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December 2, 2015

The Honorable Michael B.G. Froman
United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Dear Ambassador Froman:

In accordance with section 5(b)(4) of the Bipartisan Trade Priorities and Accountability Act of 2015, and section 135(e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Industry Trade Advisory Committee on Standards and Technical Barriers to Trade (ITAC 16) on the Trans Pacific Partnership Trade Agreement, reflecting consensus on the proposed Agreement.

Sincerely,

A handwritten signature in black ink that reads "Wayne Morris". The signature is written in a cursive style with a large, stylized "W" and "M".

Wayne Morris, Chairman
ITAC 16

The Trans-Pacific Partnership Trade Agreement

Report of the
Industry Trade Advisory Committee on Standards and Technical Barriers to Trade (ITAC 16)

December 2, 2015

Date: December 2, 2015

Subject: Industry Trade Advisory Committee on Standards and Technical Barriers to Trade (ITAC 16): Advisory Committee Report to the President, the Congress and the United States Trade Representative on the Trans-Pacific Partnership Trade Agreement (TPP).

I. Purpose of the Committee Report

Section 5(b)(4) of the Bipartisan Trade Priorities and Accountability Act of 2015, and section 135(e)(1) of the Trade Act of 1974, as amended, requires that advisory committees provide the President, the U.S. Trade Representative, and Congress with reports not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135(e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations, and each appropriate policy advisory committee, must include an advisory opinion on whether, and to what extent, the agreement promotes the economic interests of the United States, and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act of 2002.

The report of the appropriate sectoral or functional committee must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, ITAC 16 hereby submits the following report.

II. Brief Description of the Mandate of ITAC-16

The Committee shall perform such functions and duties and prepare reports as required by Section 135 of the Trade Act of 1974, as amended, with respect to the sector and functional advisory committees.

The Committee advises the Secretary of Commerce and the USTR concerning the trade matters referred to in Sections 101, 102, and 124 of the Trade Act of 1974, as amended; with respect to the operation of any trade agreement once entered into; and with respect to other matters arising in connection with the development, implementation, and administration of the trade policy of the United States including those matters referred to in Reorganization Plan Number 3 of 1979 and Executive Order 12188, and the priorities for actions thereunder.

In particular, the Committee provides detailed policy and technical advice, information, and recommendations to the Secretary and the USTR regarding trade barriers and implementation of trade agreements negotiated under Sections 101 or 102 of the Trade Act of 1974, as amended, and Sections 1102 and 1103 of the 1988 Trade Act, which affect the products of its sector; and

performs such other advisory functions relevant to U.S. trade policy as may be requested by the Secretary and the USTR or their designees.

The sector coverage as listed above for ITAC 16 includes TPP Chapters 8 and 25.

III. Negotiating Objectives and Priorities of ITAC 16

ITAC 16 discussed its negotiating objectives for the TPP Agreement and indicated its support for the Agreement's provisions that build upon WTO disciplines in the following areas:

1. *Requiring members to adhere to administrative procedures on notice and comment;*
2. *Providing for the direct participation, on a non-discriminatory basis, in the development of standards-related measures;*
3. *Reinforcing the transparency obligations requiring foreign standards-setting agencies to respond to comments received from U.S. exporters on proposed technical regulations;*
4. *Conferring binding national treatment on providers of conformity assessment, and recognizing the multiplicity of equally viable conformity assessment procedures; and*
5. *Provisions that establish formal and informal mechanisms for the rapid resolution of disputes.*

Overview:

ITAC 16 is responsible for advising the Secretary of Commerce and the U.S. Trade Representative (USTR) on all matters relating to technical barriers to trade. These include such areas as:

- Notifications by other countries of new standards and conformity assessment requirements.
- Development of standards in the other countries and recognition of international standards.
- Standards development organizations allowing for public comment, with sufficient time to consider the comments and respond to them.
- Conformity Assessment schemes and systems that are compatible with good regulatory practices.
- Regulatory actions that do not adequately allow recognition of standards from the U.S. and other countries.
- Regulatory procedures that do not allow adequate notice and comment procedures.
- An adequate amount of time for exporters to modify their products to comply with new regulations once announced.
- Recognition and accreditation schemes that equitably treat governmental and non-governmental entities conducting conformity assessment activities.

