AmCham EU

AmCham EU proposes steps to boost cross-border financing and the efficient allocation of capital

Executive summary

Establishing a Capital Markets Union would mark an important step in the right direction towards delivering the open and appropriately-regulated financial markets necessary to support Europe as an internationally competitive location for investment. At present, the fragmented state of markets represents an obstacle to cross-border investments and the efficient allocation of capital. Given concerns of policy-makers and market participants with the disruption of market liquidity, we would advise the Commission to look, as a matter of urgency, at the cumulative impact of all existing and ongoing legislation on the market maker model, and to recalibrate some of the requirements where appropriate. In particular, CMU should allow policy-makers to look with a fresh eye at the way in which legislation that is currently being negotiated may impact liquidity provision. In addition, including regulatory cooperation on financial services in the TTIP and supporting the efforts of the IOSCO Task Force on Cross Border Regulation would support Capital Markets Union by delivering consistent international standards and better harmonised implementation.

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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 US investment in Europe totalled €2 trillion in 2014 and directly supports more than 4.3 million jobs in Europe.

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American Chamber of Commerce to the European Union (AmCham EU)
Avenue des Arts 53, B-1000 Brussels, Belgium
Register ID: 5265780509-97
Tel: +32 (0)2 513 68 92 | www.amchameu.eu

Secretariat Point of Contact: David Hastings; dha@amchameu.eu +32 (0)2 289 10 36

POSITION PAPER

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1) Beyond the five priority areas identified for short term action, what other areas should be prioritised?

The American Chamber of Commerce to the EU (AmCham EU) firmly believes that establishing a Capital Markets Union (CMU) would mark an important step in the right direction towards delivering the open and appropriately-regulated financial markets necessary to support Europe as an internationally competitive location for investment.

We broadly agree with the priority areas identified by the Commission, but would like to add a number of further objectives which in our view take precedence.

Firstly, given concerns of policy-makers and market participants with the disruption of market liquidity, we advise the Commission to urgently look at the cumulative impact of all existing and ongoing legislation on the 'market maker model', and to recalibrate some of the requirements where appropriate. The market maker model is the key distribution model of securities and is therefore critical to liquidity provision. In particular, CMU should allow policy-makers to look with a fresh eye at the way legislation that is currently being negotiated may impact liquidity provision. One such example is the liquidity calibration under the Level 2 legislation of MIFID II. Other examples include the mandatory buy-in requirements under CSDR, the Financial Transaction Tax and the proposal for Bank Structural Reform.

Secondly, the Commission should intensify its efforts to develop a coordinated and consistent global regulatory framework for cross-border financial services. We fundamentally believe that including regulatory cooperation on financial services in TTIP and supporting the efforts of the International Organisation of Securities Commissions (IOSCO) Task Force on Cross-Border Regulation would support CMU by delivering consistent international standards and better harmonised implementation. Avoiding unnecessary fragmentation in the implementation of EU directives by adopting a coherent approach to third country equivalence across all EU legislation and jurisdictions would also provide for a level financial services playing field.

2) What further steps around the availability and standardisation of SME credit information could support a deeper market in SME and start-up finance and a wider investor base?

AmCham EU is convinced that increasing transparency, availability and timeliness of information, in particular financial statement information, will provide the greatest benefit to creating a deeper market in SME and start-up finance. A standardised repository with complete and timely information on SME company financials has the potential to greatly enhance investor participation in financing European SMEs. Financial statement information is the most important piece of information in evaluating the credit riskiness of a private company. A large hurdle for investor participation in SME capitalisation is the availability of complete and timely information. While the lack of corporate data is less of an issue for listed companies, the vast majority of European SMEs are unlisted. At present, no Europe-wide private company database is available and creating one presents major challenges. There is, similarly, no accepted definition of what constitutes a micro-cap, small or medium-sized company due to the huge differences in the corporate set-ups in various European countries. This will be a major impediment to institutional investors showing willingness to finance companies for which there is scant information available as the direct non-bank institutional origination model takes root.

Disclosure requirements on such private databases should ideally be minimal in the early stages. The European Commission could examine the Jumpstart Our Business Startup (JOBS) Act in the USA, which offers private companies many of the benefits of public company status when it comes to raising equity capital, with lower disclosure standards than for listed companies.

