AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Brussels, 10 August 2022

Dear Commissioner McGuinness,
Dear Minister Síkela,
Dear Mr Durand,

Based on a review of wording emerging from the Corporate Sustainability Reporting Directive (CSRD) trilogues the American Chamber of Commerce to the EU (AmCham EU) would like to express our concern about the wording of Article 40a as well as the rules applying to third-country companies with securities listed in the EU. We would very much appreciate any efforts to clarify the wording of these two matters in the final legal review of the CSRD trilogue text prior to publication in the *Official Journal*.

1. Article 40a

As currently drafted, the wording of Article 40a is somewhat ambiguous and confusing regarding the scope of reporting for subsidiaries of third country entities. The ambiguity in the text could lead to significant problems during the implementation of the CSRD as well as its subsequent enforcement. We are therefore writing in good faith in the hope that it can be clarified.

The relevant language from the trilogue text reads as follows with the language at issue highlighted in **bold**:

> 'Article 40a Sustainability reports of third country undertakings
>
> **Member States shall require that a subsidiary undertaking of an undertaking ultimately holding such undertaking and formed in accordance with the legislation of a third country (the 'third country undertaking') publish and make accessible a sustainability report covering the information specified in Article 29a, paragraph2, points (a)(iii) to (e), and where appropriate point (g) of this Directive, at the consolidated level of the ultimate third country undertaking**. This paragraph only applies to large subsidiary undertakings as defined in Article 3, point (4), and to subsidiary undertakings which are undertakings as referred to in Article 2, point (1), point (a) and which are not micro-undertakings as defined in Article 3(1).'

It is not readily clear what the exact intent of this text may be and how it should be interpreted in conjunction with other key elements of the CSRD. The ambiguity of the language also leaves open the possibility for different potential interpretations.

As recognized by the European Commission's choice of legal instrument – a Directive requiring transposition into national law – company law and company reporting are highly specialised and specific to different jurisdictions. As a Directive, the CSRD must be transposed into national law by each Member State. The ambiguity in this language could result in multiple interpretations when transposing and applying the CSRD at the national level. This could lead to third-country undertakings being subject to different reporting requirements depending on the interpretation made in any given Member State.

Furthermore, it should be clarified that the reporting requirement under Article 40a should not be understood as additional to the obligation for a subsidiary under Articles 19a and 29a of the CSRD.

Any third-country undertakings falling under Article 40a should be given the possibility to report only at the consolidated level, rather than duplicating disclosures at both the consolidated and subsidiary level, as this would confuse users and lead to duplicative costs for companies, without additional benefits. The clarification that reporting standards adopted under Article 40b are equivalent ex ante to at least part of the standards adopted under Article 29b would prevent duplication.

We therefore urge the European Commission, the Council of the EU and the European Parliament to clarify the language in Article 40a prior to the final promulgation of the CSRD and its publication in the *Official Journal* to make clear how the reporting is expected to take place and what that reporting is expected to entail.

2. Reporting for third-country companies with securities listed in the EU

In addition to AmCham EU's concerns regarding Article 40a, we are also concerned about different standards of sustainability reporting that the current text of the CSRD seems to apply to non-EU firms depending on how they are included in the scope of the Directive.

We welcome the introduction of tailored sustainability reporting standards for non-EU companies with a subsidiary and/or branch in the EU and a net turnover of €150 million in the EU under the new Article 40b of the Accounting Directive, as amended by the CSRD. However, the CSRD does not seem to apply these tailored reporting standards to non-EU companies with securities listed in the EU, which appear to have to report according to the European sustainability reporting standards on their worldwide operations. We believe this is due the fact that the articles proposed to modify the Accounting Directive on sustainability reporting for third-country undertakings (Articles 40a, 40b, 40c and 40d) have not been cross-referenced in the proposed modifications to the Transparency Directive, leaving some uncertainty about the actual reporting obligations for non-EU companies with securities listed in the EU, especially if the same firm is also captured by Article 40a.

We would strongly advise against creating two separate reporting regimes for non-EU companies, which would impact the content, location, timeline and costs of reporting. Therefore, we call on the European Commission, the Council of the EU and the European Parliament to clarify that all non-EU companies under the scope of the CSRD, including those with securities listed in the EU, will be able to report according to the tailored sustainability reporting standards for non-EU companies (Article 40b).

We remain at your disposal to discuss this matter further and would welcome an opportunity to do so. Please contact Michal.Chvojka@amchameu.eu if you would like to schedule a meeting.

Yours sincerely,
AmCham EU