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Mr. Stefano Rodota
Chairman
EU Data Protection Working Party
c/o Autorita "Garante per la protezione dei dati personali"
00186 Roma
Piazza de Monte Citorio, n. 121
Roma, Italia

Ms. Susan Binns
Director
European Commission
DG Internal Market
Data Protection Unit
C-100 6/14
B-1049 Brussels
Belgium

Dear Mr. Rodota & Ms. Binns,

I am pleased to present United States Government comments concerning the implementation of the 1995 Data Protection Directive (95/46/EC) (the "Directive"). We would like to thank the European Commission and the Members States for allowing us this valuable opportunity to present our views on this very important initiative. We fully support the European Union's (EU) decision to seek comments from all parties affected by the Directive. Moreover, we applaud efforts such as these that bring transparency to the implementation process.

First, and most importantly, we would like to emphasize our belief that the Directive should be implemented consistent with its actual requirements concerning data transfers to non-EU countries. Articles 25 and 26 of the Directive establish a basis for determinations of "adequacy" for personal data transfers from the European Union to non-EU countries. We believe that the Commission and Member States should guide implementation efforts in Europe with the understanding, set forth in these Articles, that "adequacy", not equivalency, is required of those nations and organizations seeking to import personal data from the EU. Therefore, we urge the EU to refrain from imposing compliance standards beyond those already articulated in the Directive.

Secondly, we believe that it is important for the Commission and the Members States to respect the integrity of existing EU decisions pertaining to the "adequacy" of non-EU privacy regimes. As you know, on November 1, 2000, the U.S.-EU Safe Harbor framework, which enables U.S. organizations to satisfy the requirements of the Directive, went into effect. The implementation

of the Safe Harbor culminated two years of discussions between the United States and the EU that bridged our respective differences concerning privacy protection. Since its inception, over 225 U.S. organizations have chosen Safe Harbor as their means of providing "adequate" protection as required by the EU directive. More importantly, the Safe Harbor has provided those firms with an important tool to assure their trans-Atlantic data flows and to avoid experiencing interruptions in their business dealings with the EU.

Nevertheless, while we are pleased that the Safe Harbor has proven to be an efficient means of satisfying the EU directive's "adequacy" requirement, we must express our concern that the EU may seek to expand the scope of Safe Harbor beyond what was originally intended by the two sides. In particular, we are concerned by recent calls within Europe to supplement the Safe Harbor with additional requirements intended to respond to EU law enacted subsequent to our agreement on the Safe Harbor. We would like to take this opportunity to remind the Commission and the Member States that the Safe Harbor was developed to address the "adequacy" requirements of the Data Protection Directive and is not designed to accommodate EU laws recently enacted or otherwise contemplated. Moreover, signatories to the Safe Harbor should not be asked to assume additional and more stringent requirements. Therefore, we urge the Commission and the Member States to respect the Safe Harbor in its current form.

Additionally, we encourage the Commission and the Member States to allow organizations to fully utilize the derogations specified in Article 26 of the Directive. In particular, we urge the EU to work closely with the private sector to develop business-generated standard contract clauses to effectuate the transfer of personal information from Europe. If approved, these proposed contracts, including one from the International Chamber of Commerce, would provide non-EU organizations with another alternative means to demonstrate adequacy under the Data Protection Directive. Consistent with the correspondence between Director-General Mogg and former Under Secretary La Russa in 2000, these standard clauses should not be more restrictive than the "adequate" principles agreed to in the Safe Harbor.

Furthermore, in regards to enforcement of the Directive, we encourage the Commission and the Member States to maintain their commitment to inform the Department of Commerce of any actions taken which may interrupt data flows to the United States. Enforcement actions taken by European authorities should be transparent and consistent with the principles of non-discrimination enunciated by Director-General Mogg, the Article 29 Working Party and the Article 31 Committee. Finally, we urge the Commission and the Member States to refrain from concentrating their enforcement activities exclusively on large multinational corporations. The Directive draws no distinctions between large and small companies and such unwarranted attention would call into question the consistency with which the Directive is applied and enforced.

Once again, thank you for the opportunity to present our views as you move forward with your work on this important initiative. Our continued communication and close cooperation on these

issues will greatly aid our joint efforts to maintain the flow of trans-border data, while continuing to ensure adequate protections for personally identifiable information.

Sincerely,

Michelle O'Neill
Deputy Assistant Secretary
for Information Technology Industries