Given the success of past trade agreements in reducing tariffs on U.S. exporters, we now face a global economy in which countries make increasing use of non-tariff barriers (NTBs). The trade agreements negotiated by the U.S. since the Korea-U.S. Agreement (KORUS) have thus had to contend with the “stealth-like” nature of NTBs. In designing a 21st century trade deal, ITAC 16 is of the view that we must remain vigilant in combatting the proliferation of NTBs, and ensuring that disciplines on NTBs can be enforced through formal and informal dispute settlement.

IV. Executive Summary of Committee Report

ITAC 16 supports trade agreements that have protections and strong obligations for all parties regarding the basic principles of transparency, international standards, national treatment of conformity assessment, and regulatory coherence. The TPP’s chapters on Technical Barriers to Trade (TBT) and Regulatory Coherence represent a significant step forward in this regard.

Many sections in the TBT chapter build up from the provisions of the WTO TBT Agreement, adding strengthened obligations on standards, transparency, national treatment of conformity assessment, and basic administrative procedures for federal government agencies. ITAC 16 believes that TPP fulfills the obligations set out in the President’s Trade Promotion Authority. TBT principles in other chapters further strengthen the horizontal commitments in the TBT and Regulatory Coherence chapters. The inclusion of a chapter on Regulatory Coherence marks an important contribution that should become a template for all future U.S. trade deals.

In sum, ITAC 16 endorses the TPP agreement’s provisions concerning TBT and Regulatory Coherence.

ITAC 16 regards TPP as an important upgrade of existing U.S. bilateral deals with Australia, Canada, Chile, Mexico, Peru and Singapore. It will be important, however, to plan for possible conflicts of laws between TPP and these older agreements.

Important Steps Forward in the TBT Section of the TPP

The TPP agreement contains a number of important provisions:

Technical Regulations: TPP calls for the parties to ensure that international standards and recommendations likely to form the basis for technical regulations do not create unnecessary barriers to trade. ITAC 16 believes the language in this section is fundamental, and stands as an important win for the U.S. The chapter also includes requirements ensuring that information on regulatory decision-making be made publicly available, which ITAC 16 endorses;

Conformity Assessment: TPP requires national treatment in conformity assessment procedures. Our trade partners will have to use processes similar to those used in the U.S. when ensuring that goods meet the requirements of the standards. This will help reduce the cost of testing incurred by U.S. exporters, especially small and medium-sized enterprises (SME). Additional provisions concern the need to recognize that there is a multiplicity of ways to streamline the testing and conformity assessment requirements used. This will speed up time to market, expand the number

of export markets available to U.S. companies, and reduce the overall compliance costs incurred by manufacturers;

Transparency: TPP will improve access for U.S. companies to participate in development of technical regulations, standards and conformity assessment procedures by central government bodies abroad. Our trade partners will be required to publish new technical regulations and conformity assessment procedures; offer opportunities for public comment by U.S. exporters; explain how a final regulation and (or) conformity assessment procedure meets the objectives sought; and provide responses to substantive issues raised by U.S. companies;

Compliance Period: TPP ensures a reasonable interval between publication of a new regulation and the date by which it enters into force. This will allow U.S. exporters to have advance notice and time to prepare for changes in a trade partner’s regulatory regime. Our trade partners have committed to provide U.S. exporters a reasonable period to demonstrate the conformity of their goods with the relevant requirements;

Annexes: TPP offers a number of significant TBT provisions in annexes on Cosmetics, Medical Devices and Pharmaceuticals; Information and Communications Technology (ICT) products; Wine and Distilled Spirits; Formulas for Food Products; and Organic Products. These annexes are strongly supported by industries covered, and do not diminish the horizontal commitments contained in the main body of the TBT chapter. ITAC 16 sees this as an important concept to include in all future agreements: namely, that annexes should add to, but not diminish, horizontal TBT commitments.

The TBT chapter in TPP builds on WTO TBT Agreement. In this way, TPP is WTO PLUS, expanding on provisions that will improve the business climate for manufacturers and service providers in the U.S. to sell abroad, grow their business and employ more American workers.

