September 24, 2012

Donald W. Eiss
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20508

RE: Request for comments concerning China’s compliance with its WTO commitments –
Docket No. USTR-2012-0020

Dear Mr. Eiss:

On behalf of the American Bar Association, I submit the following in response to the Office of the U.S. Trade Representative’s (USTR) request for comments concerning China’s compliance with its WTO commitments. 77 Fed. Reg. 50206-07 (August 20, 2012).

With nearly 400,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. Our members include lawyers from practice settings of all sizes and types, and from every U.S. jurisdiction and many foreign countries. Through entities such as its Task Force on International Trade in Legal Services and the Section of International Law, the ABA monitors ongoing trade negotiations and other initiatives that impact trade in legal services; informs and educates ABA members and state regulators about legal services trade issues and their implications for the regulation and practice of law in the U.S. and abroad; and regularly communicates with USTR and the Department of Commerce regarding legal services issues.

The ABA has long supported a liberalized, rules-based system of international trade, both as a mechanism to advance the rule of law and as a means to enhance the ability of U.S. lawyers and law firms to effectively serve their clients through cross-border practice. The ongoing globalization of commercial activity by American individuals and businesses makes it imperative for U.S. lawyers to be able to provide advice and assistance to their clients wherever the clients need that assistance. In 2002, the ABA adopted a policy urging the USTR to seek practice rights for outbound U.S. lawyers equivalent to the practice rights set forth for inbound foreign lawyers in the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants. In support of this policy, the ABA is actively working to enhance the ability of U.S. firms to establish offices overseas and to associate freely with foreign lawyers and law firms.

Statistics suggest that the United States annually exports legal services valued at more than $7 billion and enjoys a trade surplus of more than $5 billion.¹ These figures probably understate the

participation of U.S. lawyers in U.S. trade, for example, by excluding the significant legal services provided by in-house counsel at many businesses engaged in cross-border and foreign operations. While many of these services were provided from domestic offices, a large part was either generated by foreign offices or actually performed in such offices of U.S. firms. More importantly, legal services are a “key input to international commerce: they facilitate trade and investment by increasing predictability and decreasing risk in business transactions.”

China, as the third largest and fastest growing market for U.S. exports, is a particularly critical market for U.S. lawyers and law firms.

While China has made some progress in liberalizing its legal services market since acceding to the World Trade Organization, a number of important barriers on the ability of the U.S. law firms to operate in China remain. The 2012 National Trade Estimate Report on Foreign Trade Barriers identifies many of these market barriers:

Foreign law firms face numerous restrictions on the scope and structure of their activities in China, as well as other barriers affecting market access. Current Chinese laws and regulations prohibit foreign firms from practicing Chinese law, which means that they are unable to hire Chinese-qualified lawyers to practice Chinese law as employees of their firms, or otherwise provide advice on Chinese law to clients. China also maintains restrictions on cooperation with Chinese law firms (including investment and profit-sharing restrictions) that further limit market opportunities. Foreign law firms are also barred from directly representing clients in, or even from attending along with local Chinese counsel, regulatory proceedings administered by Chinese government agencies. In addition, foreign law firms are concerned that China may make it even more difficult to provide other legal services (such as advisory and consultation services) that are currently widely regarded as permissible.

An issue of primary importance to the ABA is the inability of U.S. law firms to hire PRC-qualified lawyers able to practice PRC law. Under current rules, Chinese lawyers employed by a U.S. (or other foreign) law firm must surrender their licenses to the Ministry of Justice and are prohibited from practicing Chinese law during the period of employment. This prevents U.S. firms from being able to offer the comprehensive and integrated services expected by clients operating in our increasingly globalized economic environment.

In stark contrast, Chinese law firms are able to hire U.S.-licensed lawyers to work for them in their offices located both in the U.S. and in China. Those U.S.-licensed lawyers are free to provide the full range of advice and services on the law of the U.S. jurisdiction in which they are licensed to practice. The end result is that U.S. firms in China are disadvantaged in comparison

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to their Chinese counterparts by not being able to offer comprehensive services on transactions involving both PRC and U.S. law.

There are additional market access constraints on U.S. firms that negatively impact their operational ability in China. The American Chamber of Commerce in the People’s Republic of China (AmCham China), in its annual American Business in China White Paper, regularly identifies a number of other restrictions on legal services that are of serious concern to U.S. firms in China.5 These include that U.S. lawyers and law firms: 1) are prohibited from participating with their clients in meetings with certain government departments; 2) face burdensome restrictions in establishing representative offices; 3) are subject to a discriminatory tax burden due to restrictions on the form of establishment; 4) face unnecessarily burdensome restrictions on lawyers transferring among firms; 5) have difficulty hiring foreign non-legal professionals; and 6) are limited to a one-year work visa.6

We realize that not all of these restrictions may constitute technical noncompliance with China’s WTO commitments on legal services. They are, however, contrary to the WTO’s guiding principle of progressive liberalization and counter to the increasing trend toward legal services market liberalization by other countries in the region, such as South Korea, Singapore and Malaysia. We appreciate past and ongoing efforts by the U.S. Trade Representative and the Department of Commerce to address legal services market barriers around the world and urge continued attention towards reducing or eliminating the barriers in China discussed above.

We appreciate the opportunity to share these comments.

Sincerely,

Thomas M. Susman

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6 Id at pp. 258-260.