9 January 2012

AmCham EU continues to support consistency in derivatives clearing standards in the EU and US

The following text was sent as a letter to Commissioner Barnier. Similar versions were also sent to MEP Sharon Bowles, MEP Werner Langen, and H.E. H.E. Ambassador Tranholm-Mikkelsen.

Thank you for your letter of 12 December 2011 on the third country issues that are raised by the European Markets Infrastructure Regulation (EMIR).

We have been encouraged by the signs of progress in the ongoing discussions between the European Parliament and the Council of Ministers on these provisions, and look forward to a prompt conclusion of the negotiations in early 2012. There are indications that progress is indeed being made on these issues towards the delivery of a workable and proportionate third country regime.

As you note in your letter, it is essential that we avoid overlaps (and underlaps) between regulatory regimes for derivatives clearing. We must ensure that market participants have legal certainty about the nature of the obligations that they face, and that supervisors have confidence that these participants are being appropriately regulated.

AmCham EU does, however, have an outstanding concern about one third country issue, relating to the operation of the intra-group exemption and its availability to groups with a non-EU parent.

You noted in your letter that the definition of 'group' that is used in the Council text "*applies to all entities of an EU group…irrespective of their location within or outside the EU*". However, our concern is that this definition could *exclude* those groups with an ultimate parent that is based outside the EU from using the intra-group exemption.

A group with a parent undertaking that is outside the EU is not governed by Articles 1 and 2 of Directive 83/349/EEC, precisely because these are requirements for *EU-based* parent undertakings. Group undertakings that were wholly owned by one parent, subject to consolidation under US GAAP, and seen as parent and subsidiaries for the purposes of the EU's Banking or Insurance Directives, would arguably not meet the ambiguous definition set out in EMIR. They could therefore be prevented from using the intra-group exemption.

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As a result two groups undertaking identical transactions between their EU entities could be treated very differently: one could potentially use the intra-group exemption for this transaction because its ultimate parent is European; the other would be required to clear the trade centrally because the ultimate parent is in the US. The same would be the case for transactions between an EU undertaking and a non-EU undertaking, the treatment again depending on whether or not the ultimate parent is established in the EU.

We believe that the exemption should be available in the same way to groups with non-EU parents and to those with EU parents, and that Articles 2 and 2a of the Council text should therefore be amended to make clear that there is no intention to discriminate in this way.

We look forward to continuing this exchange of views, and would welcome the opportunity to discuss any queries you may have on this issue.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totalled €1.4 trillion in 2009 and currently supports more than 4.5 million jobs in Europe.

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