We applaud the negotiating team for including major new areas in the TBT chapter that build on transparency requirements for both standards and regulations, and enable specific trade concerns to be raised and be more rapidly resolved.

Finally, it is extremely important to recognize that many standards-development bodies (SDO) are truly INTERNATIONAL in their procedures, in their constituents, and in their standards-development processes. In this regard, the likes of IEC, ISO, and ITU are not the only relevant SDOs. Under the ANSI Essential Requirements and the WTO Code of Good Conduct, many SDOs operating around the world—but particularly in the U.S.—operate a fully international standards-development process. These SDOs are well recognized as international SDOs, and develop globally relevant standards. Our trade partners must be reminded of this, and urged to account for it in their TBT regimes, if TPP is to deliver on its promise as WTO PLUS.

The Following are Specific Comments of ITAC 16 on Sections in TPP

Section 8.3: Scope: Paragraph 8.3.1bis calls each party to “take such reasonable measures, within its authority, to encourage observance by local government bodies. Local and sub-national parties/sub-central bodies are not usually covered in the scope of FTA’s, and even in the United States, USTR has difficulty committing the states to anything.

Section 8.5 calls for the parties to acknowledge the important role of international standards, respect the TBT Agreement in determining whether an international standard guide or recommendation exists and apply the Decision of the TBT Committee (G/TBT/1/Rev.10). This section calls for the parties to cooperate and ensure that international standards, guides and recommendations that are likely to become a basis for technical regulations and conformity assessment procedures do not create unnecessary barriers to trade. This is an important step forward to protect the rights of manufacturers and service providers that regulations respect all international standards.

Section 8.6 Conformity Assessment includes requirements to not allow parties to treat conformity assessment bodies (CAB) outside their country any less favorably than those inside. It allows CABs to apply to each party for determination that they comply with the same criteria that apply to CABs of that party. It allows consideration of provisional approval of CABs, allows CABs to be both private non-profit as well as government entities. This section also does not allow governments to reject the actions of a CAB if they operate in a jurisdiction where there is more than one accreditation body. These provisions are very important to require the parties to accept many different schemes of conformity assessment and to allow U.S. manufacturers and service providers to have more likelihood of finding increased acceptance of test data from a CAB operating in the U.S. and abroad.

National treatment for conformity assessment bodies is included, which is a positive achievement. However, the explanations described in Paragraph 8.6.2 and 8.6.3 may mean that the scope for recognition of U.S. testing and certification bodies could be limited. This has been a concern with some past FTA's such as KORUS.

In Section 8.6.2, parties are provided an out clause for government bodies designated to conduct specified services in their countries. Implementation of this provision must be given due care, especially as it relates to State owned enterprises operating as conformity assessment organizations. This exception if left open to interpretation would permit exclusion of U.S. conformity organizations in being recognized to deliver services for mandatory requirements outside of the U.S., and it would likewise permit parties to impose requirements that restrict the ability of conformity bodies in providing services cross border and on a business case basis.

Paragraph 8.6.8 encourages Parties to rely on international or regional mutual recognition arrangements, rather than bilateral MRAs and local testing requirements. Both may have a role. However the language may not be strong enough to be enforceable.

Section 8.7 contains strong provisions of transparency. These provisions allow for parties to participate in the development of technical regulations, standards and conformity assessment procedures, whether they are domiciled in the country or not. It will encourage non-governmental standards and conformity bodies to do the same. These provisions go a long way to provide equality of treatment of conformity assessment and reduce costs to manufacturers and service providers. This section also requires publishing proposed technical regulations in an official journal, notifying WTO members of new regulations, allow 60 days after transmission to

require comments, allow sufficient time to prepare responses, make available a reassessment of how the technical regulations meet the objectives, allow public responses, and have the party respond to comments. In the U.S., we take many of these provisions contained in the Administrative Procedures Act for granted, but they are not common in other countries. This agreement extends these protections of due process in regulatory and standards development to the signatories. Many of these provisions may be more difficult for certain TPP Parties to comply with than other sections, and special consideration should be paid to cooperation and/or capacity building mechanisms that may be required.