In the past couple of years most European stock exchanges have launched bond listing initiatives for SMEs. This takes place when the listing of a bond is not dependent on issuers being listed companies. But these initiatives are fragmented and there is no central listed securities database at an EU level, so listings remain country-bound and run counter to the spirit of pan-European capital markets. This results in the reduction of savings and investment options open to retail investors.

There is great disparity in the way SME officers and the majority of other investors report financial information. . To facilitate the flow of capital to SMEs we recommend requiring a standardized repository for timely and complete reporting of financial information to facilitate transparency and dissemination of information to potential investors. This will help drive capitalization and create a deeper market for SMEs in Europe.

4) Is any action by the EU needed to support the development of private placement markets other than supporting market-led efforts to agree common standards?

We support the Green Paper's proposal that one of the CMU priorities should be to work with industry to develop a pan-European private placement regime. We would welcome the Commission's support for the ongoing work of the Pan-European Private Placement Working Group, coordinated by the International Capital Market Association (ICMA), to address fragmentation in the EU by developing common market standards, best practice and standardised documentation. In particular, we note the publication of their Pan-European Corporate Private Placement Market Guide, published in February 2015, which sets out a framework of best practices for pan-European private placement transactions.

AmCham EU encourages the Commission to promote these standards and to use this work as the basis for identifying remaining barriers. For example, these barriers may include: the calibration of Solvency II capital charges for investing in private placements in the EU; uncertainty regarding the capital treatment of private placement bonds; and the tax treatment of private placement transactions, including the withholding tax on interest.

6) Should measures be taken to promote greater liquidity in corporate bond markets, such as standardisation? If so, which measures are needed and can these be achieved by the market, or is regulatory action required?

Recent regulation has both significantly reduced the incentive for existing liquidity providers to make markets and increased barriers to entry for any alternative players. This is an unintended consequence of the increase in capital, liquidity and loss-absorbency requirements on regulated intermediaries.

The effects of the reduction in market making are most acutely felt in less liquid securities, which become even more illiquid.

These effects include an increase in trading costs and higher financing costs in new-issue markets. Furthermore, the reduction in market making capacity has systemic risk implications, because of the increase in volatility which is associated with the inability of dealers to smooth out demand-supply

imbalances by trading from inventory. This intermediate role is one which provides immediacy and certainty of execution in markets that do not routinely offer a ready availability of matching buyers and sellers.

Capital Markets Union should help restore the liquidity in the market by ensuring that debt and equity markets benefit fully from the essential role played by intermediaries in bringing together issuers and investors, users and providers of capital. This can be achieved by addressing some of the problems that arise from various legislative initiatives that may decrease liquidity:

One such example is the liquidity calibration under the Level 2 legislation of MIFID II. We are concerned that ESMA's proposed calibration to determine which securities are liquid or illiquid for the purposes of the transparency requirements, puts at risk the capacity or willingness of intermediaries to execute in size in thinly-traded securities. This is done by subjecting trades in securities that do not display meaningful liquidity to transparency regimes only suitable for deeply liquid securities, in which positions can be rapidly de-risked

A second example is CSDR, where the mandatory buy-in requirements may drastically increase the risk profile of market makers, especially for the least liquid of securities.

Thirdly, the decision to define exempt market making activities under the Short Selling Regulation by reference only to activities on a trading venue, means market makers cannot use the exemption to trade Over The Counter (OTC) derivative transactions.

Fourthly, the impact of the proposed Financial Transaction Tax (FTT) will be particularly severe for market makers, who are subject to the tax throughout the transaction chain. In addition it will make the EU and particularly the participating Member States a less attractive place to do business for both domestic and international firms. The suggestion of a progressive implementation brings yet more difficulties.

For those instruments within the first phase – shares and "certain derivatives" – the damaging effects of the FTT will be felt immediately. For all other instruments, a background of uncertainty will be generated. The clear intention to introduce the full FTT proposed by the European Commission, or indeed any variant of it will affect the "real economy". For all other instruments (those other than shares and "certain derivatives") commercial investment and business decisions will be taken with the threat of uncertain direct and indirect taxation, which will only serve to discourage or distort them. This seems at odds with the objective of stimulating economic growth and boosting liquidity in Europe.

Under CMU, policymakers could address these unintended consequences either on a case by case basis, throughout the legislative (review) process of these files, or through a cumulative impact assessment followed by an EU Capital Markets Client Facilitation Regulation.

