

August 18, 2003

Office of the Secretary
PCAOB
1666 K Street, N.W.
Washington, D.C.20006-2803
USA

Dear Sirs

**Re.: PCAOB Rulemaking Docket Matter No. 005
Proposed Rules on Investigations and Adjudications**

**PCAOB Rulemaking Docket Matter No. 006
Proposed Rules on Inspections of Public Accounting Firms**

**PCAOB Rulemaking Docket Matter No. 007
Proposed Rule on Withdrawal from Registration**

The Institut der Wirtschaftsprüfer [German Institute of Public Auditors] (IDW) is pleased to have the opportunity to comment on the PCAOB's proposals (the Proposed Rules on Investigations and Adjudications, Inspections of Public Accounting Firms and Withdrawal from Registration) for oversight over non-U.S. accounting firms that audit the financial statements of U.S. public companies. We would like to assure you that, as noted in previous correspondence, we share U.S. concerns regarding investor confidence and support the objectives of the Sarbanes-Oxley Act, if not all of the individual provisions of the Act or the rules or proposed rules for its implementation. We agree with the PCAOB's stated commitment to finding ways of accomplishing the goals of the Sarbanes-Oxley Act in respect of inspections of registered public accounting firms without subjecting non-U.S. firms to unnecessary burdens or conflicting requirements.

We understand that the next meeting of representatives of the PCAOB with representatives of the EU Commission will take place in September 2003 and presume that this meeting will continue and enhance the dialogue that has been taking place

between the EU Commission and the PCAOB on issues of mutual concern in relation to the Sarbanes-Oxley Act. In this context, we are pleased to note the PCAOB's commitment to dialogue between the PCAOB and its foreign counterparts in item 6 of Docket No. 5 and item 7 in Docket No. 6.

In our opinion, the proposed dialogue on the currently proposed rules is absolutely necessary because the German legal system differs so significantly from that of the U.S., that implementation in Germany of certain provisions of the Sarbanes-Oxley Act, in particular, numerous aspects of the proposed rules relating to inspection, investigation and adjudications would be legally impossible and implementation of others would place extremely onerous burdens on German public accounting firms.

However, we would like to express our disappointment that the PCAOB did not seek to follow the recommendations of ECOFIN and the European Commission to provide an exemption for registration with the PCAOB for public accounting firms in the European Union as would have been permitted under Section 106. (c) of the Sarbanes-Oxley Act. We would like to point out that such an exemption based upon the recognition of the establishment of appropriate enforcement and oversight mechanisms by national governments and regulatory authorities in the European Union would have obviated the need for complex dialogue on the many difficult implementation issues associated with the proposals noted above.

Given the major adjustments that we believe are necessary due to the impact of the proposed rules on German public accounting firms we will limit our comments to general concerns arising from the proposed rules by addressing the major problem categories by means of examples. These examples do not purport to be an extensive or complete list of all such matters, but are intended as an illustration of the complexity of the issues that must be taken into consideration.

Confidentiality and Consent to Waiver by Client

In Germany the auditing profession is subject to professional confidentiality obligations set forth in the legislation governing the profession and audits of financial statements. This legislation prevents our members from providing the PCAOB, as a third party, access to any or all facts and circumstances with which they are entrusted or of which they become aware during the course of their professional work. The German Penal Code makes undue disclosure by an accountant a criminal offence [§ 203 Strafgesetzbuch]. Furthermore, the contract between a public accountant and the client carries an implied duty of confidentiality.

The confidentiality restrictions can only be waived with consent of the client; data security restrictions (see the treatment of data security below) would require the con-

sent of all those whose data is affected. For such consent by a client to be valid, the client must have a proper understanding of the scope of the information, the disclosure of which he or she is permitting. The PCAOB does not propose to limit the scope of information to which it has access, but rather intends to exercise its discretionary powers. Consequently, the courts in Germany would view this “proper understanding” test as not having been met.

Furthermore, client waivers of confidentiality restrictions do not in any way diminish the testimonial or documentary privileges of the public accountant (see below).

Testimonial and Documentary Privilege

The German public accountant is afforded the right to refuse to testify in civil, criminal and tax proceedings (testimonial privilege). Similarly, legislation (§ 97 Strafprozessordnung) prohibits the seizure of his working papers in criminal proceedings to the extent that the public accountant has exercised his right to refuse to testify. German civil procedure is similarly restrictive. Some of these restrictions on criminal proceedings and civil procedure are in part based upon requirements of the German Constitution and its interpretation by the German constitutional court and cannot be changed by an act of the Federal Parliament alone.

The rules allowing the PCAOB to call persons to testify also pose a problem. An employer in Germany is unlikely to be able to force an employee to testify unless this matter has been specifically addressed in the contract of employment. A further relevant factor is that in German employment law certain questions, mainly concerning criminal convictions, could be deemed inadmissible and therefore an employee may opt not to answer or may give a false answer. In such cases the law prohibits the employee from being exposed to any negative consequences from such refusal or false answer. A further factor is that in the event that a works council operates within a firm approval of that body is required before an employer can question its employees.

Hence, even if the legal confidentiality requirements were to be circumvented in some way, it is likely that data security legislation will prevent German public accounting firms from making information and documents available to the PCAOB.

Data Security

In Germany, data protection legislation was amended in 2001 in order to implement the EC Directive 95/46/EC. A transfer of data under the German Data Protection Act would be deemed to have occurred if data were made available to the PCAOB either as part of the registration documentation or by permitting the PCAOB to conduct inspections on the firms' premises. Public accounting firms hold personal data relating to their staff, their clients, their clients' staff and third party individuals e.g. customers and suppliers of their clients.

Any consent to exception would be needed from every individual affected, and specifically not only the corporate clients. Further legal restrictions apply; the consent must be freely given, specific and informed. These definitions are subject to legal interpretation. Furthermore, consent must be express and in writing. This would create an extremely onerous obligation for public accounting firms.

Even if consent were to be obtained from those affected, the German courts may well not interpret such consent as having been freely given, due to the employee-employer relationship.


Considerations of personal interest, privacy rights and the overriding concept of "legitimate interest" sensitive data, employee confidentiality, business secrecy and employment law liability complicate the matter further.

The German Data Protection Act only permits the processing of personal data required to meet German legal obligations. Foreign legal obligations are not recognized in this legislation. It should be noted that data security legislation in Germany is based on the German Constitution and jurisprudence.

Since the PCAOB is not in a position to deal with the intricacies of investigations or inspections within a German legal context, we believe that it would be in the interest of the SEC and the PCAOB to engage in constructive dialogue with both the European Commission and German authorities, regulators and oversight bodies to see whether arrangements of mutual benefit could be established.

We hope that our comments will be useful in your assessment of the nature and extent of the problems involved in applying in a German legal context what are essentially rules and statutes designed for a U.S. legal environment. Consequently, we believe it to be in our mutual interest that the PCAOB give the concerns we have due consideration. We would be pleased to be of assistance in these matters.

Yours truly

A handwritten signature in black ink, appearing to read 'Klaus-Peter Naumann', with a stylized flourish at the end.

Klaus-Peter Naumann
Chief Executive Officer

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