The increased and robust transparency provisions are in line with U.S. practice in the development of technical regulations, standards, and conformity assessment procedures. It should be noted that Paragraph 8.7.3 restates that non-governmental bodies are encouraged to abide by the provisions mandatory for central government bodies. In the U.S. this would apply to the entire standards system.

Paragraph 8.7.15 restates the TBT Agreement's requirement for central government standardizing bodies to publish a work plan for standardization. While in the U.S. there is no such body, ANSI has signed on to the Code of Good Practice on behalf of its accredited SDOs and complies with this provision through publication of Standards Action.

Section 8.8 contains the compliance period of normally no less than 6 months to allow manufacturers and service providers to meet new regulations.

Section 8.9 contains important requirements for cooperation and trade facilitation. Parties are encouraged to offer a variety of conformity and accreditation tools that can streamline how companies meet new requirements.

Paragraph 8.9.1 includes some common U.S. priorities for acceptance of conformity assessment results, such as recognizing international mutual recognition arrangements, recognizing the results of conformity assessment conducted in other Party's territory, and accepting supplier's declaration of conformity.

Paragraph 8.9.2a details a number of options for cooperation among the Parties. Progress to facilitate the cooperation among the Parties and methods of monitoring these should be defined.

Section 8.10 Information Exchange and Technical Discussions:

Previous concerns of the ITAC 16 appear to have been taken into consideration in this text.

ANNEXES

The TBT chapter also includes several sector-specific annexes to promote common regulatory approaches across the region. The ITAC 16 defers to the respective ITAC for those sectors for detailed feedback, but the annexes include the following:

- Wine and Distilled Spirits:

For example, the annex on wine and distilled spirits establishes certain best practices with regard to labeling and certifications for wines and spirits. Such commitments will help to streamline the exporting process and will make complying with various labeling rules more predictable and transparent throughout the TPP countries. For example, some of the provisions that will assist U.S. wine and distilled spirits exporters include:

Label content including declarations of alcohol and net contents will be streamlined and expiration dates shall not be required for most products;

Descriptive (traditional) winemaking terms may not be prohibited on labels, unless a country is bound by a prior FTA;

Wineries will not be required to disclose winemaking practices on a label, unless for health or safety reasons;

Most certificate requirements will be eliminated for vintage, varietal and regional claims for wine, and with regard to raw materials and production processes for distilled spirits;

Wine and distilled spirits samples for customs clearance purposes must be of reasonable size;

Encourages TPP parties to base their standards for distilled spirits solely on the minimum alcohol content and the raw materials, added ingredients, and the production processes used, consistent with the U.S. approach; and

States that lot codes may be used, provided they are clear, specific, truthful and not misleading and gives suppliers the right to determine where such codes are placed, etc. It also provides that parties may impose penalties if such codes are defaced, erased, etc., which is an important tool to ensuring the authenticity of the products.

- Information and Communications Technology (ICT) Products:

The ICT annex covers commercial products containing cryptography and that promote the electromagnetic compatibility of information technology equipment products. With respect to ICT products that contain cryptography, TPP Parties will be prohibited from disclosure of proprietary information in order to comply with technical regulations or conformity assessment procedures, a requirement that some governments could use to expropriate proprietary information and disseminate it to competitors. In cases where a TPP country requires assurance that a product complies with a technical regulation or standard for electromagnetic compatibility, Parties must accept a supplier's declaration of conformity for unintentional electromagnetic emitters, as in the United States.

- Cosmetics, Medical Devices, and Pharmaceuticals:

The annexes on cosmetics, medical devices, and pharmaceuticals promote transparent and open practices when regulating products in these sectors. For example, TPP Parties

will have to consider relevant scientific and technical guidance when developing regulations, grant marketing authorizations based on specified and publically available criteria, provide reasons for rejecting applications, and establish due process procedures that allow for appeal so that U.S. exporters are not unfairly or arbitrarily discriminated against in TPP markets. Through the Standards Alliance, a work stream has been proposed to conduct programming in Vietnam (a TPP Party) on good regulatory practices in these three sectors. A background goal of the proposed programming is to support Vietnam in its implementation of this annex's provisions.