On the issue of standardization, we do not believe that issuers should be restricted in their flexibility to issue in the structure that they prefer. Issuance structures are a function of supply and demand; this includes both issuers' corporate finance needs and investors' appetite. It is not clear that current practice represents a market failure (i.e. not an efficient equilibrium between the two parties) that warrants 'fixing' through mandatory standardization.

Standardization would only be relevant for large and frequent issuers. Small issuers are limited by absolute issuance size, while large infrequent issuers, by definition, already issue 'jumbo' standardized

bonds. However, *large frequent issues* are the part of the market that is already most liquid and therefore least in need of intervention.

Unlike equities, bonds exhibit a decreasing liquidity profile as time elapses from their issue date: frequent issues ensure that there is always a relatively recent liquid 'new issue'. Replacing these new issues with multiple taps may not provide the same liquidity profile – so there is a risk that mandatory standardization could actually reduce market liquidity.

We therefore consider that the mandatory imposition of bond standardization on the market will create negative implications for issuers, with no obvious benefits to investors. We do, however, see value in regulators taking steps to allow issuers manage the liquidity profile of their debt if this objective is important to them. Indeed, larger and more sophisticated issuers generally aim to ensure they have a liquid curve in the secondary market, both to reduce the liquidity premium associated with their bonds and to set reliable benchmarks for new issuance. This is generally feasible within the current regulatory and legal framework, but a number of obstacles may be preventing wider adoption of these practices, and we would encourage regulators to look at steps that could help issuers pursue this objective on a voluntary basis (where this is a priority for the issuer). These steps include:

- Removing tax, accounting and regulatory barriers to reopen old issuance, enabling issuers to re-open prior bonds and concentrate liquidity in a smaller number of larger bonds. Currently, changes in corporate structure or objectives may make re-opening an old bond impossible. This includes changes in issuing entity arising from mergers and acquisitions; whether the issuer has elected to delist from one exchange and relist on another; whether the prevailing tax regime makes re-opening the bond economically possible; whether financial reporting periods have changed, making these inconsistent with re-opening an old bond; whether the issuer has been downgraded to high yield, leading to expectation of greater covenants supporting the bond; whether the corporate wants to issue in a particular structure or entity that was not anticipated by the base document for the original issuance; whether changes in regulation mean an issuer can no longer comply with selling restrictions in relation to a re-opened bond;
- Making bond buybacks easier would also help issuers manage a liquid yield curve, enabling them to retire bonds with poor liquidity characteristics and/or consolidate debt into larger benchmark issues; and
- Standardization of documentation could aid the efficiency of the market. In the EU, this is already occurring to a degree with the Prospectus Directive but there are nevertheless practical differences in approach from the different listing authorities.

11) What steps could be taken to reduce the costs to fund managers of setting up and marketing funds across the EU? What barriers are there to funds benefiting from economies of scale?

Europe's private equity market is widely fragmented, reducing the opportunities to benefit from economies of scale. This fragmentation is underlined by the different recovery speeds in private equity markets across Europe, with the UK, the Nordic States (Sweden, Norway, Finland and Denmark) seeing higher activity levels of private equity investments in recent time than other Member States. Furthermore there are also differences in the focus of non-EU investors in the EU, where the UK saw 48 sponsored

buyouts from the US in 2013[1], while other Member States only saw limited investments from the US (15 in Germany and 14 in Spain). In summary, the fragmented state of the private equity market presents an obstacle to cross-border investments and the efficient allocation of capital.

The implementation of the Alternative Investment Fund Managers Directive (AIFMD) plays a key role in this respect, however timely implementation of the rules is a key factor in facilitating cross-border flows of capital. In this context, we believe that effective application of existing rules over the introduction of new measures will contribute towards the establishment of an effective CMU.

To improve the situation outlined above, the Commission should implement an effective and proportionate regime allowing for common recognition of national compliance/reporting regimes:

- Open market access is relevant to facilitate the setting up of marketing funds across the EU – cross-border marketing of AIFs should be made more efficient through adequate, yet not restrictive, disclosure requirements. It is important that there should not be additional hurdles for non-EU countries seeking equivalence, to attract investment from non-EU managers; and
- In light of the upcoming review of the AIFMD in 2017, it is important that this review considers ways for the regime to become less rule based, and more principle based for funds and their managers, while also introducing more flexibility to make disclosure requirements more proportionate and direct. This will reduce burdens imposed on the funds thereby reducing costs, while still maintaining high standards of governance and management.

