Congress of the United States
Washington, DC 20515

December 13, 2005

The Honorable Robert Portman
U.S. Trade Representative
600 17th St., N.W.
Washington, D.C. 20508

Dear Mr. Portman:

We are writing to raise concerns regarding how the ongoing World Trade Organization Doha Round of trade negotiations could affect domestic regulatory policies and authority that fall under the jurisdiction of the Congress pursuant to the powers conferred to it by the Constitution to regulate interstate and foreign commerce.

Specifically, we are concerned about negotiations regarding the General Agreement on Trade in Services (GATS) and market access for non-agricultural goods. Under GATS, "services" encompasses financial services, health care, education, energy services, telecommunications, advertising, restaurants, waste disposal, and transport, among many other activities. The negotiations threaten a vast array of regulatory protections in these areas. In addition, the ongoing "non-agricultural market access" negotiations have identified over 200 existing national laws and regulations, including U.S. laws and regulations, as potential barriers to trade that various parties may view as restraints on trade. These range from energy efficiency labeling requirements to measures to protect fish stocks from over-harvesting. We believe that such policy questions must be debated and decided domestically in Congress and, as appropriate, in state legislative bodies.

There are four aspects of the ongoing negotiations about which we are especially concerned:

1. A central element of the current GATS negotiations is the development of new "disciplines" on domestic regulation.

The GATS Working Party on Domestic Regulation in which the U.S. participates is currently debating the language to be included in the Hong Kong Ministerial Declaration on this issue. One paper being considered in the Working Party on Domestic regulation would require governments at all levels not to "prepare, adopt, or apply" measures that are more "burdensome than necessary," and to review all existing regulations to ensure that they are "the least trade restrictive." Also being discussed is language that could empower WTO tribunals to determine what are legitimate goals for domestic service sector policies.

In past communications from USTR, including the May 2005 summary of GATS negotiations provided to the USTR's Intergovernmental Policy Advisory Committee, your office has stated

that "...nothing in the GATS impedes the ability of a state to maintain or develop regulatory requirements as appropriate to each jurisdiction... The GATS fully respects the sovereign right of all WTO Members to regulate and to introduce new regulations. In addition, nothing in the GATS may prevent the adoption or enforcement of measures necessary to secure compliance with laws or regulations, such as to prevent deceptive or fraudulent practices." Yet, it would seem that the introduction of new disciplines on domestic regulation at the WTO would directly contradict these statements.

In our view, it is not in the U.S. national interest to confer on WTO panels the right to judge whether regulations made by Congress or U.S. state legislatures, within their constitutional mandates, are "necessary" or "proportionate" or are promoting "legitimate' policy goals. Such subjective, values-laden decisions must be preserved for Congress and state legislatures rather than being imposed top-down through international treaties.

Moreover, we understand that at this moment, there are intense negotiations about the appropriate scope for such new disciplines on domestic regulation that would be included in the text of the Hong Kong Ministerial Declaration. Given that the mandate in GATS Article VI-4 -- under which these negotiations have been convened -- is merely to hold negotiations determine *if* further disciples are necessary at all, it is our view that the U.S. position regarding these negotiations should be that no new disciplines are necessary.

However, we understand that in contrast, U.S. negotiators have allowed the discussion to move beyond the "if" question and on to what new disciplines are needed. The draft text on new GATS disciplines on domestic regulation, which was circulated by the GATS negotiations chairman on December 1st, lists what elements of domestic regulations would be covered by such new disciplines, including mutual recognition of qualifications, documentation and examinations and licenses across all sectors; technical standards and transparency.

Since it is our understanding that to date the U.S. position has been that these negotiations should be limited to matters of transparency, could you please assure us that you will not agree to any GATS provisions that other WTO countries, such as India, are demanding which call for work on mutual recognition standards for qualifications and licensing?

If the United States is unable to limit the proposed new disciplines to transparency, we believe it is not prudent to extend U.S. GATS commitments to allow foreign service firms to operate within our territory in some of the sectors included in the U.S. revised offer that was tabled in May 2005. That offer proposed to extend U.S. GATS coverage in areas such as air quality, treatment of contaminated sites, wastewater treatment and others for which maintaining strong domestic regulation of both domestic and foreign firms is essential to public health and safety.

2. Reviewing existing U.S. GATS commitments in light of the April 2005 Appellate Body ruling on Antigua's WTO challenge to the U.S. Internet gambling ban

The WTO ruling in the successful Antiguan challenge against the U.S. internet gambling ban (U.S. – Measures Affecting the Cross-Border Supply of Gambling and Betting Services) raises a number of issues regarding the ability to regulate in the service sector that have significance far beyond the trajectory of the actual controversy in question in that case and that directly affect the authority of the U.S. Congress.

The WTO Appellate Body made some general interpretations of the GATS' market access rules that have significant, troubling implications for the right to regulate in a wide range of service sectors well beyond gambling. The Appellate Body upheld the lower panel's interpretation that a ban on an activity in a committed service sector is equivalent to a "quota of zero," and thus a violation of the GATS' market access rules. As the Appellant Submission by the United States of America stated, determining that non-discriminatory bans on pernicious activity are violations of market access rules "unreasonably and absurdly deprives Members of a significant component of their right to regulate services by depriving them of the power to prohibit selected activities in sectors where commitments are made." Unfortunately, the WTO Appellate Body did not agree and reaffirmed this aspect of the lower WTO ruling.

