of the key concerns of businesses. However, in the interest of capturing the full scope of regulatory barriers to trade and investment, we would suggest adding uneven and inconsistent enforcement of regulation. We also suggest altering the reference to “EU companies” found in (iv) to just “companies” as U.S. businesses encounter subsidies in a broad range of countries beyond the European Union. Further, the Chamber also suggests the lack of regulatory transparency as well as inadequate notice and comment and stakeholder engagement by foreign regulators with foreign stakeholders be added as barrier separate and apart from what is captured in (i).

Using “Alignment” Instead of “Harmonization”

The Chamber notes that the term “harmonization” is used in several places in the report. We do not believe this is the best term to be used in relation to international regulatory cooperation as it carries various and often unhelpful meanings. Further, in most cases, harmonization is not what is being sought nor is it even desirable. Instead, we suggest the report use the words “alignment” or “coordination” of compatible regulatory regimes. We note that footnote 2 of the original 1991 ACUS recommendation recognized the limits of the term “harmonization” and suggest that for those very reasons, still in existence 20 years later, the report avoid, whenever practicable, the use of the term.

COMMENTS ON THE PROPOSED REVISED ACUS RECOMMENDATIONS

We would like to reiterate that the Chamber strongly supports the ACUS report’s new set of recommendations. The recommendations reflect the thoughtful and thorough work that went into the report. The Chamber would make the following comments with regard to the recommendations.

Internal U.S. Agency Coordination and Development

ACUS Proposed Recommendation 1, on page 30 of the report, suggests agencies inform themselves of existing foreign regulatory bodies with similar missions and explore regulatory cooperation activities, when appropriate. The Chamber supports this recommendation, but suggests going beyond merely informing oneself.

It is important that this recommendation call for the development of a strategic plan for international regulatory cooperation. A coherent and synchronized internal vision is necessary to achieve a truly efficient and well-rounded international regulatory cooperation program. Further, the

recommendation should also speak to the need to form intra-agency efforts that allow the international office within a regulatory agency a greater seat at the domestic regulatory policy and promulgation table. This strategy should also cover interactions with other relevant agencies, domestic stakeholders, and foreign regulatory counterparts.

U.S. Agency Review of Statutory Authority

ACUS Proposed Recommendation 2, on page 31 of the report, suggests agencies review their legal authorities. The Chamber strongly supports this recommendation as it represents an important step for regulators to properly establish a robust and interactive program of international regulatory cooperation and seek expanded statutory authority from Congress where and if needed. In order to further highlight the importance of this step, we suggest that ACUS bolster this recommendation by adding language stressing review be undertaken in as timely manner as practicable. In order to ensure uniformity of this review, we also recommend that ACUS make explicit that an agency's office of general counsel undertake this review and that any review consist of, at a minimum, examines whether the agency currently undertakes, and whether the legal authorities currently allow, the regulatory agency to engage in all four parts of the definition of international regulatory cooperation the Chamber recommends ACUS incorporate into its paper and recommendations. These steps will ensure each agency consistently conducts the due diligence necessary to request any statutory changes that may be needed by examining the same potential scope of regulatory cooperation.

Regulators should be encouraged to seek expanded scope where necessary and if after examining their legislative authority, regulators decide they need to request Congressional authority, it should still be permissible to undertake a limited number of methods of international regulatory cooperation. To this extent we suggest adding either a subparagraph or an additional recommendation to this section that indicates all agencies have sufficient regulatory authority to undertake some aspects of international regulatory cooperation.

For example, notwithstanding any clear, indisputable conflicts with their respective authorizing statutes, U.S. agencies should follow OMB guidance³ and consider the impact of any regulatory changes on U.S. competitiveness and

³ See Office of the U.S. Trade Representative and Office of Information and Regulatory Affairs, Export and Trade Promotion, Public Participation, and Rulemaking, M-11-23, May 19, 2011, available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-23.pdf>.

ensure that all regulations are drafted and implemented in a manner no more burdensome than necessary to achieve a legitimate objective.

Support for Mutual Recognition

ACUS proposed recommendation 3, on page 31 of the report, contains suggestions for various modes of cooperation. The Chamber strongly supports this section and suggests ACUS should indicate that the list is not exhaustive and U.S. agencies have the freedom to pursue other creative avenues of cooperation. The Chamber would recommend adding to ACUS's list that where statutory authority permits, regulatory agencies should consider how mutual recognition might be more robustly employed.

Interagency Coordination

ACUS proposed recommendation 9, on page 32 of the report, suggests consultations with the relevant government agencies, OIRA, USTR, Commerce, State, and Defense, when a U.S. agency engages with foreign regulators. We suggest adding an additional sentence stating that U.S. agencies also conduct the same level of U.S. governmental level cooperation with the relevant government agencies, OIRA, USTR, Commerce, and State as part of their domestic rulemaking process to better understand what impact such a rule might have on U.S. exports, trade, or investment. We support efforts that facilitate coordination with USTR on any regulatory changes that may have international impact to ensure that all actions are fully aligned internally between U.S. domestic and international policy pursuits. The Chamber would note that such coordination is not at odds with an agency's statutory authority.

SUGGESTED NEW RECOMMENDATIONS

Communication and Transparency

ACUS should explicitly add a recommendation that encourages regulators be more communicative and transparent with stakeholders on international regulatory cooperation efforts that an agency is pursuing. Too often, regulators do not seek informed stakeholder input as to the regulatory challenges that exist both from a compliance as well as trade perspective, when developing regulatory cooperation work plans and conducting bilateral meetings with regulatory agencies within foreign counterparts.

In addition, it is important for regulators to communicate their success in regulatory cooperation. Achievements are not touted in a manner that demonstrates the progress that has or is being made. A greater emphasis on communicating deliverables and explaining the valuable contribution regulatory

cooperation has achieved in a specific regulatory area will only serve to further endorse continued work. In short, success breeds success, especially where that success is well documented, well measured, and well communicated.

Advancing the U.S. Regulatory Approach and U.S. Least Trade Restrictive Regulation

The Chamber strongly believes that ACUS's updated recommendations need to speak to regulatory agency support for advancing the U.S regulatory approach embodied in U.S. administrative law as well as promoting specific U.S. regulations to the fullest extent possible. In doing so, regulators serve to export well established regulatory best practices. Further, in the case of advancing specific U.S. regulation, regulators should be empowered to share better regulatory alternatives with their foreign counterparts in order to achieve the same or better regulatory outcome in a least trade restrictive manner. Engaging in removing regulatory barriers in foreign markets is something the European Union does quite effectively as its regulators work much closer with its commercial and trade counterparts within the European Commission to advance EU commercial interests.

Making International Regulatory Cooperation a Political Priority

In order to address the concerns stated in the report regarding a lack of empowerment and attention given to international regulatory cooperation, the Chamber suggests adding an ACUS recommendation that international regulatory cooperation consistently be made a high political priority within any Administration and encourage agency heads and high-level senior political leadership foster an environment that promotes and emphasizes international trade and the continued enhancement of U.S. competitiveness within the regulatory agencies. ACUS's recommendation should go so far as to suggest an executive order be issues in support of ACUS's final recommendations.

CONCLUSION

The Chamber sincerely thanks ACUS, and particularly the efforts of Michael McCarthy in preparing the ACUS report and outline of potential updated recommendations. We appreciate the opportunity to submit these comments, and we look forward to future engagement to ensure the final recommendations on international regulatory cooperation unlock the full potential benefits for regulators, consumers, and businesses alike.

Sincerely,