In addition, we welcome the Commission's consideration to exempt European Venture Capital Funds (EuVECA), European Social Entrepreneurship Fund (EUSEF) and European Long Term Investment Funds (ELTIFs) under the review of the Prospectus Directive, and to streamline the approval process through a single EU equivalence regime for approving 3rd country prospectuses. This will avoid multilayer disclosure, increasing the resources and funds available to channel investments to technology intensive companies, start-ups and SMEs.

Finally, we recommend that that the European Commission revisits some of the regulatory barriers that hamper cross-border distribution and impose unnecessary costs on fund managers. In particular, the marketing restrictions that are applied to funds are always those of the host country in which the marketing is to take place. Therefore, while a UCITS (Undertakings for Collective Investment in Transferable Secrutieis) can be notified in other EU Member States for distribution, it will have to comply with the local requirements for marketing documentation in each of the countries in which it is sold. This can be inefficient and lead to delays in receiving approval from the host regulator to start selling. A system where the home regulator, when approving the UCITS, also approved the marketing material would significantly reduce the time to market. Absent this fix, a less effective measure would be to set a time limit on host regulators to approve the marketing material, so as not to effectively hamper sales of UCITS in multiple jurisdictions.

In respect of inducements (or payments made to intermediaries for their work in distributing funds), Member States are diverging. The implementation of MiFID II (the Markets in Financial Instruments Directive) permits Member States to go further in imposing restrictions, so there is a significant risk of firms being forced to navigate 28 different rebate regimes, a substantial barrier to the CMU.

[1] Bagshaw,I., Irving, R., and Youle, R. (White and Case) 2014: Defying the odds:the rise of European private equity

12) Should work on the tailored treatment of infrastructure investments target certain clearly identifiable sub-classes of assets? If so, which of these should the Commission prioritise in future reviews of the prudential rules such as CRDIV/CRR and Solvency II?

There is a fundamental mismatch between the needs of policy-makers and those of investors. Policy-makers need greenfield investments and/or capacity enhancements in the infrastructure sector to improve economic growth. Institutional investors, on the other hand, need stable and forecastable cash flows that can only be produced by mature assets with established demand patterns. To address this problem, policymakers can seek to re-adjust the parameters of risk and return.

Infrastructure offers a truly wide range in the risk-return spectrum. As these assets are large and bulky, private investors cannot easily rely on a portfolio effect, but policy-makers can. Private investors require each investment to be successful financially, while policy-makers as the ultimate owners of infrastructure may focus on the average of a large number of projects. In that regard, we recommend that the Commission consider various risk-sharing mechanisms, such as availability payments and pre-set ceilings on rates of return mimicking the regulated utility framework.

There are other challenges that the Commission could address in future reviews of the EU's prudential framework for insurers and pension funds that would support investment in infrastructure projects:

- Solvency II capital charges fail to distinguish long term corporate debt and infrastructure debt, despite notable differences in default and recovery rates;
- CRD4/CRR, use a standardised approach which does not recognise the nature of infrastructure investment (e.g. naturally collateralised) nor their track record of low losses; and
- Certain national restrictions also play a role in restricting investment in infrastructure, for example the prohibition of occupational pension funds investing in long term assets.

Furthermore, in EU prudential legislation, the lack of a clear definition of infrastructure investments as an asset class means it has not historically been possible to determine different capital charges for long term investors in this sector. In particular, current Solvency II capital charges fail to distinguish between long-term corporate debt and infrastructure debt. Although comparable data are hard to find, anecdotal evidence seems to indicate that default rates are higher and recovery rates are lower for corporate debt.

As infrastructure investment covers a very wide range of financing options, we agree that it will be necessary to place parameters on any preferential treatment, by defining sub-classes of assets to which the treatment will apply. Whilst differentiation between sectors is difficult in practice, we believe it should be relatively straightforward to differentiate between green and brownfield or PPP and non-PPP, given clear dividing lines between these categories. This will allow an initial assessment of possible different capital charges, and should this indicate that there is merit in pursuing this further, then other sub-categories could be considered.

A coherent approach between the CMU and other European policy fields such as the European Fund for Strategic Investment (EFSI), the Energy Union and the Digital Single Market, is imperative to avoid restricting Europe´s competitiveness in the global market arena.