- **Formulas for Food Products:**
The annex on formulas for food products will ensure that TPP countries retain full rights to require companies to provide information about prepackaged food and food additives. At the same time, it will ensure protection for the legitimate commercial interests and proprietary information of TPP companies by requiring TPP Parties to ensure the confidentiality of information regarding proprietary formulas.
- **Organic Products:**
The annex on organic products will promote trade in organic products and will encourage cooperation between the Parties on issues related to the production, processing, or labeling of products as organic.

Regulatory Coherence:

ITAC 16 is particularly supportive of the provisions included in the following sections.

Chapter 25 contains the main provisions of the section of Regulatory Coherence. A chapter on Regulatory Coherence is relatively new. It is critical in a 21st century trade deal to have a section that identifies the core ideals of Good Regulatory Practice (GRP). Importantly, in the U.S., these features will apply only to federal regulatory measures. Much of the text reflects common language on good regulatory practices, which the U.S. already implements.

Section 25.5.1 encourages a regulatory impact assessment and the threshold of economic impact assessment of regulations. This is important to identify those regulations that have significant gains for one of the parties, at the potential expense of other party(s).

Section 25.5.2 calls on parties to assess the needs of a regulation, look for feasible alternatives, explain the grounds of and rely on the best reasonably obtainable information on which to promulgate regulations.

Section 25.5.4 requires the regulations to be plainly written and 25.5 require that they be publicly accessible. Section 25.7 calls for annual public notice and 25.8 calls for parties to consider regulations from other parties.

Section 25.5 Implementation of Core Good Regulatory Practices:

Paragraph 25.5.1 encourages Parties to conduct regulatory impact assessments, which is good, but the language is softer than many U.S. industries would like to see.

Section 25.6 calls for a Committee on Regulatory Coherence to be established which could give rise to discussion of regulations that have significant impact but may not meet many of the tests of GRP. Still, it is good to see commitment to establish this committee, as it will likely provide the one of the only means to monitor and enforce compliance with this Chapter.

Section 25.7 Cooperation:

Paragraph 25.7.1 details a number of options for cooperation among the Parties. We encourage the language be strengthened in future revisions of the TPP.

Section 25.9 calls on parties to establish a contact point for regulations within 2 years and encourages regulatory impact assessment.

The chapter also contains a provision that no party shall have recourse to dispute settlement (under the provisions of the Chapter on Dispute Settlement) for any matter exclusively covered by TBT text that is incorporated from the WTO. We understand concerns for “forum shopping” but would suggest this may be easier said than done, given that PLUS provisions may require interpretation in light of incorporated text, suggesting the possibility of hybrid disputes.

Last, the chapter uses language in each section stating that the parties “should ensure....” ITAC 16 would have preferred that more prescriptive language be used. The reason is that some of our trade partners may not follow the basics of GRP. We would urge that this language be strengthened throughout, especially when the Committee on Technical Barriers to Trade takes up its review of the agreement.

Conclusion:

ITAC 16 endorses TPP as an important means of opening up trade opportunities for U.S. business. The trade deal’s provisions governing openness and transparency are better described than in previous ones. ITAC 16 believes that the TBT and Regulatory Coherence chapters, as well as collateral coverage in other chapters, fulfill the President’s mandate under Trade Promotion Authority.

For TPP’s strengthened provisions to have their intended effect of improving market access and reducing costs, the proposed TBT Committee must convene on a regular basis, convene over a structured agenda, and provide an effective mechanism for enabling the private sector to be at the table. This puts a premium on identifying and supporting the capacity building needs of developing-country members, and clarifying provisions to minimize the noncompliance.

The chapter on Regulatory Coherence is an important addition. However, ITAC 16 believes that future trade deals will require stronger provisions for compliance.

ITAC 16 submits that major provisions in TPP should be included in ALL future trade deals, including:

- Recognition of all international and globally relevant standards
- Openness and transparency in standards and technical regulations development
- Acceptance of many forms of risk-based conformity assessment
- GRP provisions such as regulatory impact assessments and research of feasible alternatives, including the decision to initiate no new regulations
- Conformity assessment procedures, recognition of CABs, and allowing for no less favorable treatment of CABs that are located outside of the country
- National treatment of conformity assessment bodies
- GRP provisions that encourage public private partnerships around the development and use of private sector standards and conformity assessment as in the U.S. OMB A-119 Policy guidance.