The new zero quota standard established by the Appellate Body has implications for diverse areas of regulation ranging from advertising (i.e., bans on billboards) to anti-spam rules to zoning regulations to bans on the dumping of toxic wastes. The prospect of WTO challenges to these kinds of prohibitions should alone be sufficient to give U.S. negotiators enormous motivation to use the current GATS negotiations to secure a rule change that makes explicit the right of a WTO signatory to ban undesirable activity in a GATS covered sector without violating GATS market access rules. We urge you to obtain such language in the on-going GATS negotiations.

If you do not deem obtaining such new language feasible, then it would seem prudent for the U.S. to reevaluate its current GATS commitments in light of the troubling Antigua gambling ruling. However, instead, the May 2005 U.S. revised GATS offers propose to bind a number of additional sectors and subsectors in which taking new commitments would open important U.S. policies to challenge under the GATS' expansive rules. This makes no sense in light of what your own pleadings in the gambling case identified as "unreasonable" and "absurd" limits on the right to regulate, which were upheld by the Appellate Body in April.

The new WTO jurisprudence deeming that bans on pernicious activity are a GATS-illegal zero quota, raises particular concerns in areas such as treatment of contaminated" waste or "solid hazardous waste" among other "environmental services," as certain forms of treatment, such as incineration, are simply banned in some jurisdictions. Similarly, given GATS Market Access rules banning needs testing, we are concerned that offering some of the sectors included in the U.S. May 2005 offer would conflict with the policies of jurisdictions that require needs tests before licensing environmentally-sensitive facilities, such as toxic waste dumps. Similarly, we are concerned about how the new zero-quota rules would affect the ability of Congress or state legislatures to simply ban certain forms of advertising, such as internet spam, or certain categories of advertising, such as of cigarettes or alcohol.

Because the GATS negotiations inherently include broad trade-offs between countries and different service sectors of interest, the fact that GATS negotiations are currently underway provides a unique opportunity for the United States to negotiate modifications of its GATS schedules. Given that GATS Article XXI would otherwise require negotiations and compensation for withdrawal of sectors done outside of this broader trade-off, this is a unique opportunity for the United States to make changes to its existing GATS commitments at the lowest 'cost.'

It also has come to our attention that the United States has made Market Access commitments without any exceptions for zoning in retail services. The schedules of other countries that have made retail service commitments include such zoning reservations, which is highly prudent. Otherwise, land use decisions by state and local governments that counter sprawl or that limit the footprint of big box stores could be challenged as violating the GATS Market Access rules' ban on quantitative limits. We urge you to use the current broad GATS trade-offs occurring in the ongoing negotiations to obtain a market access exception for zoning to the current U.S. retail services commitments.

Some of these issues were raised in the May 31, 2005, letter to you from a bipartisan group of state attorneys general. Although the issues raised by the AGs and in this letter are quite specific, your response to the AGs letter was quite general, effectively communicating that domestic officials' regulatory authority over services operating in the United States would not be limited by the ongoing negotiations. In light of recent WTO rulings regarding GATS and information regarding the current status of these negotiations, we are requesting specific answers that address in detail the concerns raised both here and by the attorneys general.

3. Mode 4: Exporting decisions about U.S. immigration policy to WTO.

It has come to our attention that a number of countries are attempting to persuade you to make "Mode 4" GATS commitments that would affect the immigration policies of the United States. Mode 4 refers to the delivery of services by the movement of natural persons.

We urge you to reject these demands and also to reaffirm the commitment made by former USTR Robert Zoellick to Members of the U.S. Senate and House that this Administration will not entertain making any commitments regarding U.S. immigration policy in the context of multilateral or bilateral trade agreements. We should not give the bloc of countries making Mode 4/immigration demands any false hopes that the Administration would be amenable at any time to agreeing to include, bind or modify U.S. immigration policy in trade agreements. We request that you make a clear public statement prior to the December WTO Hong Kong Ministerial that the United States will not be making any commitments affecting immigration policy during this on-going Doha Round of WTO negotiations.

Inclusion of immigration matters in free trade agreements degrades Congress' ability to exercise its plenary power. In addition, fast track authority takes away Congress' ability to subject

immigration proposals to the debate and amendment process so vital to creating sound immigration law. Further, because of the permanent nature of the commitment made in these agreements, Congress would be unable to subsequently modify U.S. immigration commitments made in trade agreements to adapt to changing national circumstances without placing the United States in violation of those agreements.

4. Non-Agricultural Market Access Negotiations

Among other topics, the current round of negotiations is also addressing market access for non-agricultural goods ("non-agricultural market access" or NAMA). While the NAMA negotiations have focused heavily on addressing tariffs on non-agricultural goods, another key element of these negotiations addresses non-tariff barriers to these goods. Non-tariff barriers may include almost any regulatory requirement, and even voluntary certification or labeling regimes that a country claims has a negative impact on trade.

In the course of NAMA negotiations to date, various countries have identified over 200 specific and general non-tariff barriers to trade that they would like to remove through these negotiations. Many of these so-called barriers are important regulations and voluntary efforts protecting public health and safety, national security, energy supplies, wildlife, fish stocks, forest resources, and the global environment.

5. Conclusion

Efforts to use GATS or NAMA to threaten numerous protective regulatory requirements established by Congress or the states over the years are deeply troubling to us as legislators. We therefore urge the Administration to reject them and to preserve the authority of the Congress and the states to establish appropriate prudential regulations necessary to protect public health, safety, and the environment.

Sincerely,

Edward J. Markey
Member
Energy and Commerce Committee

John D. Dingell
Ranking Member
Energy and Commerce Committee