13) Would the introduction of a standardised product, or removing the existing obstacles to cross-border access, strengthen the single market in pension provision?

We believe there should be a standardised product in addition to existing pension funds. To aid the creation of a CMU we need to focus not only on the supply side but also on how to best encourage greater demand for investment in Europe, especially in the areas of longer term finance and infrastructure. Therefore, we support the European Commission in looking at the retirement market, a very large source of under-employed capital in the EU.

UCITS have been a great success story in Europe and globally for a host of reasons: consumer protection, diversification, transparency, liquidity and sound risk management. However, UCITS are not the place for certain types of investments like infrastructure, SME loans and other as these assets tend to be less liquid and longer term in nature. The real demand for these types of investments will come from the retirement market.

Greater thought must be given to the best way to channel retirement savings (Pillar 2 pensions) toward infrastructure and SME loans. This could possibly be done through the creation of a 'UCITS-style' product for pension fund investment.

The current Pillar 2 pensions market is fragmented and lacks scalability largely due to the myriad manners in which funds are taxed across 28 Member States and the fact that taxation happens *inside* the investment vehicle in many Member States. This is done by applying taxes on a bundled basis (for example "Riester" Funds in Germany, "Fondi Aperti" in Italy and various insurance products across Europe). If a system could be created whereby EU Member States created their own 'tax wrappers' *around* the fund, fund managers could market similar products across borders whilst still giving Member States the power to levy tax appropriately under national regimes. This would improve the cross-border nature and scalability of funds thus allow for more sizeable and steadier investment flows into a greater number of companies and projects.

We believe such a regime would strengthen the single market for pension provision whilst providing investors and savers with greater choice across a more competitive and cheaper (due to economies of scale) funds range.

It is important, however, that a standardised product does not restrict investment options in certain funds or asset classes, for example. For most pension funds, private equity is becoming a more important asset class to invest in due to the low interest rate climate, search for portfolio diversification and a better understanding of the private equity industry.

Under the IORP II regime, it is important to consider the impact that prudential measures, such as the requirement for pension funds to be fully funded regarding cross-border transactions, could have on the ability of such funds to invest in the real economy.

14) Would changes to the EuVECA and EuSEF Regulations make it easier for larger EU fund managers to run these types of funds? What other changes if any should be made to increase the number of these types of fund?

We welcome the Commission's recognition of the lack of scale of private equity and risk capital markets. As the Commission already points out in this consultation paper, a wider range of market participants who can apply to set up and operate such a fund would facilitate the running of these funds

by larger fund managers. A greater degree of flexibility regarding eligible criteria within the EuVECA, for example, would also make it easier for additional fund managers to run these types of funds.

The review of the Prospectus Directive to consider exempting European venture capital funds from the obligation to prepare a prospectus to avoid multiple burdensome disclosure requirements could also help to further increase the number of these funds, as restrictions and reporting standards are kept to a minimum for venture capitalists.

Finally, some national regulators impose high minimum capital requirements on firms seeking to register under the Regulations. In addition, where the passport is being used, some host regulators are charging fees in relation to the use of the passport and imposing certain documentation requirements before the passport may be used. These actions run contrary to the single market and hinder investment in these funds across the EU.

15) How can the EU further develop private equity and venture capital as an alternative source of finance for the economy? In particular, what measures could boost the scale of venture capital funds and enhance the exit opportunities for venture capital investors?

We believe the Commission should boost venture capital funds as well as enhance exit opportunities for capital investors by:

- Promoting a vibrant IPO market in Europe –In comparison to the US market initial public offerings are firstly smaller and secondly rarer in Europe. The intention to make IPOs easier through examining the costs of producing IPO prospectus aiming to facilitate a lighter regime or even exemption from providing prospectuses for IPOs is to be supported;

- Avoiding implementing measures which lead to double taxation, which is a major consideration for companies when investing. In Europe, there remain large differences between Member States in how investment funds are treated for tax purposes, which causes uncertainty regarding liabilities and double taxation. The current trend in which tax legislation mainly serves as a measure against tax evasion shouldn't overshoot its goal and lead to double taxation for funds;

- Ensuring predictability and certainty in the broader regulatory framework by focusing the Commission's efforts on effective implementation of the current regulatory regime rather than creating new regulatory regimes across Europe. AmCham EU is concerned that the Commission's proposed regulation on benchmarks contains an equivalence regime that could harm users of EU capital markets. We are hopeful that the co-legislators will address these issues in order to avoid harmful disruption to capital markets;