V. ITAC 16 Opinions on Other Chapters in the Agreement

Chapter 2. National Treatment and Market Access:

Section 2.12 Remanufactured Goods (Paragraph 2.12.2)

The footnote to this section mentions that a Party may require that remanufactured goods meet all applicable technical requirements that apply to equivalent goods in new condition.

Chapter 5. Customs Administration and Trade Facilitation: We strongly support the outcome of the negotiations in this chapter.

Section 5.2 Customs Cooperation (Paragraph 5.2.1b)

Each Party shall endeavor to provide advance notice of significant change or modification to regulations. This is common to the TBT Chapter transparency requirements.

Chapter 10. Cross Border Trade in Services

Section 10.8 Domestic Regulation (Paragraph 10.8.2 and 10.8.3)

The provision calls for technical standards and licensing requirements to be based on objective and transparent criteria, while not posing a restriction on the supply of services. This seems to be positive, but the footnote in Paragraph 10.8.3 notes that “Relevant international organizations” for the development of the technical requirements refers to international bodies whose membership is open to the relevant bodies of at least all Parties to the Agreement. This could be seen as conflicting with the definition of relevant international standards included in the TBT Chapter.

Chapter 13. Telecommunications

Section 13.25 Relation to International Organizations

There is positive inclusion of promotion of international standards for compatibility and interoperability, and to promote work through “relevant international organizations.”

Chapter 15. Government Procurement

Section 15.12 Technical Specifications (Paragraph 15.12.2)

We support the requirement for procuring entities to base technical specifications on international standards when they exist (consistent with OMB A-119 and U.S. law).

Chapter 16. Competition

Chapter 17. State-Owned Enterprises

The inclusion of an SOE chapter is ground-breaking and commendable, as well as is relevant to a level and competitive playing field for TBT-related considerations. For U.S.-domiciled providers of conformity assessment, the SOE chapter contains important non-commercial assistance commitments in 17.6 that should enhance U.S. service providers' competitiveness both in the U.S. and in the TPP Parties' countries. The fact that 17.14 obligates Parties to undertake additional negotiations on SOE matters within 5 years of the ratification of the TPP is likewise important to ensure commitments are implemented and to further reduce unfair practices tied to SOE commercial operations. As it intersects with TBT matters, additional care will be needed as it relates to 17.2.8 and 17.2.10, to understand what non-discrimination exceptions TPP Parties will be able to take as it relates to conformity assessment service providers. These provisions permit Parties to discriminate in the provision of services related to the "exercise of government authority." Because technical regulations relate to the "exercise of government authority", it is unclear if these provisions will limit the market opening impact of the TBT chapter as it relates to the provision of conformity assessment services.

Chapter 20. Environment

Two positive mentions of relevant international standards:

- Corporate Social Responsibility (Section 20.10)
- Voluntary Mechanisms to Enhance Environmental Performance (Section 20.11)

VI. Other Issues

Our ITAC 16 has been diligent in researching the issues at the forefront of modern trade deals. Our members are "cleared advisors" and have had our bona fides thoroughly vetted. We were dismayed not to receive some level of additional information, or early indications, of the text of the agreement, except by special request, and even then only for parts of the deal for a limited time. This has made a thorough review of the information dependent on summary documents, or briefings that do not include actual text. In addition, ITAC 16 was made aware of the initial TBT request of USTR and DOC on the TBT section, but has not had the opportunity to see any further text changes, or agreed upon text, until it was made public. We have made our concerns known to DOC and USTR but, to this point, no adequate resolution has been reached. Briefings are helpful, but, without the actual text, we are unable to provide fully detailed advice to USTR and DOC. This compromises the purpose of the ITAC 16, and the ITAC system more generally. We would ask that USTR and DOC find a better way to include ITAC members earlier, and more fully, in future trade negotiations.

VII. Membership of Committee

Industry Trade Advisory Committee On Standards and Technical Barriers to Trade

Chairman

Wayne Morris
Vice President, Technical Operations & Standards
Association of Home Appliance Manufacturers

Primary Vice-Chairman

S. Joe Bhatia
President
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