- Revisiting the range of European Investment Bank and European Investment Fund schemes to assess their ability to address different segments of the market. For example, clarifying eligibility; simplifying negotiations to make lending quicker and easier; and extending the terms of borrowing to allow more long-term investment. In addition, further promotion could increase awareness; and

- Encouraging Member States to consider the examples of successful national-backed growth funds, such as the Spanish FOND-ICO Global and the UK Business Growth Fund, and the extent to which they can be replicated to address local needs. If calibrated appropriately, these schemes

can adjust the parameters of risk and return for private investors and develop businesses to go public sooner than they might otherwise.

16) Are there impediments to increasing both bank and non-bank direct lending safely to companies that need finance?

Efforts by the Commission to increase non-bank direct lending to companies throughout Europe represent a step in the right direction. Commissioner Hill has recently noted that the European economy is still heavily reliant on bank lending with over 80% financing provided by the banking sector[1] which contrasts with the US model of non-bank lending.

AmCham EU supports recent legislative discussions within the context of the proposed Bank Structure Regulation. There is a need for more flexibility in the treatment of certain AIFs. It is important that such suggestions are maintained as these investments are crucial for the European economy in the short- to mid-term, while the non-bank lending sector has not yet fully matured. Maintaining flexibility is an effective way to reduce potential obstacles to financing company growth.

It is important to note that European firms' reliance on bank finance is to a large extent a result of the failure to channel large amounts of long-term stable funding from institutional investors into capital markets. The retirement market in particular is a very large source of under-utilised capital in Europe. In the UK, for example, pension assets grew from 20% to 80% of GDP between 1980 and 2009[2]; and since 2008, pension funds have been increasing their market share among institutional investors[3]. This process drove resulted in the UK stock market becoming one of the deepest and most liquid in the world. Institutional investors have historically been much smaller in other parts of Europe partly because of regulation. AmCham EU believes the Commission should address some of the regulatory barriers, such as IORP II and Solvency II, which we have highlighted throughout this response. This would significantly improve the ability of firms to access the finance that they need from a variety of sources.

21) Are there additional actions in the field of financial services regulation that could be taken to ensure that the EU is internationally competitive and an attractive place in which to invest?

AmCham EU considers an open and appropriately-regulated European financial market as prerequisite to an attractive and internationally competitive investment. By their very nature, financial markets are global. In order to compete with the deeper and more liquid capital markets in the United States, Europe's capital markets need the EU to remain attractive to investors and issuers internationally.
The EU Commission should consider the following elements in creating the necessary framework for CMU:

- *Coherent approach to third country equivalence:* AmCham EU urges the adoption of a coherent approach to third country equivalence across all EU legislations and jurisdictions. Third country equivalence provisions and access restrictions have not been adopted in a uniform manner across different legislative measures and presently remain as costly and burdensome obstacles

[1] http://europa.eu/rapid/press-release_SPEECH-14-1460_en.htm
[2] https://www.cityoflondon.gov.uk/business/support-promotion-and-advice/promoting-the-city-internationally/china/Documents/Insurance%20companies%20and%20pension%20funds%20report.pdf
[3] http://www.oecd.org/pensions/PensionMarketsInFocus2013.pdf

to international investors and issuers. We therefore recommend that a rigorous and impartial study of third country regimes across the legislative framework should be undertaken. The results of this study should be the basis for beginning a political dialogue aimed at reshaping the European Union's approach to third countries and achieving international regulatory coherence in financial services.

- *International Co-operation:* The members of AmCham EU have been strong supporters of the G20 process aimed at strengthening the regulatory framework around international financial markets. We believe that these rules will lead to increased resilience. Recognising the global nature of financial services, it had been our expectation that the G20 would also contribute to a consistent and unified international framework. While we recognise and appreciate the efforts made by the FSB to achieve this and notes the goal set out in the September letter to G20 Finance Ministers and Central Bank Governors to build a coordinated international framework "based on cooperation, peer review and outcomes-based approaches to resolving cross-border issues" we have seen little significant evidence of these goals being achieved.

- *Free Trade Agreements/TTIP:* Free trade agreements should be negotiated by the European Union to encourage international investments by foreign parties into European capital markets. As such, the AmCham EU supports the inclusion of regulatory cooperation on financial services in the Transatlantic Trade and Investment Partnership and the efforts made by the IOSCO Task Force on Cross Border Regulation, in particular as we believe that more coherent and consistent international standards and their harmonised implementation across the EU will be essential in building capital markets that can power European growth.

- *Secondary markets:* We would request that the EU consider the improvements which are necessary to capital market infrastructure to improve the performance of secondary capital markets in Europe. Transaction costs, fragmentation in the market and limited cross border cooperation are some of the issues which need to be tackled to build on the existing reforms being initiated under the existing Targets 2 Securities Project and CSD Regulations.

The following are several substantive and practical examples:

a) *Ensuring an open transatlantic capital market:* Regulatory equivalence and extraterritorial application may deter foreign investment if not addressed adequately. The Commission is undertaking equivalence assessments for a considerable number of jurisdictions as part of key regulatory regimes (e.g AIFMD, EMIR and MiFID) (i) Given the international nature of the derivatives markets, EMIR contains provisions that have extra-territorial implications. Ensuring that non-EU CCPs will continue to be able to provide their services in the EU will be key to safeguarding the continued smooth functioning of the international derivatives markets. (ii) The equivalence requirements contained in MiFID II/MiFIR include a reciprocity requirement as a precondition to an equivalence decision. This will act as a barrier to third country recognition. Objective, timely, transparent, non-political and outcomes-based decision-making processes around equivalence and the authorisation of non-EU CCPs and third country firms are crucial for maintaining free access to markets. This process should be completed in a way that causes no undue disruptions to existing global markets.

b) *Avoiding duplicative or conflicting rules:* One such example of regulatory inconsistency relates to the EMIR reporting provisions. While the U.S. Dodd Frank Act only requires one of the counterparties to a transaction to report, EMIR mandates both counterparties to report the details of the transaction to a Trade Repository. This so-called dual reporting requirement in turn gives rise to significant operational challenges in the implementation phase.

While we realise there might be instances where national specificities might be required we would urge the European Commission and EU institutions to try and adhere to the following principles:

- Where international standards are in existence any divergence in national or regional rules should be clearly explained and justified;
- Compliance by a third jurisdiction with the agreed international standards should be used as the determining factor for any equivalence determination; and
- Where the political process permits national or regional jurisdictions should await the outcome of the discussions at international level before drafting their own legislation.

AmCham EU does not believe the strict compliance with these rules in any way limits the accountability of the law making process, nor the ability of jurisdictions to respond to future regulatory requirements. Instead it would contribute to legal certainty, reduce compliance costs and contribute to ensuring that the EU is an internationally competitive and an attractive place in which to invest.

We therefore recommend that the European Commission adopts a cross-cutting omnibus regulation that is no less liberal than the current arrangements in relation to individual directives and that sets out a consistent EU approach to third country access and equivalence for financial services legislation. Such a regulation must include a consistent approach to transitional periods to allow the ESAs and the European Commission sufficient time to conduct third country reviews before confirming equivalence.

22) What measures can be taken to facilitate the access of EU firms to investors and capital markets in third countries?

AmCham EU considers a well-functioning and appropriately regulated transatlantic capital market to be an important driver of long-term economic growth and competitiveness in Europe and the US. Free trade agreements should be negotiated by the European Union to encourage international investors and issuers to EU markets. In particular, we have been strong supporters of the EU-US Financial Markets Regulatory Dialogue over recent years but believe that the scale, complexity and possible economic consequences of a failure to agree on the detail of certain rules suggests that additional support for the process of transatlantic rule-making is necessary. Consequently, AmCham EU has always been firmly committed to the inclusion of regulatory cooperation on financial services in the TTIP.

Restrictions on third country firms seeking to access European Union financial markets may also lead non-EU countries to reciprocate similar measures which may impede the access of EU firms to investors and capital outside of the Union. For example, the application of a restrictive equivalence approach could provoke retaliatory reciprocal measures. We refer in particular to the reciprocity requirement contained in the Markets in Financial Instruments Regulation (MiFIR) (see response to Q21 above).

Instead, a revised coherent EU's third country policy should serve as a leading reference for regulatory best practice for other countries. Such a policy should follow a careful analysis to determine whether equivalence measures are appropriate tools.

28) What are the main obstacles to integrated capital markets arising from company law, including corporate governance? Are there targeted measures which could contribute to overcoming them?

The CSD Regulation and the draft amendments to the SHRD are both intended to address barriers to cross border investment and should be allowed to take effect, but it is the opinion of AmCham EU that the available evidence that company law or governance differences constitute a genuine barrier and therefore justify further regulation.

Company law and corporate governance models in the EU's Member States are perhaps too diverse to harmonize easily, given historical attempts and the various vested interests involved. Rather than a top-down 'one-size-fits-all' approach, a more workable solution is to continue to work within local frameworks but underpinned by three fundamental pillars that must be rigorously enforced:

1. **Comply or Explain:** we agree with giving companies flexibility by allowing them to adapt their corporate governance frameworks to the local market; as well as their size, stage of development, shareholding structure and sector. Embedding Comply or Explain has been an EU success story and should be robustly promoted and defended.
2. **Transparency:** in relation to corporate reporting, governance behaviors, architecture and (not least) related party transactions. This allows comparability of financial and non-financial reporting, allowing investors and the market to better assess cross-border investment risk to price it appropriately.
3. **Shareholder Rights:** underpin the two principles above, giving meaningful recourse to shareholders in the event of a failure. This includes the fundamental principles of **one share, one vote** and the elimination of **Control Enhancing Mechanisms.** In addition, the **right to approve related party transactions**, dismantling **impediments to cross-border voting** and measures to ensure **a level M&A playing field** are important.

Without high standards of corporate governance and removal of barriers, money will not flow easily across the EU and markets will assign a discount to those stocks and Member States that do not apply appropriate or comparable standards. This would prevent the European Commission from achieving its laudable aim of building a meaningful and effective Capital Markets Union.

Annex I: AmCham EU Position on Securitisation

In the context of the Commission's priority of reviving the securitsation markets, AmCham EU also welcomes the opportunity to comment on the Commission's consultation on high quality securitisation. Securitisation cannot and should not be regulated in a silo; neither investors nor issuers work in silo. The securitisation market (including simple, standard and transparent securitisation) cannot be fixed without comparability with the treatment of covered bonds, secured debt, whole loan portfolios and other asset based finance instruments - this is true not only for the regulatory treatment but also for the legal treatment.

While the criteria for simple and transparent securitisation have to be discriminative (to create the category) the treatment of the 'qualifying securities should not create a massive cliff a la Solvency II

(between Type 1 and other securitisations) with all the associated negative consequences for the markets in terms of funding and portfolio diversification.

There is a need to expedite the EU and global decision making process for establishing the criteria and for determining the respective regulatory treatment (capital, liquidity, retention, due diligence, etc.) for securitisation – In the EU the market continues to shrink, there is a massive attrition of specialists and investors, and its rebuilding will be increasingly difficult the longer these processes continue.

We agree that the BCBS revised securitisation framework should be used as a baseline for the establishment of the EU rules on the capital treatment of securitisations. Despite the shortcomings of the Basel framework that have been well documented, the international consistency of both the capital treatment and "high quality" definition remains essential to limit global market fragmentation. To that end, should the Commission adopt the Basel final rules, consideration should be given to applying a scaling factor to the capital level that under the BCBS final rules for securitizations that meet the "high quality" definition. This approach benefits from relying on an internationally harmonious capital standard while also giving appropriate recognition to securitizations that satisfy a finalized "high quality" definition.

- The new regime should seek to realign global treatment - e.g. retention in the US is not required for qualifying assets. Furthermore, if the residential and CRE mortgage criteria for securitisation are the same as the criteria for covered bonds then the two instruments overlap and cannibalise each other, rather than complement each other;

- The proof of transparency and due diligence should not be restricted only to securitisation - there are investments with much higher risk than securitisation; this singles out an instrument which ultimately in Europe did not experience serious impairment despite the severe crisis; and

- If securitisation is to compete with ECB financing, repo and covered bonds successfully even when its pricing is wider, it must help the banks offload assets and free capital - the current rules for significant risk transfer are unclear while the accounting treatment is prohibitive and creates phantom assets and liabilities on bank balance sheet.

In summary, AmCham EU believes that creating qualifying securitisations which are simple and transparent is one step in the right direction towards achieving a thriving securitisation market in the EU and freeing up capital for jobs and growth. However, this will not be sufficient and a more supportive regime for originators would also need to be considered. We would therefore recommend the Commission to consider the issues highlighted above when drafting their proposal for the revitalisation of the EU securitisation market.